



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.11 OF 2014

BETWEEN

HON. DR. EVANS ODHIAMBO KIDEROPETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS1ST RESPONDENT

INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS3RD RESPONDENT

AND

HON. RACHAEL SHEBESH INTERESTED PARTY

RULING

1. Before me are two applications for joinder of interested parties to this petition. The first application is dated 15th January 2014 is by the Nairobi City County. The second application dated 16th January 2014 is brought by the Orange Democratic Movement (“ODM”) and the Coalition for Reform and Democracy (“CORD”).
2. Under **Rule 7 of the Constitution of Kenya (Protection of Fundamental Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (“The Rules”)**, the court has discretion to join an interested party. The Rule provides:
 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.*
3. **Rule 2 of the Rules** defines the term ‘interested party’ 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.*”

4. The party who seeks to be joined must demonstrate the identifiable stake or legal interest in reference to the proceedings. It is therefore vital to understand the nature of the case in order to identify the stake or legal interest. The petition dated 10th January 2014 arises out of an incident that occurred on 6th September 2013 involving the petitioner and the interested party; Hon Rachael Shebesh. The incident led to both parties filing police reports. These reports were then forwarded to the Director of Public Prosecutions (“DPP”) who made a decision to charge the petitioner with the offence of assault and the interested party with the offence of causing a breach of the peace.
5. As the prayers in the petition show, the case is directed at impugning the decision of the DPP and his authority to commence criminal proceedings on the basis that the petitioner’s fundamental rights and freedoms and the Constitution have been violated.
6. The Nairobi City County (“the County”) contends that it has an interest in the matter as the events that led to the criminal charges occurred on the premises and while the petitioner, the County Governor, was exercising lawful authority. The County contends that it has a legitimate interest in these proceedings as the alleged assault on the petitioner amounted to an assault on the office of Governor, its integrity and was done in the Governor’s office and in the course of execution of his duties.
7. The 2nd application is brought by the political party and coalition sponsoring the Governor. The grounds upon which it is brought is that the interested parties are aware that there has been an attempt to use all means to oust the ODM/CORD leadership, which is in control of the County government, by removal of the petitioner from office amongst others by use of criminal process. They wish to demonstrate that the criminal law is being abused and used for ulterior purposes and motives. They argue that political parties are entitled to join these proceedings as they are public entities recognised by the Constitution, **Political Parties Act** and **Elections Act**.
8. The 1st respondent and interested party oppose the applications on the ground that proposed interested parties do not have an identifiable legal interest given the nature of the subject matter and that the issues raised are matters of evidence which can be brought in the proceedings on behalf of the petitioner without the necessity of joining parties. They contend that joining the applicants will obscure the real issues in controversy.
9. As I stated earlier, the legal interest or identical stake must be in relation to the proceedings at hand. The central issue for determination in the matter is whether the petitioner’s rights and fundamental freedoms have been violated by the exercise of the DPP’s power to commence criminal proceedings against him. While this is an issue of general public interest, no doubt because of the position the petitioner holds, it is a personal matter as it involves his fundamental rights and freedoms and specific breaches of the Constitution in relation to him.
10. The deposition of Lilian Ndegwa, the County Secretary, sets out at paragraphs 4, 5, 6 and 7 the circumstances under which the alleged assault and breach of peace took place. These facts are the same facts recited in the petitioner’s supporting affidavit hence there is no need to bring in any further facts. As regards the issues of law and the status of Governor, the petitioner himself, as Governor, will be in a position to articulate them, if indeed these are the grounds upon which the decision of the DPP is impugned. I therefore find and hold that the County has not established a basis to be joined in these proceedings.
11. As to the issues of the inter play between the County Government, National Government and the Office of the DPP, the Attorney General who represents parties to these proceedings is able to articulate the same should they arise. The same issues can also be dealt with by the petitioner in the event they are the basis for him to impugn the DPP’s decision. I also note that in any event, the court is at liberty to call upon *amicus curiae* to assist the court should elucidation of specialized issues be required. Furthermore, the court may, at any stage of the proceedings order 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 in accordance with **Rule 5(d) of the Rules.**

12.I also find that both ODM and CORD have not established any interest that would fall within the purview of **Rule 7 of the Rules.** Their interest as political parties or coalitions cannot be over and above that of any political party in the affairs of any of its elected officials charged and prosecuted for an offence. I also find that if there is any abuse of process or improper motives on the part of any person, then this is an issue of evidence that can be presented by the petitioner himself.

13.The issues raised in the deposition of Senator Anyang Nyong'o in his affidavit of 15th January 2012 are outside the scope of these proceedings. They concern the effect of criminal proceedings on the governance structures of the County. At the end of the day, the charge preferred against the petitioner and interested party are personal in nature as they deal with criminal liability of the individual and the petition is concerned with the DPP's decision to prosecute him for the alleged offence. The court at this stage is not concerned with the legal or political impact that may result from the criminal process and such arguments are premature.

14.On the whole, I find that that joinder of the County, ODM and CORD would obscure the real issues in controversy and impose unnecessary costs on the parties and therefore undermine the objects of **Article 159(2)** of the Constitution.

15.The Notice of Motion dated 15th January 2014 and the Notice of Motion dated 16th January 2014 are dismissed. There shall be no order as to costs.

DATED and DELIVERED at NAIROBI this 16th day of January 2014.

D.S. MAJANJA

JUDGE

Prof. Ojienda, S.C., instructed by Prof Tom Ojienda and Associates Advocates for the petitioner.

Mr Kamula with him Ms Wanjala, Ms Magoma and Mr Ondimu instructed by the Director of Public Prosecutions.

Ms Munyi instructed by the State Law Office for the 2nd and 3rd respondents.

Mr Otachi instructed by Ogetto, Otachi and Company Advocates for the Nairobi City County.

Hon. Orenge instructed by J.A.B Orenge Advocates for Orange Democratic Movement and Coalition for Reform and Democracy.