



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
MISC. CRIMINAL APPLICATION NO. 194 OF 2013

TIMOTHY ISAAC BRYANT.....1ST APPLICANT

GITONGA GERRY GRAHAM.....2ND APPLICANT

(Both practicing law in the firm of Bryant & Associates)

REGISTERED TRUSTEES KENYA YOUTH

HOSTELS ASSOCIATION.....3RD APPLICANT

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS

DEPARTMENT.....2ND RESPONDENT

ADAN AHMED HASSAN.....3RD RESPONDENT

RULING

1. Before me are two Applications by parties seeking to be joined as interested parties in the revision proceedings pending before me, that is **High Court, Misc. Criminal Application No. 194 of 2013 Timothy Isaac Bryant & Gitonga Gerry Graham vs. the Inspector General of Police, the Director Criminal Investigations & Adan Ahmed Hassan.**
2. The 1st Application is a **Notice of Motion dated 16th July 2013** filed under Certificate of Urgency and brought under **Articles 40, 47 and 50(1)** of the **Constitution**. The Application by Desiral Company Ltd. is supported by the Affidavits of Jane Mwasia and John Katiku both sworn on 16th July 2013. The Applicant/Interested Party seeks to be joined to the proceedings to safeguard its interests over monies paid in a land transaction with the 1st, 2nd and 3rd Applicants relating to land parcel LR NO. 209/965/2 which was the subject matter in the lower Court’s proceedings that occasioned the revision proceedings before this Court
3. The 2nd Application is a **Notice of Motion dated 25th September 2013** brought under **Articles 40, 47 and 50(1)** of the **Constitution**. The Application is supported by the Affidavit of Gideon

Chris Maina sworn on 25th September 2013. The Applicants/Interested Parties are James Osogo and Gideon Maina who claim to be legitimate registered trustees of the Kenya Youth Hostels Association (hereinafter 'the Association') and Musa Mukangwa, Francis Muthini and Gideon Chris Maina, who claim to be the legitimate officials of the Association holding the positions of Chairman, Secretary and Treasurer respectively. The Applicants/Interested Parties are also seeking for an order that the 3rd Applicant in the proceedings, Registered Trustees of Kenya Youth Hostels Association be removed from the proceedings.

4. The Applicants/Interested Parties state that they ought to be joined in the proceedings as they are the legitimate trustees and officials of the Association. They state that the sale of property belonging to the Association which necessitated the complaint to the police, was irregularly executed by persons claiming to be the trustees of the Association. They state that the proceeds of the said sale were paid to the 1st and 2nd Applicants who do not have authority to act on behalf of the Association which risks being defrauded since no monies were remitted to the Association or its legitimate registered trustees or officials. It is therefore their case that they ought to be joined in the proceedings in order to safeguard the interests of the Association.
5. The two Applications for joinder of the Interested Parties stemmed from the Revision Application that is pending before this Court. The Revision Application arose out of orders of the lower Court issued on 14th May 2013 in **CMC, Misc. Cri. App. No. 640 of 2013 Republic v Cooperative Bank Upperhill and Timothy Bryant/James Ngugi Mwangi.**
6. In the said proceedings, Chief Inspector Adan Ahmed Hassan was granted warrants to investigate and freeze the bank account No. 01109162693500 in the name of Timothy Bryant/James Ngugi Mwangi held at Cooperative Bank Upperhill Branch Nairobi. According to the Affidavit of Adan Ahmed Hassan, sworn on 14th May 2013 in support of the application for warrants, the orders were sought following complaints by a person working for the Association and a Director of Desiral regarding the sale of a property known as **LR NO. 209/965/2 NAIROBI** which belongs to the Association by persons who intended to defraud both the Association and Desiral Company Limited.
7. The Applications were opposed through the Replying Affidavit of Mutavi I. Maseki, sworn on 31st July 2013. The deponent states that he is one of the registered trustees of the Association, and that the matters before the Court concern the revision of the lower Court's orders based on the evidence and record already presented to that Court. He adds that criminal procedure does not require further evidence or new parties to join in revision proceedings.
8. The deponent avers that by allowing the joining of the Interested Parties, this Court would be permitting the said parties to prosecute a parallel criminal case while maintaining a civil claim against the Applicants, and thereby further the Interested Parties' intention to delay justice. The deponent states that Desiral Company Limited is a dishonest party coming to Court using unreliable and forged documents. He also asserts that allowing the company to be enjoined would go against the constitutional powers of the Director of Public Prosecutions as enshrined in Article 157 of the Constitution. He adds that the institution of criminal and civil proceedings have been orchestrated by the owner of Desiral Company Limited.
9. With respect to the sale of the property, the deponent maintains that the sale was legitimately effected to facilitate the repayment of a loan that had been advanced to the Association between 1994 and 1999. He states that the Ignatius Mutua referred to by Desiral Company as one of the officials involved in the intended purchase of the property ceased to be an employee of the Association and could not therefore be a complainant in the matter. The deponent distanced himself from the alleged Agreement for Sale between the Association and Desiral Company Limited and stated that the purported signatures of the deponent and Livingstone Simel Sane as trustees of the Association were forgeries.

