



Mathenge & another v Inspector General of Police & 4 others; Kenya National Commission on Human Rights & 3 others (Interested Parties); GALCK + (Gay and Lesbian Coalition of Kenya) (Proposed Interested Party) (Constitutional Petition E048 of 2023) [2025] KEHC 3048 (KLR) (14 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3048 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E048 OF 2023**

G MUTAI, J

MARCH 14, 2025

**IN THE MATTER OF THE CONSTITUTION OF KENYA, ARTICLES
2, 3, 8, 10, 11, 12, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 31, 32, 37, 39,
40, 56, 159,160 AND 258 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF THE PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION**

BETWEEN

**JOHN MATHENGE 1ST PETITIONER
THE CENTRE FOR MAJORITY RIGHTS AND STRATEGIC
LITIGATION 2ND PETITIONER**

AND

**THE INSPECTOR GENERAL OF POLICE 1ST RESPONDENT
SALIM AND SAID KARAM 2ND RESPONDENT
ATHMAN AHMED 3RD RESPONDENT
THE ANTI LGBTQ MOVEMENT 4TH RESPONDENT
MOHAMED ALI 5TH RESPONDENT**

AND

**THE KENYA NATIONAL COMMISSION ON HUMAN
RIGHTS INTERESTED PARTY
AMNESTY INTERNATIONAL KENYA INTERESTED PARTY
THE KENYA HUMAN RIGHTS COMMISSION INTERESTED PARTY**



**THE NATIONAL COHESION AND INTEGRATION
COMMISSION INTERESTED PARTY**

AND

**GALCK + (GAY AND LESBIAN COALITION OF
KENYA) PROPOSED INTERESTED PARTY**

RULING

1. Before the court is a notice of motion dated 16th September 2024 vide which the proposed interested party/applicant seeks the following three orders:-
 - a. That this honourable court be and is hereby pleased to grant leave for the applicant to be joined as an interested party in this petition;
 - b. That upon leave being granted as per prayer one above, this honourable court be and is hereby pleased to grant leave to the applicant to present oral and written submissions and any other relevant pleadings in this petition as the honourable court may direct; and
 - c. That there be no orders as to costs regarding this application.
2. The basis upon which the application is brought as disclosed by the grounds in the body of the motion and also by the affidavit of Mx Lorna Dias sworn in Nairobi on 16th September 2024 are briefly that the petitioners in this court seek various declarations, the most significant of which that their right to assemble, demonstrate, to picket and to present petitioners to public authorities are not available if the demonstrators intend or plan to breach Article 33 (2) of *the Constitution*, an order prohibiting the 2nd to 5th respondents from calling for extra judicial killing, lynching, punishing, stoning, forcible conversion or any other way of harming LGBTQ+ identifying persons, allies, businesses, homes, expulsion from Kenya or any or parts of Kenya of the said sexual minorities, and declaration that LGBTQ+ citizens are entitled to the protection afforded by Article 12, 26, 27, 28, 29, 31, 32, 33, 36, 39 and 43 and declaratory reliefs that the 2nd to 5th respondents are in breach of various specified Articles of *the Constitution*.
3. The proposed interested party/applicant described itself as a coalition of 18 organizations working together with the aim, mission and vision of advancing the right and full inclusion of sexual and gender minorities in Kenya. It was stated that each member of the applicant was affected by the respondents' actions. They stated that the petition seeks the redress of gross violation of human rights and freedoms of the said community, which rights and freedoms were overtly violated by the respondent's actions of mounting protests. The proposed interested party/applicant supports the ends of the petition to ensure the protection of fundamental rights and freedoms of Kenyan citizens who happen to identify as LGBTQ+ individuals or organizations that respond to their rights and needs.
4. They urge that they have an identifiable stake or legal interest in the proceedings before the court for the orders, and declarations sought in the petition dated 6th October 2023 are wholly and materially corresponding to the mission, vision and objectives of the intended interested party/applicant and that they would be directly affected by to the orders sought in the petition as it would directly inform the operations and the missions of to member organizations.
5. The proposed interested party/applicant stated that their presence would enable the court to appreciate the issues raised and to effectively and fairly adjudicate upon and settle all issues raised in the petition. For the foregoing reason, it was urged that the application be allowed as prayed.



