



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.88 OF 2015

BETWEEN

DAVID NYEKORACH MATSANGA..... 1ST PETITIONER

JOHN MUIRURI KIMANI.....2ND PETITIONER

AND

HON. MR. JUSTICE PHILIP WAKI.....1ST RESPONDENT

THE OFFICE OF THE PROSECUTOR OF

INTERNATIONAL CRIMINAL COURT.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

THE MYOT WELFARE ASSOCIATION

(KALENJIN COUNCIL OF ELDERS).....INTERESTED PARTY

RULING

1. The Interested Party, the Myot Welfare Association (Kalenjin Council of Elders) is allegedly an organization duly registered under the **Societies Act** with the objectives, *inter alia*, of promoting peaceful co-existence with all neighbours' of the Kalenjin Community.
2. It has filed the Notice of Motion dated 23rd April, 2015 seeking that it be enjoined in the Petition as an Interested Party. Mr. Seii, the Chairman of the Interested Party, in his Affidavit in support of the Application stated that the Kalenjin Community was adversely affected by the violence that took place after the 2007 Presidential Elections but it was never given an opportunity to record its evidence and give its side of the story before the Commission of Inquiry into Post-Election Violence (CIPEV). He particularly claimed that the Report of CIPEV denigrates, belittles, defames and prejudices the Kalenjin Community individually or collectively as it ascribes guilt of the past, present and future generations of the Community. It was therefore his contention that

- unless the allegations made in the CIPEV Report are challenged, the past, present and future progeny of the Kalenjin Community will suffer collectively and individual prejudice in Kenya and elsewhere in the world.
3. Mr. Arusei, learned Counsel for the proposed Interested Party submitted that the ends of justice would better be served by enjoining the Interested Party to the Petition and allowing it to ventilate its side of the story. That the Kalenjin community has a recognizable stake in the Petition and it was his position that the Proposed Interested Party would enlighten the Court in addressing some of the issues raised in the Petition.
 4. He further submitted the CIPEV Report did not give the Interested Party or its membership an opportunity to be heard in violation of rules of natural justice that demand that a person should not be condemned unheard.
 5. He also claimed that the joinder of the Proposed Interested Party would not cause any delay, harm or prejudice to any of the Parties and the Application should be granted as prayed.
 6. The Application is opposed and the Petitioners filed Grounds of Opposition dated 9th September, 2015. It was their case that the Application is bad in law and an abuse of the Court process because the Interested Party had not shown its claim or cause of action and its joinder would not help the Court in any way but would instead delay the hearing of the Petition. It also claimed that the Proposed Interested Party has the option of filing its own Petition in which it would ventilate its claim without joining the present Petition.
 7. Mr. Gitonga, learned Counsel for the Petitioners in his submission stated that the Interested Party has not demonstrated sufficient interest and the value it would add to their Petition even if it supports the Petition. That the Application is therefore frivolous and should be dismissed with costs.
 8. The 1st Respondent also opposed the Petition through Grounds of Opposition dated 15th September, 2015 and Mr. Okoth who appeared for him submitted that the issue in the Petition largely rotated around the right to access information as guaranteed under **Article 35** of the **Constitution** while the Proposed Interested Party's Application is predicated on its right to fair hearing. He therefore claimed that the Applicant had not demonstrated any specific identifiable interest it was pursuing in the Petition and contended that the issues to be raised by the Proposed Interested Party are outside the scope of these proceedings.
 9. It was also his position that the Proposed Interested Party had failed to show that its presence was necessary in these proceedings so as to enable the Court to effectually and competently adjudicate upon and settle all questions involved in the Petition and further submitted that the Proposed Interested Party had also failed to demonstrate that it would present any fresh material to the Court for consideration and that the joinder would only lead to delay and will also impose unnecessary additional costs on the Parties.
 10. The 2nd Respondent did not file any response to the Application and did not also make oral arguments on the same.
 11. The 3rd Respondent similarly did not file a response to the Application but Mr. Njoroge, learned State Counsel, associated himself with the submissions of Mr. Gitonga and Mr. Okoth and added that any negative or adverse conclusion against the Proposed Interested Party is not sufficient to warrant its joinder in the Petition.
 12. I have taken into account all the above submissions. The singular issue before me is whether the Proposed Interested Party ought to be enjoined in the present Petition.
 13. In that regard, an Interested Party has been defined in **Rule 2** of the Constitution of Kenya

(Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 as;

“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.”

Similarly, **Rule 7** of the said **Rules** provides that;

“A person, with leave of the Court, may make an oral or written application to be enjoined as an Interested Party.”

14. In that context I heard Mr. Arusei submit that the ends of justice in this Petition would better be served by enjoining the Proposed Interested Party to the Petition. The issue of enjoining a party as an Interested Party was addressed by the Supreme Court in **Communications Commission of Kenya & 4 Others vs Royal Media Services Ltd. & 7 Others (2014) eKLR** in the following words;

“An Interested Party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is the one who will be affected by the decision of the Court when it is made either way. Such a person feels that his or her interests will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. A party could be enjoined in a matter for the reason 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 of the rights of a party who would otherwise be adversely affected in law;

iii. Joinder to prevent a likely course of proliferated litigation.

15. I am duly guided and I note that in the Petition, the Petitioners are challenging the constitutionality of the alleged concealment and or withholding of the contents of a sealed envelope containing names of persons suspected to have borne the greatest responsibility for the Post Election Violence of 2007/2008 in Kenya. The CIPEV handed that envelope to the Chair of the Panel of Eminent African Persons, Dr. Kofi Annan. The Interested Party's case on the other hand seems to be premised on the ground that it was not heard before it was adversely mentioned in the CIPEV Report.

