



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

PETITION NO. 27 OF 2015.

**IN THE MATTER OF THE CONSTITUTION OF KENYA ALLEGED CONTRAVENTION OF
ARTICLES 52, 53, 55 AND 56 OF THE CONSTITUTION OF KENYA.**

VIRGINIA MARTI VEITH.....PETITIONER

VERSUS

EVERRET JONES

KENNEDY MAKANJI.....RESPONDENTS

KENNEDY BOMJI

AND

DAVID ONUNGA

CHAIRMAN BOARD OF MANAGEMENT

MISSION TO THE FATHERLESS.....APPLICANTS

DOUGLAS OGOLLAH

BRIAN MUNG'ASIA

R U L I N G

1. The application before me brought by way of Notice of Motion is dated 1st December, 2015. It is supported by the affidavit of the 1st applicant, David Onunga dated 1st December, 2015. A supplementary affidavit by the said deponent was filed on 25th February, 2016.
2. The applicants seek the following orders:-

(i) Spent;

(ii) That this honourable court be pleased to enjoin the applicants herein as the 2nd, 3rd and 4th petitioners respectively;

(iii) That the petition herein be amended to reflect the addition of the applicants as petitioners and that the amended petition be served upon the respondents; and

(iv) That the costs of this application be in the cause.

3. The application is anchored on the following grounds:-

- a. *The 1st applicant is the chairman of the Board of Management of the Mission to the Fatherless Children Homes in Kenya;*
 - b. *That pursuant to Board of Management Resolution of 13/11/2015 the 1st applicant was mandated to apply to be enjoined to this petition for purposes of protecting the interests of Kakamega and Oyugis Mission to the Fatherless Children's Homes;*
 - c. *That the Kakamega Home has a children population of 48 while Oyugis has 42;*
 - d. *The 2nd and 3rd applicants are Directors of the two homes accommodating a total of 90 children;*
 - e. *That the 2nd and 3rd applicants are also the managers of the two homes;*
 - f. *It is absolutely necessary to bring the applicants on board as additional petitioners to assist the court in making a just decision;*
 - g. *The applicants are authorized by the Kenyan Mission to the Fatherless Constitution to run the affairs of the two institutions to the exclusion of any other person;*
 - h. *That the 1st respondent in the petition is the president of the Mission to the Fatherless INC a registered entity in the United States of America which was formed with (sic) the sole purpose of collecting funds in United States of America to support the Kakamega and Oyugis homes respectively;*
 - i. *The Mission to the Fatherless INC headed by their President exceeded its mandate and purported to make decisions on the management of the Mission to the Fatherless Institutions in Kenya and hence lost focus on the objectives for which it was formed;*
 - j. *The Mission of the Fatherless INC from the finance statements (sic) filed in response to the petition clearly indicate collection of tens of thousands of dollars collected by that U.S.A. outfit while remitting very little money for the support of the two homes in Kenya;*
 - k. *The U.S.A. Board (MTTF INC) parted ways with the Kenya Board after its president conspired with the 2nd and 3rd respondents in the petition to dispose off (sic) land and buildings currently housing the Kakamega Home without authority of the Kenyan Board;*
 - l. *The petitioner herein parted ways with the 1st respondent in the petition as well as MTTF INC when they failed to account for the huge collection of dollars from various donors;*
 - m. *Section 17 (sic) allows funding of the two Kenyan homes from voluntary donations from individuals, well wishers and organizations both in Kenya and outside Kenya;*
 - n. *The Mission to the Fatherless INC in which the first respondent in the petition is president stopped funding the Kakamega home in August, 2014 to date;*
 - o. *The Mission to the Fatherless INC also stopped all financial support to the Oyugis Home with effect from November, 2015;*
 - p. *The two homes are now operating on funds from other donors and the petitioner herein and the two institutions are properly executing their mandate despite the pulling out of the 1st respondent in the petition together with his U.S.A. outfit Mission to the Fatherless INC.*
4. The respondents through the 2nd respondent, Kennedy Makanji, filed a replying affidavit dated 2nd February, 2016 to oppose the application herein.

