



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 76 OF 2012

SDV TRANSAMI KENYA LIMITED AND 19 OTHERS..... PETITIONERS

VERSUS

THE ATTORNEY GENERAL & 2 OTHERS..... RESPONDENT

AND

CONTAINER FREIGHT ASSOCIATION OF KENYA..... PROPOSED INTERSTED PARTY

RULING

THE APPLICATION

0. By a Notice of Motion dated 15th June 2015, the proposed Interested Party made an application for its joinder in the constitutional petition seeking the following specific orders:
 - a. *This application be certified urgent and heard ex parte in the first instance, and a hearing date for the same be given.*
 - b. *The proposed Interested Party Container Freight Stations Associations (CFSA), be enjoined in these proceedings as an Interested Party and fully participate in these proceedings as such Interested Party; being representative of its Members as more particularly specified in the Schedule attached hereto.*
 - c. *The applicant, upon joinder, be allowed and or be at liberty to file any such pleadings and Affidavit that it may desire in propagating its case herein in safeguarding the interests of its members that stand to be prejudiced in the absence of such material, to enable the Court reach a fair and just determination of the matters in controversy.*
 - d. *The costs incidental to this application be provided for.*
0. The application for joinder was made after the hearing of the petition had been concluded on the 16th January 2015 and judgment reserved for 20th March 2015, when it was adjourned on account of heavy workload at the court.
0. The petitioner filed a Notice of Preliminary Objection date 17th June 2015 upon terms as follows:
 1. *THAT the Application is defective, incompetent and without any legal basis.*
 2. *THAT the basis of the said Application is the vertical integration in respect of the Petitioners' operations as set out in Section 16 of the Merchant Shipping Act (Cap 389) whereas the Petition before the Honourable Court in respect of the constitutionality of the Merchant Shipping (Maritime Service Providers) Regulations 2011;*
 3. *THAT the Applicant has no interest in the issues canvassed in the present Petition and therefore*

- has no constitutional right to be consulted on the same'*
4. ***THAT*** the 3rd Respondent represents the interests of all the industry players in the Kenyan maritime industry including the interest of the applicant/proposed interested party and entertaining such an application at this very late stage when the delivery of judgment has been postponed on two (2) separate occasions would lead to further protracted proceedings contrary to the overriding objectives of the very same Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 particularly Rules 3(4) and 3(5);
 5. ***THAT*** the applicant's prayer for joinder is misconceived and misplaced and this Honourable Court has no jurisdiction to grant the same;
 6. ***THAT*** in view of the foregoing the Applicant's Notice of Motion dated 4th June, 2015 is vexatious and an abuse of the Court process; and
 7. ***THAT*** the said Notice of Motion is consequently fatally flawed and should be dismissed/struck out with costs.”
0. When the matter came up before the court on 24th July 2015 at the request of counsel for the petitioner, the Court directed that the preliminary objection be determined first in the event that it disposed the application as a whole. Counsel for the parties – Mr. K. Asige for Petitioners, Ms. Lutta for the 1 and 2 respondents, Mr. Moya for the 3rd Respondent and Mr. Buti for the proposed Interested Party – were heard on their respective position as regards the preliminary objection and ruling was reserved for the 11th August 2015.
 0. The principal objections addressed by the Petitioners was that the Interested Party’s interest lay in section 16 of the Merchant Shipping Act which deals with restrictions to Ship-owners which was the subject of related petition Mombasa Constitutional Petition NO. 91 of 2011 (Nairobi No. 18 of 2010) and that their petition was a private matter between them and the respondents and the proposed Interested Party ***ought not*** be joined into the present proceedings in which they had no identifiable interest; that the applicant had not obtained leave of court to make the application for joinder; and that the joinder would result in further delay in the determination of the dispute the judgment in which had been adjourned twice before. Reliance was place on the High Court decision of ***Nyambene Miraa Traders Association (NYAMITA) (suing through its Chairman Leandro Ngalu Baariu & 2 Ors. v. National Agency for the Campaign Against Drug Abuse (NACADA) & 2 Ors.*** [2013] eKLR on the proposition an applicant for joinder need to show an identifiable interest in the subject matter of the litigation which is of a public nature.
 0. The court however pointed out to counsel for the petitioner that the matter before court though being between the petitioners and the respondents related to a challenge on subsidiary legislation made by the 4th respondent for the regulation of the maritime industry in Kenya and that could hardly be described as a private matter between the petitioner who are only some of the operators in the Industry. Counsel for the petitioner appeared, rightly, to abandon that line of argument. Shorn of that argument the petitioners’ objection became merely an opposition to the application for joinder on the grounds of late filing of the application for the joinder after the hearing of the petition and the resultant delay that would be occasioned by the grant of the application for joinder of the proposed Interested Party.

