



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 484 OF 2012

KHALEF KHALIFA
.....APPLICANT

VERSUS

REPUBLIC.....
.....RESPONDENT

**NATIONAL COHESION & INTEGRATION COMMISSION
(NCIC)**

.....1ST
INTERESTED PARTY

CHIRAU ALI MWAKWERE.....2ND
INTERESTED PARTY

LAW SOCIETY OF KENYA.....PROPOSED
INTERESTED PARTY

R U L I N G

1. Before me is a Notice of Motion dated 20th May 2013, brought under **Articles 23, 159 and 258** of the **Constitution** and **Section 4** of the **Law Society of Kenya Act** by the Law Society of Kenya seeking to be enjoined as an interested party in the Revision proceedings before this Court.
2. The Application is supported by the Affidavit of K. M. Mwangi, an Advocate of the High Court of Kenya and a member of the Law Society of Kenya, sworn on 20th May 2013. The Application is based on the following grounds:
 - a. The Proposed Interested Party has obligations under **Section 4** of the **Law Society of Kenya Act**, to assist the government and courts in all matters affecting legislation and the administration of justice, and to protect and assist the public in Kenya in all matters concerning the law,
 - b. The subject of the Criminal Revision proceedings before court raises various questions of the law,
 - c. The relevant provisions of the law were misapplied, misconstrued and misinterpreted, thus the need for the High Court to address the issues,
 - d. The Applicant has a public obligation to ensure that the law is properly interpreted, construed and applied.

- e. The Constitution requires that all public officers and institutions be accountable in participatory public processes,
 - f. The instant proceedings bear a great impact on the Constitution and will determine how other Courts will interpret the law in light of **Chapter Six** of the **Constitution**,
 - g. It is necessary to enjoin the Applicant as an interested party to ensure the principles and interests of the criminal justice system are upheld and to protect the public against public offences.
 - h. No prejudice will be occasioned to the Respondents.
3. The 2nd Interested Party opposed the Application by his Replying Affidavit sworn on 18th June 2013 and filed on 19th June 2013. He depones that the Application lacks procedural and juridical basis. He also challenges the Affidavit sworn by Mr. K. M. Mwangi in support of the Application for joinder for failing to prove the deponent's position as an Advocate and authorization by the Proposed Interested Party to file the Application. The deponent states that no evidence has been adduced by the Proposed Interested Party to show connection with the Applicant of the Revision Application, Khalif Khalifa, adding that the Proposed Interested Party has misapprehended the proceedings before this Court with constitutional proceedings. Further, it is the deponent's position that the Applicant has not demonstrated which grievance or legal matter it seeks to agitate before the Court.
 4. The deponent states that a reading of the Affidavit in support of the Application shows that the Proposed Interested Party is not a neutral party. He questions the motives of the Law Society of Kenya, noting that it seeks to use the proceedings to undertake private prosecution and further that the Proposed Interested Party is not challenging the decision of the DPP to accept the Conciliation Agreement. The 2nd Interested Party suggests that the Applicant is holding brief for the Applicant who is a member of Muslim for Human Rights (MUHURI), who were the complainants in the criminal case and one of the parties in the Conciliation Agreement. Therefore, the deponent states that the Law Society of Kenya has no *locus* in the proceedings and has not shown any cause to warrant its joinder.
 5. In a Supplementary Affidavit sworn on 26th June, 2013, Apollo Mboya, the Secretary/Chief Executive Officer of the Law Society of Kenya states that the law firm of Gakoi Maina & Co. Advocates was authorized to act on its behalf in the matter and further that Mr. K.M. Mwangi, is an Advocate holding a current Practising Certificate. The deponent adds that the case before Court raises matters ancillary to the law that affect the application of the Criminal Procedure Code and the National Cohesion and Integration Act. Thus, it is in line with the objects of the Law Society of Kenya that it seeks to be enjoined. The deponent adds that the Proposed Interest Party is seeking to be enjoined as an interested party and not a neutral party or a friend of the court.
 6. The deponent points out that the Proposed Interested Party has clearly demonstrated that the issue it seeks to canvass in Court concerns the misapplication of the law in the lower Court's proceedings. He urges that all that is required of the Proposed Interested Party at this stage is that it has a *bonafide* interest in taking part in the proceedings. The deponent adds that by this Application, the Law Society of Kenya seeks to challenge the entire process regarding the arraignment, prosecution and discharge of the 2nd Interested Party as conducted by the 1st Respondent, the office of the DPP and the Court in the Criminal Case, and therefore, failure to challenge the Conciliation Agreement does not affect the Application.
 7. The deponent denies any relations with the Applicant in the Revision proceedings and emphasizes that the interest to be enjoined is in fulfillment of obligation to the public under **Section 4** of the **Law Society of Kenya Act** and to ensure the proper application of the law in defence of the Constitution. Accordingly, by seeking to be enjoined in the proceedings, the Proposed Interested Party is not seeking to institute private prosecution of the 2nd Interested Party.
 8. Learned Counsels, Miss Gikonyo, and Miss Maina who appeared for the Applicant and the DPP respectively did not oppose the Application. Mr. K.M. Mwangi, for the Proposed Interested Party