10. During the hearing, Learned Senior Counsel, Mr. Kitonga for the 1st, 2nd and 3rd Applicants submitted that allowing the application for joinder would change the nature of criminal proceedings which involve only two parties, the prosecutor and an accused person. Learned Senior Counsel underlined that by this Application the said Interested Parties were asking the Court to blend civil proceedings with criminal proceedings yet such parties were not contemplated in criminal procedure.
11. Citing the proceedings before the lower Court, the learned Senior Counsel added that the said proceedings involve the original complainant – the DPP, Chief Inspector Aden Hassan and the original suspected persons in the subordinate court. He likened the Applicants/Interested Parties to Advocates watching brief in criminal proceedings who do not have audience with the Court.
12. In emphasis, the learned Senior Counsel stated that the Criminal Procedure Code was not cited by the Applicants because it did not enable them to make such an application. He added that the Application was clothed under the Constitution, which is only a document of principles while the Criminal Procedure Code was the enabling legislation. He therefore, urged that the Court does not have jurisdiction to entertain these Applications. He cautioned that allowing the Application would result in a myriad of such applications in future by parties seeking to join all criminal proceedings.
13. Mr. Mbaabu, learned Counsel for the Interested Parties, referred to as the legitimate trustees and officials of the Association, submitted that the powers to join the interested parties in proceedings are discretionary. He added that in this case, the Court can exercise its discretion to hear all the parties who are interested in the matter where the Applicants are seeking for revision of a lower Court's order concerning investigations. He urged the Court to consider the fact that the investigations by the police commenced after a complaint by the Interested Parties who therefore ought not to be excluded in the proceedings. Learned Counsel submitted that the overriding consideration ought to be the need to dispense justice between all the parties as opposed to procedural considerations.
14. In response to Mr. Kitonga's line of submissions, Mr. Ojiambo, Senior Counsel for Desiral Company Limited, submitted that the High Court has original unlimited jurisdiction. He added that the issues being urged are neither criminal nor civil, but with respect to a right to property. This right, learned Senior Counsel submitted, is a justiciable right which cannot be hemmed in by technicalities. He emphasized that the Constitution which is not a code of dead principles ought to guide the Court in these proceedings.
15. Mr. Ojiambo further contended that learned Senior Counsel for the Applicants could not acknowledge that Desiral Kenya Limited were the complainants in the investigations and in the same breath submit that they do not have a right to be heard. Counsel emphasized that there were no proceedings as yet in the subordinate Court for the reason that freezing orders were sought following a complaint and the process so far, is with respect to investigations by the police in pursuit of statutory and legal mandate to do so.
16. Mr. Okemo appearing for the State agreed with Mr. Ojiambo's submissions and added that there is a clear distinction where a trial has already commenced in which the Republic represents the complainant and therefore no other party would have a right to prosecute the matter. He averred that the proceedings before the Court did not amount to a criminal trial. Learned State Counsel stated that were the Court to go by the strict application of Section 362 of the Criminal Procedure Code, the revision proceedings before this Court would also not be considered since that provision deals with criminal proceedings while, in actual fact, there are no criminal proceedings before the lower Court. He added that an application to enjoin a party is discretionary and that the Court should be wary of failing to do justice when matters of procedural justice have been raised
17. The main issue for determination is ***whether the proposed interested parties who were not parties to the lower Court proceedings can join the proceedings before this Court.*** On the position of

interested parties in criminal proceedings, it is true that the Criminal Procedure Code, does not expressly provide for the participation of an interested party in court, and it does not define who an interested party is. Borrowing from the **Constitution of Kenya (Protection of Fundamental Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Legal Notice 117 of 2013), Rule 2** defines an 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.”