6. The 2nd, 3rd, and 5th respondents opposed the application for joinder through a replying affidavit sworn by Salim Said Karama and Athman Ahmed on 7th November 2024. The deponents urged that there was no evidence that the deponent of the affidavit had the authority to sign the affidavit on behalf of the proposed interested party/applicant. Further, the proposed interested party had not shown any nexus between the allegations and the complaints in the instant petition or how those complaints or concerns affect the proposed interested party/applicant.
7. The deponents averred that the claims that members of the LGTBT+ community were being affected were mere generalised allegations, not specifically defined and explained, and were also not supported by any form of proof and connection of those allegations. They denied that the applicant had identified a single stake in the petition other than “mere general allegations, which may be made by any person nor shown any link to the petition or how the applicant organization will be affected by its failure to participate in these proceedings.”
8. It was thus urged that the application lacks merit and should be dismissed.
9. Hon Lady Justice Olga Sewe gave directions in respect to this matter on 29th October 2024. The parties were asked to file written submissions. As the other parties were not opposed, the contestation in respect to the application is only between the proposed interested party/applicant and the 2nd, 3rd and 5th respondents, represented by Mr Mitullah and Mrs Ali, respectively.
10. Both parties complied and filed written submissions. I shall give a precis of their submissions below.
11. The submissions of the proposed interested party/applicant are dated 10th December 2024. Vide the said submissions it was urged that the application be allowed.
12. The applicant urged that the applicant was a coalition representing 18 different organizations working together with the aim, mission, and vision of advancing the rights and full inclusion of sexual and gender minorities in Kenya and that each of the member organizations was affected by the respondents’ action.
13. The interested party/applicants’ objectives, it was urged, support the ends of the petition to ensure the protection of fundamental rights and freedoms of Kenyan citizens who identify as LGBTQ+.
14. Counsel for the interested party/applicant submitted that they had been affected by the actions of the respondents and that the matters to be canvassed in the petition are so central to the applicant’s and its members’ programs and that failure for it to participate will be a grave injustice.
15. They urged that they had a legal interest and an identifiable stake in the proceedings and were, therefore, necessary parties in order for the court to effectively settle the issues raised in the petition.
16. It was urged that it had not been demonstrated that the deponents of this affidavit had no authority to swear the affidavit. In support of this contention, reliance was placed on the case of Private Development Co. Ltd vs Rebecca Ngonyo & 2 others [2018] eKLR and Spire Bank Ltd vs Land Registrar & 2 others [2019] eKLR.
17. On the issue as to whether the applicant should be joined it was urged that it should.
18. Reliance was placed on the decision of the Supreme Court in the case of Francis Karioko Muruatetu & Another vs Republic [2016] eKLR and Wanjigi & others v Inspector General of the National Police Service & others; Musembi (Intended Interested Party)[2023] KEHC 1612 (KLR).
19. It was urged that the applicants had shown they were qualified to be joined as applicants as they had knowledge of the matter in dispute and would help the court arrive at a just decision.



20. The applicant prayed that it was in a unique position to address the court on the effect of the respondent's actions on human rights and urged that the application be allowed.
21. The respondent's submissions, on the other hand, are dated 16th December 2024.
22. They counsel for the 2nd, 3rd and 5th respondents urged that the application to be denied.
23. Mrs Ali submitted that the proposed interested party/applicant had no identifiable stake in the proceedings. It had not specified, defined, or demonstrated the same other than making general allegations and failed to establish any link between itself and the petition.
24. Counsel urged that the applicant had exaggerated facts and that their interest was peripheral. They had not demonstrated or proven their stake by way of evidence before the court, nor was their interest proximate enough to the petition.
25. In support of her submissions, counsel relied on the decision of Munyao, J in SKOV Estate Ltd & 5 others vs Agricultural Development Corporation & another [2015]eKLR where the said judge stated as follows:-

“ 18. In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation. Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in a suit as interested party. In other words, there needs to be a demonstration that the interest of the person goes further than “merely being affected” by the judgment or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not enjoined, the court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another. A joinder may also be allowed if the intended interested party has a claim of his own, which in the circumstances of the matter, needs to be tried, or is convenient to be tried alongside the claims of the incumbent plaintiff and defendant. The threshold for joinder of an interested party should not be too low, or else, this is prone to open doors for busybodies to be joined to proceedings, merely to spectate or confuse the issues in the matter. Apart from the above, whether or not to enjoin a person as an interested party, must be looked at within the context and surrounding circumstances of each particular case.”

26. She urged that the proposed interested party/applicant's absence would not alter the outcome of the matter and that their allegation that it would alter their program would not be sufficient to warrant their joinder as interested parties.
27. Counsel submitted that including the proposed interested party/applicant would expand the dispute before the court by introducing new triable issues to be determined by the court. In support of this



reliance was placed in the determination of the Supreme Court in Francis Karioko Muruatetu & another v Republic [2017] eKLR.

28. It was urged that the fact that the proposed interested party/applicant was a coalition of organizations engaged in the promotion of the rights of the members of the LGBTQ+ community did not constitute an identifiable stake in the proceedings and that they had not demonstrated how they would be prejudiced.
29. Counsel submitted that the petitioner had joined four organizations that would speak to the court on the issues the proposed interested party/applicant proposed to address. Thus the applicant hadn't shown how its submissions would be different.
30. It was thus urged that the application be denied.
31. What, then, are the orders that should be issued? To answer this question, I must first identify what I consider to be the issues in this matter. They are: -
 - a. Whether the deponent of the application was properly authorised and thus, if there is a proper application before the court; and
 - b. Whether the proposed interested party/applicant can be added to these proceedings as an interested party
32. It would appear to me that the first objection is not merited. Mx Lorna Dias was described as the executive coordinator of the applicant /proposed interested party. Although Mx Dias did not attach the letter of authority, I note that no official of the petitioner organization, or any member of the coalition, has come forth to contest Mx Dias' position or to state that the said person was not, in fact, authorized to do depone to the affidavit.
33. I am guided by the decision of the Court of Appeal in Spire Bank Ltd vs Land Registrar & 2 Others [2019] eKLR, where the court expressed itself as follows:-