The applicant's case

5. Mr. David Onunga in his supporting affidavit dated 1st December, 2015 deposes that the respondents violated the Constitutional rights of the children in the homes by unlawfully removing them from the Kakamega home and relocating them to the Oyugis' home without a court order or permission from the children's department.
6. The deponent also states in paragraph 5 of his affidavit that he was appointed the chairman of the Board of Management of the Mission on 13th November, 2015, at a special general meeting.

7. He further deposes in paragraph 6 of his affidavit that as the Chairman of the Board of Management, that the two Mission homes are currently a home to 90 orphans and destitute children who are all in various schools and colleges courtesy of funding from the petitioner, her family, friends and business concerns
8. In paragraph 8 thereof, the 1st applicant asserts that they have been compelled by circumstances to apply to be enjoined to this suit (the petition) to protect the rights of the orphans and destitute children currently in the two homes in Kenya after discovery of the fact that the 1st respondent in the petition is engaged in the business of collecting donations in the name of assisting the said children when in the actual sense he is the beneficiary of the said funds with his friends hiding under the umbrella of the USA Mission to the Fatherless Board.
9. The 1st applicant in paragraph 9 states that the Mission homes in Kenya are independent institutions that are duly registered to assist orphans and destitute children to have a better future.
10. In paragraph 11, the 1st applicant deposes that as the Kenyan Board to the Mission they took the painful decision of locking out the 3 respondents after realizing that their presence in the Mission institutions is not in the best interest of the children.
11. In paragraph 13 of his affidavit, the 1st applicant claims that the respondents conspired to secretly sell the Kakamega home with all developments thereon for unknown reasons and that it took the intervention of the court to preserve the said land.
12. In paragraph 15 of the said affidavit, the deponent avers that as the Chairperson of the Mission, he has established from Barclays Bank Ltd Kakamega Branch that funds were drawn from the Mission's Bank account No. 203184558 and not applied to the Kakamega or Oyugis Homes. A copy of the bank statement was attached to the affidavit and marked as DO4.
13. The deponent concludes his supporting affidavit by stating that as a Kenyan Board to the Mission, they share similar intentions with the petitioner to preserve the 2 Mission institutions and their property thus their prayer to be enjoined as petitioners to the petition.
14. With regard to the supplementary affidavit in paragraph 20, the 1st applicant deposes that having been a Board member of the Mission since the year 2012, he knows that since July, 2014 to date, the 1st respondent, David Makanji has never chaired any Board meeting hence the paradox that he is still the Chairperson of the Board.
15. In paragraph 21 of the supplementary affidavit, the 1st applicant states that under their Management, all the 90 orphans in the Homes who are learning in various institutions in Kenya are still attending school courtesy of the petitioner who is their main donor alongside other well wishers and therefore they cannot be of the supplementary affidavit locked out of the petition that affects children under their care.
16. Those are the two paragraphs that I find relevant to the matter in issue.
17. It is based on the foregoing information that this court has been beseeched to enjoin the applicants to the petition.

The respondent's case

18. The 2nd respondent, Kennedy Makanji, in his affidavit dated 2nd February, 2016, also claims to be the Chairman of the Kenyan Board to the Mission. He deposes in paragraph 3 that the applicants are total strangers to the Mission institutions. He controverts the claim that the 1st applicant is the Chairman and that 2nd and 3rd applicants are Directors of the Mission Homes and

that none of them is a member of the Board of Management of any of the homes.