18. Learned Counsels for the Interested Parties urged that the parties have an interest in the property which is the subject matter of investigations by the police. The Applications have both been brought under **Articles 40, 47 and 50(1)** of the **Constitution**. Article 40 provides for the protection of the right to property. Article 47 recognizes the right to a fair administrative action; while **Article 50(1)** is with respect to the right to a fair hearing by an impartial independent court.

19. I will not take the narrow interpretation, as was urged by Learned Senior Counsel for the 1st, 2nd and 3rd Applicants that the Court was only bound by the Criminal Procedure Code in determining these Applications. This is because the Court is guided by constitutional principles in exercising its judicial authority and in particular **Article 159 (2)(e)** of the **Constitution** which states that:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

the purpose and principles of this Constitution shall be protected and promoted.:

Therefore, in addressing all proceedings before me, I am enjoined to uphold the principles set out in the Constitution in order to serve out the interests of justice.

20. On matters of jurisdiction, I must also set out whether the applications before me can be entertained in the context of revision proceedings. In his Replying Affidavit, Mutavi I. Maseki, states that the matters before the Court concern the revision of the lower Court on the evidence and record already presented to the Court, and further that the Criminal Procedure Code does not require further evidence or new parties to join. The Applications before me were made in the 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.”

21. **Article 165** of the **Constitution** also provides for the supervisory jurisdiction of the High Court 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.”

22. As provided for above, the High Court exercises its revisional jurisdiction in the context of *the record of any criminal proceedings before any subordinate court*. This implies that for the Court

to found a decision on the finding, order, sentence or proceedings before that subordinate court, the High Court is guided by the material that was presented before that Court. However, the Constitution adds that the Court “*may make any order or give any direction it considers appropriate to ensure the fair administration of justice.*” Having this in mind, I am not of the position that the Court cannot allow for further submissions beyond what was presented before the lower Court. Furthermore, **Article 48** of the **Constitution** contemplates access to justice for all persons.

23. The main Application before me is a Revision Application arising from proceedings before a lower Court that granted warrants to enable investigation into alleged criminal acts. The proceedings at the lower Court are however, not in the strict sense, criminal proceedings where there is a definite accused person facing a particular charge. The Court, though exercising a judicial function is, at that stage, not adjudicating over a case which entails establishing the guilt or innocence of a person facing a charge over the commission of a criminal offence. On the contrary, the role of the Court in that context, is supervisory, as a safeguard against the unjustified breach of fundamental human rights and freedoms as in this case, the right to privacy and to property. Thus, while the police do have the mandate to investigate crimes, this power is subjected to prior judicial authorization where the process of investigation would ultimately entail infringing on a person’s privacy or property.

24. These applications are anchored on the ground that the parties are entitled to be heard since they have an interest in the subject matter that led to the proceedings before me. It is their submission that they stand to be affected by the decision this Court will make. In my view, that is not the standard to be applied in considering whether or not a party should be joined as an interested party. The factors to be considered and which this Court will be guided by are, as enunciated by the Court ***Meme v Republic*, [2004] 1 EA pg. 124,**

“(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.”

25. While the nature of proceedings in the above-cited case are different from the one before me, I do find the principles instructive. Thus, the underlying consideration is whether, as I stated in a ruling in ***Samuel Muriithi Watatua v Republic Miscellaneous Criminal Application 185 of 2012***, ***‘the ends of justice would be better served by joining the Intended Interested parties to the suit, allowing them to ventilate their side of the story.’*** This is because, the Court does not dispense justice in a vacuum, rather, in the context of the reality that issues raised before it serve the interests of private parties or the public interest. The question is whether the Applicants/Interested Parties have satisfied this Court that they ought to be enjoined for the interests of justice to be served.

26. Desiral Kenya Ltd. has demonstrated that they had paid monies amounting to KES 23 million as part-payment towards the purchasing of the property which was sold and transferred to another party. They lodged their complaint to secure the deposits made. That position has been challenged by Mr. Maseki in his Replying Affidavit, who distanced himself from the purported intended sale, alleging that their signatures as trustees were forged. This clearly, is a matter in dispute that cannot be resolved before this Court. However, the parties against whom the complaint was made to the police are the 3rd Applicant represented by the 1st and 2nd Applicants.

27. From the facts presented, I do not find any proof of abuse of process by Desiral Kenya seeking to be enjoined. Furthermore, the proceedings before me or the lower Court, are independent of any civil proceedings on the same or similar subject matter and cannot therefore, be used to grant reprieve in the matter pending before the civil Court. Nothing precludes the subsistence of criminal proceedings and civil proceedings parallel to each other. The process of seeking of warrants to facilitate investigation into the commission of a crime is not the purview of private

parties, rather is a power granted to the police which is subject to supervision by Courts.