DETERMINATION

Court’s power to join Interested Party not in question

0. There is no doubt that the court has jurisdiction to order joinder of an Interested Party in a constitution petition such as the one before the court. Under Rule 7 of THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013 provision is made for the joinder of parties as follows:

“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.”

The Rules define the term 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.”

0. The ‘Preliminary Objection’ was purely a challenge of the application for joinder on its merits holding that the application should not be granted because it was filed late by persons who in the contention of the petitioner had no interest in what was considered a private dispute between the petitioner companies and the respondents and it would in any event result in delay of the fair determination of the petition which had already been heard and was awaiting a determination by judgment of the Court.
0. I am not able to hold that the leave of Court necessary for the making of the application for joinder cannot be sought and or obtained simultaneously with the grant of joinder of the interested party. If the application for joinder may itself be made orally, the application for leave may similarly be made orally. Moreover, the court can of its own motion grant an order for joinder of a party as an interested party. Suffice it to state that the grant of leave of court and of an order for joinder is in the discretion of the court.

Preliminary Objection Unsuitable where the Court has Jurisdiction and Discretion.

0. In the *locus classicus* on preliminary objections, ***Mukisa Biscuits Co. v. West End Distributors Ltd***, (1969) EA 696, 701, Newbold, P. with whom Duffus, V-P and Law JA. agreed stated as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.” [Underlining mine]

0. The jurisdiction of the court to grant joinder of an Interested Party is not in dispute. It is the appropriateness, propriety or suitability of the exercise of the discretion to order joinder of the proposed Interested Party herein that is questioned in the circumstances of the cases based on the alleged private nature of the petition, the timing of the application and the alleged prejudicial consequences of the grant of an order for joinder with regard to the final conclusion of the determination of the dispute. In accordance with the authority of ***Mukisa Biscuits*** case, such an objection cannot be taken as a ‘Preliminary Objection’ as it is squarely an opposition to the exercise of a discretion of the court, which should be urged and considered as an answer or response to the application in the usual way and not as an objection *in limine* or as a demurrer.

CONCLUSION

0. The points taken on the ‘Preliminary Objection’ herein are really matters of fact and or of exercise of discretion for or against joinder of the proposed Interested Party in this Petition, including whether the proposed Interested Party has identifiable interest in the Petition; whether leave to make an application for joinder may be granted; whether the application may be granted late in day when the petition is pending judgment; and the impact of possible prejudice in the resultant delay in determination of the dispute, all which are factors that go the exercise of the discretion by the Court of its undisputed jurisdiction to order joinder under Rules 7 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**. They are no pure points of law as to the jurisdiction, competency of the court or justiciability of the subject matter of the application, which are the proper subject of a Preliminary Objection.
0. With respect, paradoxical as it appears, it is the raising of the preliminary objection to the

application for joinder of the proposed Interested Party that may result in greater delay of the final determination of the matter. The question whether or not to join the proposed Interested Party to the petition before delivery of judgment is to be considered on the hearing of the application for joinder to which the preliminary objection was raised. As this 'Preliminary Objection' cannot succeed in view of it being an objection to a favourable exercise of the discretion to join a party, the application for joinder must proceed to hearing on the merits and, regardless of the outcome of the application, it will necessarily lead to a further delay in the conclusion of the suit.

ORDERS

0. Accordingly, for the reasons set out above, the petitioners' preliminary objection dated 17th June 2015 is dismissed with costs in the Cause.
0. In the interests of an expeditious disposal of the matter, the application for joinder of the proposed Interested Party is set for hearing on the 17th August 2015 at 2.30pm.

DATED AND DELIVERED THIS 11TH DAY OF AUGUST 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Asige for the Petitioner

Miss Lutta for the Respondents

N/a for the Respondents

Mr. Buti for the Proposed Interested Party

Ms. Linda - Court Assistant.