19. In paragraph 4 thereof the 2nd respondent states that he did not convene the meetings held on 27th October, 2015 and 13th November, 2015 and that the meetings took place without their knowledge or input rendering them illegal.
20. In paragraph 6, the deponent claims that 2nd and 3rd applicants were sacked from the employment of the Mission to the Fatherless and had no mandate to attend the meetings and that the other members listed as present in the said meetings had no authority to attend.
21. In paragraph 7, the 2nd respondent deposes that the applicants are strangers to the Mission to the Fatherless and have no **locus standi** to litigate in respect of the said institution as the purported copy of the constitution of the Mission to the Fatherless presented by the petitioner and applicants is forged and incorrect.
22. The 2nd respondent further contends in paragraph 8 of his replying affidavit that the Kenyan Board cannot operate independently of the USA Board as the mandate to constitute the Kenya Board or run the Kenyan homes arises directly from the USA Board.
23. In paragraph 9 thereof, the 2nd respondent asserts that the Kenyan Board to the Mission to the Fatherless can only be constituted under the Chairmanship of a member of the USA Board and in the last such meeting, the 2nd respondent was elected as the Chairman and the 3rd respondent as the Treasurer and the two are still in office as no lawful changes have been made.

The Applicants submissions

24. The applicants filed their written submissions on 25th February, 2016. Mr. Samba, their learned counsel, highlighted the said submissions.
25. He submitted that the applicants seek to be enjoined to this petition under the provisions of rule 5 (c), and 5 (d) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
26. He informed the court that the main consideration in deciding whether the applicants should be enjoined to the application or not, is rule 5 (d) sub rule (ii) of the above rules and that the key words are ***“any persons whose presence is necessary to assist the court adjudicate on the matter in question.”***
27. Mr. Samba indicated that the 1st applicant is the Chairman of the Mission to the Fatherless Homes, Kenya and that the 2nd and 3rd applicants are the Directors to said Homes. The said applicants are the custodians of 90 orphans and destitute children currently residing in Kakamega and Oyugis homes of the Mission. He submitted that the petition between the petitioner and respondent touches on the Mission to the Fatherless Homes where the applicants are in charge and it follows that any decision that this honourable court is likely to make will directly affect the 90 children who are in the homes and the management of the homes which is under the applicants. He submitted that the inclusion of the 3 applicants will be necessary in the petition.
28. Mr. Samba added that the Kakamega and Oyugis homes of the Mission to the Fatherless operate under a registered constitution which was annexed to the petition and marked as annexure VMV8. He submitted that it was under that constitution that the applicants herein found their way into management of the Institution (Mission to the Fatherless.) He stated that section 3 of the said constitution provides that the homes shall be run by a Board Management, with Section 9 thereof making provisions for the functions of the said Board.
29. Mr. Samba indicated that one of the issues raised by the respondents is that the applicants were

sacked from the Mission to the Fatherless by a U.S.A based Board. It was submitted for the applicants that the U.S.A Board has no power to dismiss anyone from the Management of the Board in Kenya as removal of Directors or any member of the Board of Management can only be done under the registered constitution for the Mission to the Fatherless in Kenya. The constitution registered in the United States has no application in Kenya as it is not registered in Kenya. The court was informed that under the constitution registered in Kenya, there is no power donated to any other institution to remove any member of the Board.

30. Mr. Samba submitted that the reason why there is an opposition to the application for enjoinder of the applicants to the petition is because the applicants have crucial and damaging information regarding the respondents who conspired and violated the rights of the children in the two homes.
31. This court was informed that while the petition was pending, the respondents invaded a bank account of the Mission to the Fatherless, in Barclays bank, Kakamega in November, 2015 and without authority withdrew \$4,000 but the money was not surrendered to the management of the Mission to the Fatherless. He added that investigations on this are ongoing.
32. Mr. Samba submitted that the 2nd and 3rd respondents were removed from the Management of the Mission to the Fatherless on 27th October, 2015 in a special general meeting. The counsel indicated that the Minutes of the said meeting marked as VMV11 were attached to the supporting affidavit of the petitioner. He prayed for the applicants to be enjoined for a just decision of the case.