submitted that the Revision Application raises serious questions of law and on the administration of justice, as spelt out in the grounds of the Application, which grounds also touch on **Chapter 6** of the **Constitution**. Counsel likened this case to other matters that raise questions of law, where the Law Society of Kenya has been enjoined. In this case, Counsel submitted that ethnic hatred, the subject matter in the lower Court's proceedings, is a matter of public interest.

9. Mr. Mwangi, learned Counsel for the 2nd Interested Party submitted that the proceedings are not appropriate since the Proposed Interested Party was not a party to the lower Court's proceedings. Learned Counsel submitted that in revision proceedings, the parties to be heard are the State, the accused person and the complainant, who in this case were the NCIC and MUHURI. He added that the inclusion of the Proposed Interested Party would prejudice the 2nd Interested Party, adding that instead, it ought to have filed its own independent application, a constitutional petition in which the 2nd Interested Party and the rest of the public could participate. Counsel submitted that the eventual orders of the Court would only affect the 2nd interested party and not the rest of the public. Mr. Mwangi emphasized that the Proposed Interested Party does not have the right to address the Court neither at this stage, nor in the lower Court's proceedings had it been watching brief. He submitted that the Proposed Interested Party is not neutral in this case, and by being enjoined, it would prosecute the 2nd Interested Party. He urged that the Application be dismissed since the applicant had not established a *locus standi* in the matter.
10. In rejoinder, Mr. K.M. Mwangi, submitted that the issues raised on behalf of the 2nd Interested Party ought to be canvassed in the main Application. Counsel added that by setting out the issues to be canvassed, the Proposed Interested Party is not seeking to prosecute the 2nd interested Party. He also clarified that the Proposed Interested Party is not restricted to be enjoined as *amicus curiae* and could come to court whenever the law is not properly applied. Counsel added that the threshold for determining its suitability as an interested party is whether there is an issue touching on the law that it can advance. While not denying that the Law Society of Kenya was not a party in the lower Court's proceedings, Counsel urged that the issue it is seeking to advance arose after the ruling of the Court. In emphasis, Counsel cited the case of ***Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai Estate & 4 Others, Supreme Court of Kenya Petition No. 4 of 2012 [2013] eKLR*** where the Law Society of Kenya was enjoined at the Supreme Court level in a case that had originated from the High Court.
11. The issue for determination is whether the Law Society of Kenya qualifies to be enjoined as an interested party in these proceedings. This matter arose out of an Application dated 29th October, 2012 seeking revision of the lower Court's proceedings in **Nairobi Chief Magistrates' Court, Cr. Case No. 1215 of 2012, Republic v. Chirau Ali Makwere**. In the said case, the 2nd Interested Party had been charged with the offence of ethnic contempt contrary to **Section 62(1)** of the **National Cohesion and Integration Act**. However, before the matter had taken off for trial, the DPP sought to have the matter withdrawn following a conciliation process between the NCIC, MUHURI and the 2nd Interested Party which is evidenced by a Conciliation Agreement dated 15th September 2012. The 2nd Interested Party was therefore discharged under **Section 87(a)** of the **Criminal Procedure Code**. The Applicant in the Revision proceedings is a director of MUHURI, which had lodged a complaint to the National Cohesion and Integration Commission, on the basis of which criminal proceedings had been instituted against the 2nd Interested Party.
12. The current Application is therefore made in context of revision proceedings, whose scope is captured by the **Criminal Procedure Code** in **Section 362** and it provides that:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

