



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

ENVIRONMENT AND LAND COURT PETITION NO. 15 OF 2013

**IN THE MATTER OF ARTICLES 2(6),10(2),(b),63(d),(i) AND 258 OF THE CONSTITUTION OF
KENYA 2010**

**IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER**

**ARTICLES 11, 19(C),25(a),28,29(c),43,56 AND 53(d)(i) OF THE CONSTITUTION OF KENYA
2010**

AND

IN THE MATTER OF VARIOUS PROVISIONS OF INTERNATIONAL HUMAN RIGHTS LAW

BETWEEN

DAVID KIPTUM YATOR

LUKA TOROTICH KIRATON

JOSEPH CHETORUS

Suing as Leaders of the Sengwer Community.....PETITIONERS

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE KENYA FOREST SERVICE.....2ND RESPONDENT

ZONAL FOREST MANAGER

(MARAKWET EAST DISTRICT).....3RD RESPONDENT

THE DISTRICT COMMISSIONER

(MARAKWET EAST DISTRICT).....4TH RESPONDENT

THE NATIONAL LAND COMMISSION.....5TH RESPONDENT

AND

KATIBA INSTITUTE.....INTENDED INTERESTED PARTY

RULING

Introduction

The Instant Application before the honourable Court for Determination is a Notice of Motion dated 16th Day of April 2015. The said Motion is brought pursuant to the provisions of Article 3(1) and 259 of the Constitution of Kenya and Rule 6 and 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 and all enabling provisions of the Law. The Application is seeking that leave be granted to the Applicant to be admitted in the above Petition as an Intended Interested Party and be granted an opportunity to submit written and oral arguments and to produce and or file expert information on how forest can facilitate conservation as well as any other information that may be necessary for the determination of this Petition and that there be no costs in relation to this Application.

The application is founded on the grounds on the face of it and further supported by the Supporting Affidavit sworn by YASH PAL GHAI on 16th April 2015. On the other hand, the instant Application is opposed by the 1st and 4th Respondents on the basis of Grounds of Opposition dated 17th day of April 2015 and filed in court on 20th April 2015. The application is also opposed by 2nd and 3rd Respondents on the basis Grounds of Opposition dated 20th April 2015 and filed in Court 21st April 2015.

The Applicant's Case

The Applicant has stated that it is a non-profit making organization and non-governmental organization registered in Kenya with expertise in constitutional law and international human rights. The applicant has stated further that it has previously engaged with various governmental agencies to advocate on how the rights of Segwer Community can be secured by application of the principles of the constitution without requiring community to abandon its forest-dwelling lifestyle while at the same time conserving the Embobut Forest. It is stated in the application that the applicant seeks leave to assist the Court in the instant case with the interpretation and application of relevant constitutional principles, human rights and comparative foreign law on the issue of rights of forest dwellers and forest conservation.

The applicant, the Intended Interested Party, has stated further that this application should be granted because of the exceptional importance and impact that the determination that this case will have on the interpretation and enforcement of various provisions of the Constitution of the Republic of Kenya 2010.

In its supporting Affidavit Sworn on 16th April 2015 by Prof. Yash Pal Ghai, it is deponed that the Applicant, Katiba Institute, is registered as a company by guarantee and that it is staffed with directors and staff lawyers who have expertise on Constitutional Law and Human Rights Law. It is deponed that the institute (the applicant), is aware that the controversy presented by this Petition is on the rights of forest dwellers, specifically, the rights of the Sengwer community and that on various occasions, the Institute has tried to engage policy makers, including the National Land Commission (NLC) on the best way to address the plight of the Sengwer community within the frame work of the Constitution, international human rights law and international best practice.

It is deponed further that despite the institute's efforts, it has not received any positive or tangible response from the policy makers it has engaged with and that the Institute believes that it has genuine interests in this litigation since this litigation will likely address and give guidance on how the interest of the Sengwer Community can be addressed with reference to Constitutional principles and international human rights law.

1st and 4th Respondents' Opposition.