The respondents' submissions

33. The respondents written submissions dated 29th February, 2016 were highlighted by Mr. Akwala learned counsel for the respondents. He submitted that he opposed the application through the replying affidavit dated 2nd February, 2016. He submitted that the applicants' application is frivolous and devoid of merit and should be dismissed as the applicants seeking to be enjoined to the petition are strangers to the said petition.
34. The court was referred to paragraph 11 of the replying affidavit dated 2nd February, 2016, where the respondents have raised the issue of *locus standi*. It was submitted that the petition was instigated by the present applicants because if they had wanted to be included in the petition they ought to have filed a joint petition or filed a petition simultaneously. Mr. Akwala submitted that although the applicants claim to be officials of the Mission to the Fatherless, the respondents position is that they are not as they were dismissed on 2nd September, 2014 and barred from any engagement in the said Mission as per the minutes of the meeting that resolved to dismiss them attached to the replying affidavit to the petition marked as EJ6 and EJ7.
35. Mr. Akwala urged the court to examine if the meeting of 27th October, 2015 in which the applicants were allegedly appointed officials to the Mission to the Fatherless was lawful. He submitted that the said meeting was not lawful because it was convened by strangers and it was not convened in compliance with the constitution of the Mission to the Fatherless. He submitted that the applicants position is that the respondents were in the Management until 27th October, 2015 when the applicants took over whereas a look at the supplementary affidavit sworn on 24th February, 2016 shows that the meeting was allegedly convened on 26th October, 2015. The notice was through a purported email which was never received by the respondents.
36. It was further submitted for the respondents that the constitution of the said Mission in section 14 provides that a meeting must be convened in consultation with the chairman after giving 7 days notice. In section 15 of the said constitution, a special meeting is convened after sending a Notice to members of not less than 2 days. The agenda of such meetings ought to be attached to such a Notice. It was submitted that the purported meeting of 27th October, 2015 was un-procedural and

any resolutions made were of no legal effect.

37. In addition, the actions of the applicants of purporting to appoint themselves as Members of the Board of Management were unlawful. The position therefore remains that the respondents are the *bonafide* officials of the Mission to the Fatherless and there is therefore no basis to allow strangers to be enjoined to this petition. He added that the intention of the applicants is to convolute this matter and delay the determination of the petition.

Mr. Akwala prayed that the application be dismissed with costs to the respondents.

Analysis and determination of the application

The issue for determination is, whether the applicants herein have established *locus standi* to be enjoined in the petition.

Preliminaries

38. Although the applicants in their supporting and supplementary affidavits and the respondents in their replying affidavit have made reference to annexures which they term as the constitution for the Mission to the Fatherless (hereinafter referred to as "the Mission"), I note that the constitution attached to the 2nd respondent's replying affidavit as annexure **KM2** has inscriptions of the word 'draft'. This is a clear indication that the said constitution has not been submitted to the relevant State department for registration in Kenya. In his submissions, the counsel for the applicants referred to an annexure marked as **VMV11** purportedly attached to the supporting affidavit of the petitioner. I did not find any annexure marked as **VMVII**.

39. In his supplementary affidavit, the 1st applicant has referred to the copy of the constitution marked **VMV8** attached to the supporting affidavit of the petitioner in her petition filed in court on 27th October, 2015. I note that the said constitution is unsigned, undated and incomplete. None of the two parties can therefore purport to have availed a valid constitution to this court. Neither the applicants nor the respondents availed a copy of the certificate of registration for the Mission as a Children's Home. A perusal of the copies of the two purported constitutions of the Mission shows that some clauses are at variance. I therefore make a finding that this court cannot rely on any of the two constitutions in making a decision herein. This being the case, in reaching a decision hereto, the court will be guided by the affidavits of the parties and the other annexures attached to the said affidavits and the applicable legal provisions.

Locus standi

40. The Constitution of Kenya 2010 in article 22 (1) provides that:-

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or is threatened.”