16. Having reflected on the matter, and perused the Petition herein. The specific prayers sought are the following;

“(1) A declaration that of the Commission of the inquiry into the Post-Election Violence (CIPEV) abdicated its legal and mandatory obligation under the Commissions of Inquiry Act, Chapter 102 of the Laws of Kenya, by failing to handover the full and/or its entire Report to the President of the Republic of Kenya as required by the aforesaid law and the Constitution of Kenya.

(2) A declaration that the failure by CIPEV to hand over and/or transmit the full and/or its entire Report to the President of the Republic of Kenya and the concealment and/or non-disclosure of part of the said Report by CIPEV was unlawful, improper, illegal and unconstitutional.

(3) A declaration that the Government of the Republic of Kenya abdicated its legal and constitutional mandate by failing to acquire, obtain and/or demand for the full and entire Report prepared by the Commission of Inquiry into the Post-Election

Violence (CIPEV).

(4) A declaration that the handing over and/or transmission of part of the Report prepared by the Commission of Inquiry into the Post-Election Violence (CIPEV), being the sealed envelope containing the names of persons suspected to have borne the greatest responsibility for the Post-Election Violence, to the Chair of the Panel of Eminent Persons, Dr. Koffi Atta Annan was unlawful, improper and/or illegal.

(5) A declaration that the handing over and/or transmission of part of the Report prepared by the Commission of Inquiry into the Post-Election Violence (CIPEV), being the sealed envelope containing the names of persons suspected to have borne the greatest responsibility for the Post-Election Violence, by the Chair of the Panel of Eminent Persons, Dr. Koffi Atta Annan to the Prosecutor of the International Criminal Court (ICC), Mr. Luis Moreno Ocampo (as he then was) was unlawful, improper and/or illegal.

(6) A declaration that the continued concealment and/or withholding of the contents of the Report prepared by the Commission of Inquiry into the Post-Election Violence (CIPEV), being the sealed envelope containing the names of person suspected to have borne the greatest responsibility for the Post-Election Violence, and the Office of the prosecutor of the International Criminal Court is a violation of the Petitioner's right of access to information as guaranteed under Article 35 of the Constitution of Kenya, 2010.

(7) An order compelling the Honourable Justice Philip Waki to submit to His Excellency the President of the Republic of Kenya the Report prepared by the Commission of Inquiry into the Post-Election Violence (CIPEV), being the sealed envelope containing the names of persons suspected to have borne the greatest responsibility for the Post-Election Violence, which was submitted by himself to the Chair of the Panel of Eminent Persons, Dr. Koffi Atta Annan.

(8) A mandatory injunction be and is hereby issued directing and/or compelling the Office of the Prosecutor of the International Criminal Court to return and/or disclose to the Republic of Kenya the concealed contents of part of the Report by CIPEV being the sealed envelope containing the names of persons suspected to have borne the greatest responsibility for the violence that erupted during and after the General Elections held in 2007.

(9) An order of Mandamus compelling the Honourable the Attorney General to obtain and disclose to the Republic of Kenya the concealed contents of part of the Report by CIPEV being the sealed envelope containing the names of persons suspected to have borne the greatest responsibility for the violence that erupted during and after the General Elections held in 2007.

(10) That the Respondents be and are hereby ordered to publish and/or publicize, the entire, full and proper Report prepared by the Commission of Inquiry into the Post-Election Violence (CIPEV) including the sealed/secret envelope containing the names of persons suspected to have borne the greatest responsibility for the Post-Election Violence, which was submitted and/or hand-over to the Chair of the Panel of Eminent Persons, Dr. Koffi Atta Annan.

(11) Any other and further orders as the Honourable Court may deem fit.

(12) The Respondents to pay the Petitioners cost of these proceedings in any event."

17. I also note that what brings the Petitioner and the Interested Party together is the CIPEV Report. That Report is what led to the creation of the list of persons who were said to have had the greatest responsibility in the 2007-2008 Post-Election Violence in Kenya.
18. While the Petitioners were not themselves adversely mentioned in that Report, the Kalenjin Community whom the Proposed Interested Party claim to be representing was certainly adversely mentioned. That fact would therefore create an interest for it in the present proceedings.
19. As regards the fact that the Petitioners seek the information contained in the envelope mentioned above, it is obvious to me that the Proposed Interested Party has an interest in the same information.
20. The Kalenjin Council of Elders would certainly want to know who promoted, funded and/or precipitated the Post-Election violence in a bid to show that it was never heard before the CIPEV Report was published and before its members were adversely mentioned.
21. As was stated in *Communication Commission of Kenya & Others (supra)*, a party adversely affected, would need to join proceedings filed by another to protect its interests and also to avoid proliferated litigation.
22. Why should this Court entertain separate proceedings arising from the CIPEV Report even if in the course of doing so, an extra issue for determination arises? Precious judicial time and resources would be saved if the Court were to determine all questions arising from that report in one case and not a multiplicity of cases. That is one of the purposes of **Article 159(2)** of the **Constitution**.
23. Having so held, I see merit in the Application dated 23rd April 2015 and it is allowed with the consequence that the Myot Welfare Association (Kalenjin Council of Elders) is enjoined as an Interested Party to the present Petition.
24. Cost shall be in the cause.
25. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 13TH DAY OF NOVEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Gitonga for Petitioner

Miss Barasa for 1st Respondent

Mr. Njoroge for 3rd Respondent

Order

Ruling duly delivered.

By Court

Oral submissions under Article 165(4) of the Constitution to be made on 9/12/2015.

ISAAC LENAOLA

JUDGE