



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**J.R. Petition 416 of 2008**

**MASTERMIND TOBACCO (K) LIMITED.....PETITIONER**

**VERSUS**

**ATTORNEY GENERAL.....RESPONDENT**

**R U L I N G**

By a petition dated 7<sup>th</sup> July, 2008, filed on 11<sup>th</sup> July, 2008, Mastermind Tobacco (K) Limited (hereinafter referred to as the petitioner), has petitioned this court under Section 84 of the Constitution of Kenya and Rules 11 and 12 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedom of the Individual) High Court practice and procedure Rules 2006, seeking declarations:

- a) That the Tobacco Control Act 2007 is unconstitutional, null and void.
- b) That the Penal Sections in the Tobacco Control Act 2007 are irrational and not an illegitimate exercise of the state police powers and are accordingly null and void.
- c) That Sections 12(a), 13(1) & (2), 14(2), 16, 17(1), 18(1), (2) & (3), 19(1) & (2), 20(1), (2) & (3), 22, 23, 24, 25, 26(1), are unconstitutional, null and void.

That petition has been served on the Hon. the Attorney General who has entered appearance. In the meantime, Patrick Mariru, Kinyanjui Kamau, Kiragu Wachira, Jane Gachare, and Rachel Kitonyo, (hereinafter referred to as the intended interested parties), have through a chamber summons dated 23<sup>rd</sup> July, 2008 applied to be enjoined to the petition as interested parties. The grounds upon which the application is made are as follows: -

- (a) Patrick Mariru, Kinyanjui Kamau, Kiragu Wachira, Jane Gachare and Rachel Kitonyo are all Kenyan adult citizens of sound mind in addition to being registered trustees of the Institute for Legislative Affairs (ILA) Trust.
- (b) The Institute for Legislative Affairs (ILA) Trust was registered on 25.08.2006 with the following objectives:
  - (i) To offer gratuitous or otherwise any technical assistance to stakeholders in the legislative process.

- (ii) To conduct research on legislative issues and process.
  - (iii) To review current and proposed legislation.
  - (iv) To draft legislation, amendments to legislation, gazette notices, rules, by-laws and memoranda.
  - (v) To promote public participation in the legislative process.
  - (vi) To facilitate information sharing on the legislative process and output among stakeholders.
  - (vii) To do any other thing incidental to the objects listed above or generally to fulfill the vision and mission of ILA.
- (c) This Petition raises a number of issues that are of concern to the legislative agenda and to the general public.
- (d) As an Integral part the Kenyan general public Patrick Mariru, Kinyanjui Kamau, Kiragu Wachira and Jane Gachare and Rachel Kitonyo verily believe that they have an interest in the proceedings, the subject of this Petition.
- (e) That as trustees of the Institute for Legislative Affairs (ILA) Trust, Patrick Mariru, Kinyanjui Kamau, Kiragu Wachira, Jane Gachare and Rachel Kitonyo verily believe that the proceedings in this Petition raises issues that are within the objectives of the trust hence they have a sufficient interest in the matter.
- (f) It is just and equitable that as much as possible, members of the general public individually or through organized groups, are allowed to participate in these proceedings so that the issues are conclusively canvassed and decided upon.

The application is also supported by an affidavit filed by one of the intended interested parties, Rachel Kitonyo who reiterates the grounds stated on the affidavit. She avers that the Institute of Legislative Affairs Trust was actively involved in the drafting and enlightening of stakeholders on the legislative process of the Tobacco Control Act, 2007. She swears that the issues raised in the petition before court are within the objectives of the Trust and therefore the Trust has sufficient interest in the matter to justify the joinder of the trustees to these proceedings.

Pursuant to orders made by Hon. Wendo J. on 29<sup>th</sup> July, 2008, the intended interested parties filed skeletal arguments. Neither the Petitioner nor the Hon. Attorney General filed any skeletal arguments as ordered. Leave having been granted for the hearing of the chamber summons dated 23<sup>rd</sup> July, 2008 to proceed during the High Court Vacation, the hearing proceeded before me on the 5<sup>th</sup> August, 2008.

In support of the application, Mr. Ongoya who appeared for the proposed interested party referred to ***Black's Law Dictionary 8<sup>th</sup> Edition*** which defines an interested party as a party who has a recognizable stake (and therefore standing) in a matter. He maintained that the intended interested party has a recognizable stake in this matter which is twofold. First, by virtue of being adult citizens who have an interest in the Tobacco Control Act due to social, health and economic reasons. Secondly, by virtue of being registered Trustees of the Institute for Legislative Affairs which is a trust concerned inter alia with research, drafting, and offering technical assistance in the legislative process, in which capacity the trust was involved in the legislation of the Tobacco Control Act.

In support of his submissions Mr. Ongoya cited the case of ***Njoya & Others vs. the Attorney General & Others (2004) 1 EA 194*** in which the court allowed joinder of the Muslim Consultative Council and the Chambers of Justice due to the public character of the issues under consideration. Mr. Ongoya further referred the court to the following passage in ***Meme vs Republic (2004) 1 EA 124***.

**“More Fundamental, however, was our concern that constitutional litigation which touches on the public interest in such a central governance issue as corruption in public office, should not be restricted in its scope as a private matter, but should instead be opened up to all relevant stakeholders. We consider the Constitution as such a vital framework of governance that any litigation touching upon it, out to involve any interested parties. So important is this principle that, in our view, the participation of interested parties in constitution litigation should never be kept under the restrictions of any technical rules. As constitutional interpretations and litigation are important matters embraced by the High Court’s jurisdiction, we hold that this Court must retain a broad discretion for entertaining applications such as the one that has been brought by the Kenya Anti-Corruption Commission, by way of chamber summons.”**

Mr. Ongoya urged this court to adopt the above proposition as the guiding principle in considering joinder of a party in constitutional matters. He submitted that like the Meme case, the current proceedings were touching on an important public interest issue of tobacco control which raises issues of grave public concern such that the widest possible public participation in the proceedings should be encouraged. The court was therefore urged to allow the intended interested parties to be enjoined in these proceedings.