41. Article 22 (2) provides that:-

“In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –

- a. ***A person acting on behalf of another person who cannot act on their own name;***
- b. ***A person acting as a member of, or in the interest of, a group or class of persons;***
- c. ***A person acting in the public interest;***
- d. ***An association acting in the interest of one or more of its members.”***

42. The Constitution of Kenya 2010, widened the scope of the persons that can institute legal

proceedings, unlike the previous constitution where locus standi was contained in a strait jacket where parties had to undergo the rigorous test of showing what direct interest they had in cases. In addition, the provisions of article 258 of the Constitution which are in similar terms to those of article 22 (2) of the Constitution are a clear indicator that a person's right to institute legal proceedings cannot be curtailed under the Constitution.

43. The application herein is predicated on the provisions of rule 5 (c) and 5 (d) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure rules, 2013, commonly referred to as **the Mutunga rules**. These rules are contained in Legal Notice No. 117 published on 28th June, 2013. The rules make clear provisions of the parties that can be enjoined in a constitutional petition. The rules relevant to this application provide as follows:-

Rule 5 (c) “Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.

(d) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—
(i) order that the name of any party improperly joined, be struck out; and
(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

44. A wealth of authorities abound of instances where the courts have allowed parties to be enjoined in Constitutional petitions under the provisions of rule 5 (c) and 5 (d) of Legal Notice No. 117 of 28th June, 2013. A case in point is Constitutional Petition 2 & 2 ‘A’ of 2014 (consolidated) , **John Mining Temoi & Another Vs. Governor of Bungoma County & 17 others [2014] eKLR** where Justice Mabeya was of the view that the Constitution has relaxed the *locus standi* rule and that where one purports to enforce the rights of another, there must be a nexus between the parties.
45. A perusal of the annexure marked KM5 attached to the replying affidavit of the 2nd respondent shows that an email sent by the 1st respondent, Everret Jones on 12th June, 2014 was addressed to various parties that included the 2nd and 3rd applicants as well as the 2nd and 3rd respondents. This is sufficient to establish that the 2nd and 3rd applicants hereto were in one way or the other part and parcel of the decision making body of the Mission or were involved in the management of the Mission Homes before they were purportedly removed from any future involvement with the Mission Kakamega home vide a Board resolution of a meeting held at Everret/Carole Jones Home in Lakewood, Ohio, USA on 2nd September, 2014.
46. The 1st applicant claims to be the *bonafide* Chairman of the Mission. The court's duty in this matter is not to determine if the 2nd or 3rd applicants were properly removed from office or whether the said applicants through their meetings of 27th October, 2015 and 13th November, 2015 properly removed the 2nd and 3rd respondents from office and appointed the 1st applicant the Chairman of the Kenyan Board to the Mission. I note that the Notice of Motion dated 1st December, 2015 describes the 2nd and 3rd applicants as Directors and Managers of the two homes.
47. I am satisfied from the information contained in the affidavits of the applicants hereto that it will be in the best interest of the children of the two Mission Homes for the applicants to be enjoined in the petition filed by Virginia Marti Veith, on 29th October, 2015. I am satisfied that the applicants have established *locus standi* within the constitutional threshold set out in articles 22 (1) and 22(2) and 258 of the Constitution of Kenya, 2010 and rule 5 (d)(ii) of the Constitution of Kenya

(Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. They have clearly indicated that they want to be enjoined to protect the Constitutional rights of the 90 children in the Kakamega and Oyugis Mission Homes.

46. I therefore make the following orders:-

1. *That the 1st, 2nd and 3rd applicants herein be enjoined as the 2nd, 3rd and 4th petitioners in Kakamega High Court Petition No. 27 of 2015;*
2. *That the petition herein be amended to reflect the addition of the applicants as petitioners;*
3. *The amended petition be filed and served upon the respondents within 21 days; and*
4. *Costs in the cause.*

DELIVERED, DATED and SIGNED in open court at **KAKAMEGA** on this **18TH** day of **MAY**, 2016

NJOKI MWANGI

JUDGE

In the presence of:-

..... **for the Applicants**

..... **for the Respondents**

.....**Court Assistant**