The 1st and 4th Respondents are opposed to the instant application vide the Grounds of Opposition dated 17th April 2015 and filed in Court on the even date by the Office of the Attorney General. In opposing the instant application, the 1st and 4th Respondents through **Mohammed W. Odongo, Litigation Counsel at the Office** of the Attorney General has enumerated 11 principle grounds of opposition which may be condensed into the following main grounds:-

That the application is incurably defective, incompetent, untenable, scandalous, frivolous, and devoid of merit and hence ought to be dismissed; That the application does not satisfy the established principles for enjoining an interested party in the proceedings within the meaning of rule 2 and 7 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 or any other Provisions of the Law; That the proposed legal exposition by the intended interested party cannot be determined through judicial process rather it should be addressed through well established administrative forums which the intended interested party has since initiated; That this application introduces new issues and causes of action which were neither raised nor anticipated to be raised by the petitioner; That the intended interested party has not demonstrated any useful idea, knowledge or expertise it wishes to assist the court with for effectual determination of this matter on merits; That the application is intended to delay the matter; That the application is an affront of Article 69 of the Constitution of Kenya in respect of Kenya's international obligation to protect and conserve forests cover.

2nd and 3rd Respondents' Opposition

The 2nd and 3rd Respondents are also opposed to the instant application on the basis the Grounds of Opposition dated 20th April 2015 and filed in Court on 21st April 2015. In opposing the instant application, the 2nd and 3rd Respondents through Sifuna and Sifuna Advocates have enumerated 9 grounds of opposition which may be condensed into the following main grounds:-

That the instant application is misconceived, brought under the wrong provisions of the law, overtaken by events and contravening the court's orders issued on 18/2/2015 and 20/3/2015 and that by dint of the provisions of Rule 3(6)(b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 require that order of the court must be complied with; That the application has been made after unreasonable delay that has not been explained; That the applicant has failed to demonstrate a legally protected interest in this matter and thassty it is a busy body, activist and academic with no value to the ends of justice herein; That the Applicant being an expert in Constitutional law and international human rights should have participated in these proceedings early enough as experts witnesses or amicus curiae, and not an interested party; That the written and oral arguments and expert information the Applicant is praying to be allowed to file or produce can only be evidential and expert matters that ought to have been filed with the petition and other pleadings and responded to but not at the submissions stage as that will prejudice the Respondents who have not had a chance to respond thereto or call their experts on; That the matter the matter the subject of this petition such as has been thoroughly addressed by the parties in their pleadings and is also one which the court is possessed of adequate knowledge and intellectual competence to handle; That the petitioners seem to have lost interest in pursuing this petition and entertaining this application will further delay the timely disposal of this petition contrary to Rule 3(5)(c) of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.

Submissions.

Parties through their respective counsels tendered oral submissions in court.

Authorities Relied Upon by the 1st and 4th Respondents

The 1st and 4th Respondents through the Office of the Attorney General on the 22nd Day of April 2015

filed list of authorities dated 17th April 2015. The said list of authorities entail the following case law;

One:

Communications Commission of Kenya & 4 Others vs. Royal Media Services Ltd & 7 Others [2014]eKLR, In the Supreme Court of Kenya, Petition No. 14 of 2014. In this case, the Supreme (J.B Ojwang JSC, and S.C Wanjala JSC) court referred to Mumo Matemu case where it was held at paragraphs 14 and 18 that ***An Interested Party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. The court noted that he or she is one who will be affected by the decision of the Court when it is made, either way and that such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.***

In the foregoing, **Communications Commission of Kenya & 4 Others vs. Royal Media Services Ltd & 7 Others [2014]eKLR,** supra, the Supreme Court further referred to the case of **Meme vs. Republic [2004] 1 EA 124,** where the High Court observed that a party could be enjoined in a matter for the reasons that;

“(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;

(ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;

(iii) joinder to prevent a likely course of proliferated litigation.”

The supreme court, in the Communications Commission of Kenya case, had to consider two salient questions in determining the application before it. These are One, ***what is the intended interested party's stake and relevance in the proceedings?*** and Two, ***will the intended interested party suffer any prejudice if denied joinder?*** The court in its final determination dismissed the application on the ground that it was speculative and as such misconceived.