While the Hon. Attorney General had no objection to the application, the application was strenuously opposed by the Petitioner. No grounds of opposition or skeletal arguments were filed on behalf of the Petitioner. However, Counsel for the Petitioner Mr. Ngatia responded to the application during the hearing and submitted on the law. Mr. Ngatia submitted that the matter before the court being a constitutional reference brought under Section 84 of the Constitution the relevant parties are the aggrieved party who is canvassing his grievances against the State or State Organs. Mr. Ngatia’s view was that neither Section 84 of the Constitution nor the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006, provides for the participation of an interested party. He distinguished the concept of an interested party as applicable in Judicial Review Proceedings under Order LIII of the Civil Procedure Rules. Mr. Ngatia distinguished the case of Meme on two grounds. First, as a case in which the concept of the court’s inherent jurisdiction was applied, having been decided before the enactment of Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006. Secondly, what was being challenged was the existence of KACA as a legal body. It was therefore appropriate that the body be given an opportunity to be heard. Mr. Ngatia’s view was that in this case, the intended interested parties have no recognizable stake in the petition, as their interest in the legislative process was not a recognizable stake. Referring to ***The Law Society of Kenya vs the Attorney General High Court Petition No.185 of 2008***, Mr. Ngatia submitted that the court’s discretion to allow joinder must be informed by the following: -

- a) A clear interest in the matter where orders adverse to the interest of the party sought to be joined, are sought.
- b) That the party sought to be joined does not have a partisan interest.
- c) That the party sought to be joined must seek to litigate a *bona fide* claim.

It was contended that in this case the intended interested parties did not have a grievance for which they would be entitled to a remedy. In Mr. Ngatia’s view, the joinder of the intended interested parties would be an impediment to the proceedings. Mr. Ngatia therefore urged the court to disallow the application.

In response, Mr. Ongoya maintained that courts have allowed participation of interested parties in constitutional references as a matter of principle. In his view, although Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006 did not make any reference to interested parties the court could still permit joinder of parties. Mr. Ongoya referred to the Njoya case where the Muslim Consultative Council was joined as an interested party even though there were no adverse orders sought against it. Mr. Ongoya reiterated that the applicant’s interest was not a business interest but interest of a public

character. He urged the court to be guided by the principle stated in the Meme case and allow the application.

Having considered this application, the contending submissions made by Counsels and the authorities cited, it is evident that the substantive proceedings before the court of which the intended interested parties seek to be joined is a constitutional reference under Section 84 of the Constitution of Kenya. It is also apparent that neither Section 84 of the Constitution, nor Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006, refer to the participation of an interested party in constitutional references brought under Section 84 of the Constitution. In my view, that omission does not necessarily mean that there can be no participation in a constitutional reference by an interested party. Indeed, neither the substantive provision nor the procedural rules expressly oust the participation of interested parties. The court has an inherent jurisdiction to control and conduct the proceedings and to make orders in the interest of justice. This is a power which need not be expressly provided for by statute. It is an inherent power always lurking in the background of any judicial proceedings. Needless to state that courts have in appropriate proceedings (including constitutional references) ordered joinder of interested parties. The case of Njoya and Others which was cited by Counsel is a case in point.

The question is the criteria to be used in determining whether an intended interested party should be joined to the proceedings. Section 84 of the Constitution generally deals with the protection of the rights and freedoms of the individual. Thus, more often than not, the constitutional reference will be initiated by an individual. In this case, the interested parties seek to join the proceedings to protect their interests as individuals and also their interests as an institution.

The subject matter of the litigation before this court is the Tobacco Control Act. The intended interested parties have demonstrated that they were involved in the legislation of the Tobacco Control Act. The proceedings before court now threaten to change the character of that Act by having various provisions of the Act declared null and void.

I concur with the advocate for the intended interested party that this is a matter of concern not just to the intended interested parties but to the general public due to the social, economic and health implications of that Act. I am in agreement with the sentiments expressed in the case of Meme that constitutional litigation which touches on a matter of such public interest ought not to be restricted in its scope as a private matter, but should be opened to all relevant stakeholders. Indeed, this would have the effect of avoiding a multiplicity of actions involving the same subject matter. I have considered the criteria that were advanced by Mr. Ngatia for allowing joinder of interested parties. I do accept that the parties sought to be joined must have a clear interest in the proceedings, and that such interest should not be partisan interest. I concur also that there must be a danger that orders adverse to the interest of the parties sought to be joined are likely to be made. In my considered view the intended interested parties have complied with these criteria. They have clearly demonstrated their interest in the Tobacco Act. It is apparent that the orders sought by the petitioner may be adverse to the interest of the intended interested parties who appear to have been at the forefront in the legislation of the Tobacco Control Act.

For all these reasons, it is only fair and just that the intended interested parties are allowed to participate in these proceedings so as to protect their interests and that of the larger public by having an opportunity to make representations concerning the Act. I therefore allow the chamber summons dated 23<sup>rd</sup> July, 2008. costs shall be in the cause.

Orders accordingly.

**Dated and delivered this 13<sup>th</sup> day of August, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Ngatia for the petitioner

Ongoya for the Applicant

Omondi for the Attorney General