



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**JUDICIAL REVIEW APPLICATION NO. 2 OF 2021**

**IN THE MATTER OF:**

**AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDER OF CERTIORARI AND PROHIBITION; AND SUCH LEAVE TO OPERATE AS STAY**

**AND**

**AN APPLICATION UNDER SECTIONS 129(3) (a) AND (e), 126( 5) AND 129 (4) THE ENVIRONMENT MANAGEMENT AND CO-ORDINATION ACT, 1999; SECTIONS 2(i), 7(1) (b) (i) & (ii), 7 (2) (b), (c), (d), (k), (l), (m), and (n) AND 9(2) FAIR ADMINISTRATIVE ACTIONS ACT, NO. 4 OF 2015; ARTICLES 47 OF THE CONSTITUTION OF KENYA, 2010 AND ALL OTHER ENABLING PROVISIONS AND PROCEDURES OF THE LAW**

**AND**

**IN THE MATTER OF ;**

**THE DECISION AND/OR ORDERS MADE BY THE NATIONAL ENVIRONMENT TRIBUNAL IN APPEAL NO. NET 38 OF 2020 ON 23<sup>RD</sup> MARCH, 2013**

**BETWEEN**

**KILIAVO FRESH LIMITED.....APPLICANT**

**VERSUS**

**THE NATIONAL ENVIRONMENTAL TRIBUNAL.....RESPONDENT**

**RULING**

What is before Court for determination is the Intended Interested Parties application dated the 20<sup>th</sup> April, 2021 brought pursuant to article 48 of the Constitution, Order 1 Rule 10 (2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Intended Interested Parties seek for the following orders:

1. The Conservation Alliance of Kenya be and is hereby granted leave to join as first interested party in the suit.
2. That the Big Life Foundation be and is hereby granted leave to join as the second interested party.
3. That the Interested Parties be granted 14 days to file their statements of response and incidental documents.
4. The status quo be maintained in respect of orders issued by the National Environment Tribunal on the 23<sup>rd</sup> March, 2021 in NET 38/ 2020 until finalization of present suit.

The application is premised on the grounds on the face of it as well as the supporting affidavit of STEVE ITELA and BENSON LEIYAN. In the affidavit of STEVE OKOBO ITELA who is the Chief Executive Officer at Conservation Alliance of Kenya (CAK), he deposes that the application for judicial review orders given by the National Environment Tribunal on 23<sup>rd</sup> March, 2021 was precipitated by their institution's successful application to the said Tribunal which was prosecuted by his Counsel. He contends that despite this fact being in the knowledge of the Applicant, he failed to enjoin them in this suit. He reiterates that it is fair and in the interests of justice that CAK should be enjoined in this suit.

In the affidavit of BENSON LEIYAN, he deposes that he is the Chief Operation Officer at Big Life Foundation and that the application for judicial review orders given by the National Environment Tribunal on 23<sup>rd</sup> March, 2021 was precipitated by their institution's successful application to the said Tribunal vide NET 38 of 2020 wherein the Applicant sued the said Foundation. He explains that the orders sought to be reviewed were precipitated by CAK's successful application to the National Environment Tribunal, which application the Big Life Foundation supported. He contends that despite this fact being in the knowledge of the Applicant, he failed to enjoin them in this suit. He reiterates that it is fair and in the interests of justice that Big Life Foundation should be enjoined in this suit

### **Analysis and Determination**

Upon consideration of the Notice of Motion application dated the 20<sup>th</sup> April, 2021 including the supporting affidavit and parties' oral submissions, the following are the issues for determination:

- Whether the Intended Interested Parties' should be enjoined in this suit.
- Whether the Status quo should be maintained in respect of orders issued by the National Environment Tribunal on the 23<sup>rd</sup> March, 2021 in NET 38/ 2020 until finalization of present suit.

As to whether the Intended Interested Parties' should be enjoined in this suit.

The applicants' submitted that they have fulfilled the criteria to be enjoined as Interested Parties'.

The Ex parte Applicant/ Respondent opposed the application and relied on the case of **Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR** to buttress its arguments.

Order 1 Rule 10 (2) of the Civil Procedure Rules stipulates as follows:

*' (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.'*

Black's Law Dictionary, 9th Edition, and defines '*Interested Party*' as "*A party who has a recognizable stake (and therefore standing) in a matter*".

In the case of **Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR**, the Supreme Court of Kenya while dealing with an issue of joinder of an Interested Party laid parameters as follows: '**From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:**

**One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:**

**The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.**

**The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.**

**Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.....we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.**

**[42] Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.**

**[43] Consequently, the issues of constitutionality of the death penalty and/or its abolition, are not issues presented by the petitioners before this Court. Any interested party or amicus curiae who signals that he or she intends to steer the Court towards a consideration of those 'new issues' cannot, therefore, be allowed. Further, such issues are matters relating to the interpretation of the Constitution, and we cannot allow them to be canvassed in this Court for the first time, as though it was a Court of first instance.**

We recognize the hierarchy of the Courts in Kenya, and their competence to resolve these constitutional questions (See Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others, Supreme Court Petition No. 2 of 2012, [2012] eKLR).

[44] We also note that criminal matters occupy a different platform from that of civil proceedings. Criminal proceedings directly touch on the personal fundamental rights and freedom of an individual, particularly the right to liberty. Consequently, just as the standard of proof is elevated in criminal matters (beyond reasonable doubt), so should the threshold for admission of interested parties be in criminal matters as compared to civil matters, where proof is on the balance of probability. Just as Mr. Ngatia urges, the Court has to guard against third parties (such as interested parties and amici curiae) proliferating the issues brought by the petitioners. In criminal proceedings, the accused should ordinarily be informed before hand of the case against him/her. Therefore, the Court should always guard against admitting third parties who may end up clogging the case of the petitioners in criminal matters.'

While in the case of **Trusted Society of Human Rights Alliance V Mumo Matemu & 5 Others (2015) eKLR** the Court defines an interested party as follows: '*(An) interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is 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 interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.*'

From the brief averments in the supporting affidavit and Counsels' submissions, it is not denied that it is actually the Intended Interested Parties who had made an application before National Environment Tribunal (NET) that culminated in a decision which is sought to be reviewed. Further, the ex parte applicant never enjoined them in the current proceedings. From the definition of an Interested Party and based on the analysis in the two decisions I have cited above, I find that the Intended Interested Parties actually have a role to play in these proceedings as their complaints to NET are the foundation of the dispute herein. In associating myself with these decisions, I find that they have a stake in the dispute herein and will allow their application for joinder.

As to whether the Status quo should be maintained in respect of orders issued by the National Environment Tribunal on the 23<sup>rd</sup> March, 2021 in NET 38/ 2020 until finalization of present suit. From the Intended Interested Parties' averment, they have not informed Court of the status quo they wish to be maintained. Further, I concur with the averments of the Ex parte Applicant that this is an omnibus order. In the circumstance, I will decline to grant the said order as sought.

In the circumstance, I find only prayers No. 1, 2 and 3 of the application dated the 20<sup>th</sup> April, 2021 merited which I will allow. I however decline to grant prayer No. 4.

Costs will be in the cause.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 10TH DAY OF MAY, 2021**

**CHRISTINE OCHIENG**

**JUDGE**