And Two:

Judicial Service Commission vs. Speaker of the National Assembly & Others [2014]eKLR, In the High Court of Kenya, Petition No 518 of 20134. In this case, the High Court (Mwongo, PJ, Meoli, j, Chemitei J. Omondi, J, and Ngugi, J.), observed that in considering whether or not to allow the participation of any party either as an interested party or as a friend of the Court, the Court is guided by the provisions of **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.** The court noted that **Rule 2** thereof defines ***“friend of court”*** as an independent and impartial expert on an issue which is the subject matter of proceedings but is not a party to the case and serves to benefit the Court with their expertise.

Whereas, the 2nd and 3rd Respondents relied on the following case law;

One:

Maria Sote Educational Trust vs. Registrar of the Titles & Another [2014]Eklr in the E&LC at Eldoret, ELC Case No. 13 of 2013. In this case, the learned judge Munyao J. cited the holding in the case of **Meme vs. Republic & Another (2004) 1KLR 637,** supra where it was held that **the constitution as such a vital framework of governance that any litigation touching upon it, ought to involve any interested parties.** The court held further that, **so important is this principle that, in our view, the participation of interested parties in constitutional litigation should never be kept under the restrictions of technical rules.**

In the foregoing, **Maria Sote** case, the learned judge Munyao J. in dismissing an application seeking for joinder of an interested party, observed that **any party who wants to be enjoined as interested party,**

needs to file its application fairly early in the proceedings and that if the application comes too late, then the parties to the suit will be prejudiced and hardship will be occasioned to them. The learned judge Munyao J. noted further that it will be unfair to the original parties to allow an application for joinder as an interested party, very late in the proceedings. The court observed further that the original parties stand the risk of being caught flat-footed without the opportunity to rebut what the interested parties want to raise.

Two:

Shawaese Limited & Another vs. Pianesi Gino [2012]eKLR, High Court at Malindi, Civil Case No. 183 of 2011. In this case, the High Court noted that there is a wealth of authorities for the proposition that the commencement of an action on behalf of a limited liability company must be authorized by a resolution of the said company.

And Three

Bugerere Coffee Growers Ltd vs. Sebaduka and Another [1970] E.A at Pg 147. In this case, it was held that when companies authorise the commencement of legal proceedings a resolution or resolutions have to be passed either at a company or board of directors meeting and recorded in the minutes.

Determination

The instant application is brought pursuant to the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the so called Mutunga Rules. As much as the applicant failed to invoke the provisions of Rule 7(1) & (2) Of the foregoing Mutunga Rules, I find these provisions to be very relevant in the instant application. Rule 7 of the said Mutunga Rules states that;

“7.(1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.

(2) A court may on its own motion join any interested party to the proceedings before it”.

While Rule 2 of the foregoing rules defines interested party as follows;

“interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation;

In the instant application, the Intended Interested Party at para 9 of the Supporting Affidavit has deponed as follows;

“THAT KI (Katiba Institute) because of its expertise in human rights, constitutional issues and specifically on forest dwellers and conservation is at a vantage position to assist the court with the necessary research and information needed to determine justly the issues raised in the petition”.

In the case of **Meme vs. Republic & Another (2004) 1 KLR at pg 637,** the Court of Appeal held as follows;

“More fundamentally however, was our concern that constitutional litigation which touches on the public interest in such a central governance issue as corruption in public office, should not be restricted in its scope as a private matter but should instead be opened up to all relevant stakeholders. We consider the constitution as such a vital framework of governance that any litigation touching upon it, ought to involve any interested parties.

While in the case of *Lilian Wairimu Ngatho & Anor. v Moki Savings Co-operative Society & Anor.*, (2014)eKLR, ELC No. 745 of 2001 (OS), the Court held:

“A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising”.

And in the case of *Joseph Kotonya Aketch v N.S.S.F Board of Trustees & another [2014] eKLR, Environment and Land Court at Nairobi (Milimani) ELC No. 1136 OF 2004*, the learned judge Gacheru J. held as follows;

“Joinder of a party to a suit is provided under Order 1 Rule 10 of the Civil Procedure Rules which makes it possible for a party to be made part thereof at any stage of the proceedings. “Proceedings” are defined in Black’s Law Dictionary 9th (ed.) at page 1324 as “the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment”. The purpose of joinder is to enable the court to effectually and completely adjudicate upon and settle all questions involved in a suit. As it stands now, the suit has been determined and there are no questions to be adjudicated upon”.