“it is essential to appreciate that the intention behind Order 4 Rule 1(14) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on behalf of the corporation. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations and obtaining fraudulent or unwarranted orders from the court ... with this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.”
34. A similar holding was made in the case of Private Development Co. Ltd v Rebecca Ngonyo, Samuel Kamau Macharia & Jackson Njenga Njoroge [2018] KEHC 6129 (KLR), where the Court stated as follows:-
 - “ 10. In my own view, unless there is serious contention by an insider of the company that the company could not have issued a resolution to institute the suit, then the court ought to be slow to infer that the company, which has commenced the suit, had no authority to do so, especially where a director or directors have sworn affidavits affirming that they have indeed authorized commencement of the case. In our instance, Mr. Macharia, a director of the company, has sworn an affidavit stating that the company has authorized the institution of this suit. If a director of the company has said so, and nobody else within the company



has contested such statement, I do not see how an outsider, or the court, can now infer that no such authority exists.”

35. This court notes that this is a constitutional petition. To deny a party audience on mere ground that a deponent of an affidavit was not authorised would be unduly harsh, wont promote constitutionalism and be a fetter to access to justice. The court would, in essence, be placing undue regard to technicalities.

36. In the circumstance, I find and hold that the 1st ground of objection to the joinder has no merit.

37. The conditions an applicant seeking to be joined as an interested party must meet are well settled. In the case of *Wanjigi & others v Inspector General of the National Police Service & others; Musembi (Intended Interested Party)*[2023] KEHC 1612 (KLR), it was held as follows:-

“ 11. Deriving from the foregoing, the following conditions are relevant in the consideration of joinder applications: -

- i. The party intending to be enjoined has an identifiable stake which is proximate enough and not merely peripheral;
- ii. The party has a clear legal interest in the matter;
- iii. The party has a defined duty in the proceedings;
- iv. The party is not directly involved in the litigation. In other words, the party is not one of the main parties in the proceedings as either a Petitioner or a Respondent;
- v. The party will be affected by the decision of the Court when it is made, either way;
- vi. The party demonstrates that his or her or its interest will not be well articulated unless he himself or she herself or itself appears in the proceedings and champions the cause. Differently put, the party must demonstrate that it stands to be prejudiced if it does not take part in the proceedings; and
- vii. The party should not expand the prevailing cause of action or introduce a new cause of action.

38. In *Francis Karioko Muruatetu & Another vs Republic & 5 others; Petition 15 as consolidated with 16 of 2013 [2016] eKLR*, the Supreme Court identified the following applicable conditions and stated as follows: -

“ 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: -

- i. 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;
- ii. 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; and



- iii. 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.

39. I must now apply the above case law to the matter before me. In my view, the applicant meets all the conditions. I say so for a number of reasons: -

- a. As a coalition of organizations engaged in advocacy of sexual minorities and impugned actions of the respondents directly affects its members and their abilities to enjoy the enumerated rights;
 - b. The proposed interested party/applicant is engaged in advocacy. Its and that of its members' capacity and freedom to engage in advocacy may be severely curtailed if what the petitioner states is indeed the case. It, therefore, has a legal interest in the matter;
 - c. The applicant may be able to demonstrate to the court, from a lived experience of its members, how the impugned conduct of the respondents will affect the LGBTQ+ community in Kenya;
 - d. It is not directly involved in the litigation in these proceedings either as the petitioner or as the respondent;
 - e. The court's decision, whether made in favour of or against it, will directly affect it as it may be unable to run its programs effectively;
 - f. Since the applicant will be speaking from a lived experience standpoint, their interests may not be well articulated unless they are part of these proceedings;
 - g. The addition of the party will not expand the prevailing cause of action or introduce a new cause of action.
40. The proposed interested party/applicant's non-joinder will be prejudicial to it, as it and its members won't be able to fully engage in their advocacy activities. The court will be denied a chance to consider the petition from the perspective of those directly affected.
41. The respondents have not demonstrated, in my view, how they will be prejudiced if the application is allowed.
42. In the circumstances and in the exercise of my discretion. I allow the application and grant leave for the proposed interested party /applicant to be an interested party in these proceedings.
43. I grant leave to the interested party to present oral and written submissions in this petition.
44. The matter will be mentioned before the Presiding Judge, the Hon Ngaah, J, for further directions on April 3, 2025.
45. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 14TH DAY OF MARCH 2025. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI
JUDGE

In the presence of:-



Mr Maundu, for the Petitioners;

Mrs Ali, for the 2nd, 3rd and 5th Respondents;

Mr Maundu, holding brief for Mr Mitullah for the proposed interested party/applicant; and

Arthur – Court Assistant.