13. It is the case of the Proposed Interested Party that it has established a good case for joinder mainly

for the reason that the Application pending before Court raises matters of law touching on criminal procedure, the Constitution and the administration of justice. The Proposed Interested Party cites its enabling Act, the **Law Society of Kenya Act** as its authority for the public interest in this case whose subject matter concerns the public.

14. An interested party is defined under **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.”

While the *Black’s Law Dictionary 8th Edition* at page 1234 defines an interested party as:

“a party who has a recognizable stake (and therefore standing) in a matter.”

15. From the above definitions, the clear criteria that must be established by a party seeking to be enjoined as an interested party is to show that it has *an identifiable stake or legal interest or duty in the proceedings*. Other factors that the Court may consider were enunciated by the Court in the *Meme v Republic, [2004] 1 EA 124*, as follows:

“(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.”

16. An argument was raised on behalf of the 2nd Interested Party that the Law Society of Kenya is not fit to be enjoined for being partisan. The definition of an interested party does not show clearly that an interested party has a identifiable stake, unlike a friend of the court who, is *“an independent and impartial expert on an issue which is the subject matter of proceedings but is not party to the case and serves to benefit the court with their expertise.”* (**Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**). It is therefore not out of order for the proposed Interested Party to advance an interest in the matter in question.

17. The Proposed Interested Party cites its public duty under **Section 4 of the Law Society of Kenya Act** to:

“(c) assist the Government and the courts in all matters affecting legislation and the administration and practice of the law in Kenya,

(e) protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law...”

18. Further, **Article 258 of the Constitution** gives guidance on institution of court proceedings concerning contravention of the Constitution or threat of such contravention. Such a matter can be instituted by any person acting in his own interest or a person acting in the public interest.

19. There is no defined procedure in criminal proceedings on participation of interested parties, largely because of the nature of criminal proceedings which ordinarily involve the state and the accused person. However, the court has an inherent jurisdiction to control and conduct proceedings before it and to make orders in the interest of justice. **Article 165 of the Constitution** which also provides for the supervisory jurisdiction of the High Court provides a basis for the

Court to make further orders as appropriate for the advancement of the interests of justice. It partly reads as follows:

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

20. The subject matter in question was the prosecution of an individual party, the 2nd Interested Party. Crimes, however, are wrongs against the public, and their prosecution is primarily done in the interest of the public. The charges which were the subject matter in the lower Court concerned acts committed against several communities. Furthermore, as submitted for the Proposed Interested Party, the purpose for seeking joinder is to challenge the entire proceedings in the lower Court, which it has submitted, raise issues affecting the administration of justice and the application of the law. This, I do not find, amounts to the prosecution of the 2nd Interested Party, since the Revision proceedings are not an avenue for such conduct.

21. For the above reasons, I allow the Law Society of Kenya to be enjoined as an interested party to these proceedings.

It is so ordered.

SIGNED DATED and DELIVERED in open court this **29th** day of **January 2014**.

L. A. ACHODE

JUDGE