Note that the provisions of **Order 1 Rule 10** referred to, above, are similar to the provisions of **Rule 7** of the Mutunga Rules herein. The instant petition is yet to be concluded. The parties are yet to file their final submissions to the substantive petition. What the Intended Interested Party is seeking is to be granted **an opportunity to submit written submissions and oral arguments and to produce and or file expert information on how forest dwellers can facilitate conservation as well as any other information that may be necessary for the determination of this petition.**

The instant petition is premised on the rights of the Indigenous Forest Dwellers. That is the, the Sengwer (Hunter-Gatherers) community that is opposed to its eviction from the Embout Forest Reserve. In light of the foregoing cited Mutunga Rules and the case law discussed above, it is my considered vie and I do find that the Intended Interested Party, being Katiba Institute should be granted leave to join the instant proceedings as an Interested Party so as to tender its expertise submissions with regard to the rights of the Indigenous Forest Dwellers. The court believes that it will benefit from their well researched presentations and that the Respondents will not suffer prejudice in any way as the court in its own wisdom may only use the information presented by Katiba Institute for the benefit of all parties concerned. In any event, all parties still have opportunity to counter the purported submissions.

Be that as it may, the 2nd & 3rd Respondents in their grounds of opposition to the instant application have stated that under the Companies Act as a Limited Liability Company, the said Katiba Institute being an incorporated company may only institute or join legal proceedings in its name upon a resolution of its Board of Directors and that therefore having failed to file with their Application such a resolution lacks capacity and locus to join those proceedings. To this end counsel for the 2nd and 3rd Respondents relied on the cases of *Shawaese Limited & Another vs. Pianesi Gino [2012]eKLR*, *supra*, and *Bugerere Coffee Growers Ltd vs. Sebaduka and Another*, *supra*, in both cases, it was held that the commencement of an action on behalf of a limited liability company must be authorized by a resolution of the said company.

The Intended Interested Party, Katiba Institute, through its director Yash Pal Ghai has deponed that Katiba Institute is registered as a company limited by guarantee. To this end, there is annexed and marked YGI a copy of the certificate of incorporation. Constitution Petitions are governed by the above cited Mutunga Rules. **Rule 2** of the said **Mutunga Rules** defines a person as follows;

“person’ includes an individual, organisation, company, association or any other body of persons whether incorporated or unincorporated”

The foregoing rule buttresses, the provisions of **Article 260 of the Constitution of Kenya 2010**, which

defines person to include **a company, association or other body of persons whether incorporated or unincorporated.**

It is my humble view that in light of the above definitions regarding a person in relation to Constitutional Petitions, whether a body of persons are incorporated or not, is immaterial in so far as Constitutional Petitions are concerned. It follows therefore, that in cases of incorporated bodies, it is not necessarily a requirement that it must pass a resolution so as to seek enjoinder of a constitutional petition as an Interested Party. If this was the position, then it would have been expressly provided for under the foregoing Mutunga Rules. More importantly, Katiba Institute, the Intended Interested party is seeking to be enjoined as an Interested Party and not in any way intends to institute legal suit in the Instant Petition. Its role in the instant petition is limited only to tendering expertise submissions. It is clearly cut out in prayer 2 on the face of its application; **“THAT the Intended Interested Party be granted an opportunity to submit written submissions and oral arguments and to produce and file expert information on how forest dwellers can facilitate conservation as well as any other information that may be necessary for the determination of this petition.**

In the premises, it is my finding that the 2nd & 3rd Respondents’ argument that the Indented Interested Party, Katiba Institute, required a resolution, so as to make the instant application is misconceived.

Conclusion

The upshot of the above is that the instant Application is allowed with no order as to costs.

DATED AND DELIVERED AT ELDORET THIS 8TH DAY OF JANUARY, 2016.

ANTONY OMBWAYO

JUDGE