28. The other interested parties allege that they are the legitimate trustees and officials of the Association. Their case against the persons purporting to be the registered trustees of the Association is, the fraudulent transfer of property belonging to the Association and failing to remit the proceeds of the sale to the Association or its legitimate trustees or officials. The fact of the legitimacy of the trustees and officials of the Association is evidently in issue, and cannot be ventilated in this Court. The Applicants/Interested Parties have instituted a civil case against the parties referred to as the 3rd Applicant in the proceedings before me touching on among others the issue of legitimate representation of the Association.
29. Having observed the above, the proceedings leading to the issue before me, were instituted in the context of investigation into the commission of a crime and not in the context of prosecution of a person suspected to have committed a crime. Therefore, the position of the Applicants/Interested Parties is not, as opined by Senior Counsel for the 1st, 2nd and 3rd Applicants, that of complainants whose representation by their respective Counsels would be limited to watching brief. As they stand, the Applicants/Interested Parties are in the position of an informant or complainant for purposes of investigation, and should criminal charges be brought, they would be complainants/witnesses for purposes of prosecution. Even at the prosecution, it is not possible to say, in this age, that their role would be limited to watching brief. A trial Court, can, when circumstances so requires, and in exceptional cases, allow an advocate for a complainant to address the Court
30. The case before me does present the need to balance the rights of parties. The Applicants who initiated the revision proceedings are aggrieved by the decision of a lower court that affects their rights to property, namely, the bank account. There are also the parties who claim a stake on the property in question – that is, monies paid as a result of the sale of property not being remitted to the legitimate persons representative of the Association on the one hand, and on the other hand monies paid towards the purchase of a property, which has ostensibly been sold off to another party, thus at the risk of being lost. These are issues that are not for determination by this Court but which nevertheless demonstrate an interest by the parties.
31. I have also considered the prayers sought and the grounds raised by the Applicants in the Revision Application. Without going into the depths of the Revision Application, I do wish to point out that the said Application does raise matters touching on the legitimacy of the complainants, motive of the police officer seeking warrants, and powers of the Court to order freezing of an Advocate/Client account. Some of these issues will be better clarified by allowing the Applicants/Interested Parties to participate in the proceedings to enlighten the Court in addressing some of the issues raised and ultimately in determining the appropriate orders to make.
32. Having said so, I must emphasize that allowing an interested party to participate in proceedings such as the ones before me is the exception rather than the general rule. The duty lies with the Court to determine, depending on the circumstances of the case, whether or not a party should be enjoined in proceedings of this nature. Learned Senior Counsel, Mr. Kitonga need not worry as evinced by his submissions, that allowing an application such as the one before me would open the floodgates and that criminal proceedings would be encumbered by parties seeking to be joined as interested parties. This is a discretionary power of the court that ought to be applied judiciously. Therefore, the participation of the interested parties is limited to addressing the Court on the subject matters that arose before the lower court so that the High Court's consideration will not depart from the subject issue that was before the lower Court.
33. Finally I must address myself to prayer No. 1 of the 2nd Application for joinder dated 25th September 2013. The Applicants/Interested Parties have also made a prayer for removal of the 3rd Applicant from the pleadings as such for the reason that the Association did not give instructions to any firm of Advocates to represent them in the sale of the subject property. This prayer is related to the existing dispute as to who the legitimate trustees and officials of the Association are.

As noted above, this is a matter that is not for this Court to entertain. Furthermore, the context of the matters that this Court can determine is limited to issues touching on the Revision Application and the lower Court's proceedings. This prayer is therefore dismissed.

34. In consideration of the foregoing, I make the following orders:

- a. Desiral Kenya Limited be and is hereby enjoined as an interested party in these proceedings;
- b. James Osogo, Gideon Maina, Musa Mukangwa, Francis Muthini and Gideon Chris Maina be and are hereby enjoined as interested parties in these proceedings;
- c. The parties so enjoined to file and serve their respective responses to the Notice of Motion dated 10th July 2013 within 7 days of the date herein, limited to the subject matter in the lower Court's proceedings;
- d. The matter shall be mentioned on **27th November 2013** to confirm the parties' compliance with the said order and to fix a hearing date for the Revision Application.

It is so ordered.

SIGNED DATED and **DELIVERED** in open court this **14th** day of **November 2013**.

L. A. ACHODE

JUDGE