



REPUBLIC OF KENYA



KENYA LAW
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**Madara v Gitonga & 17 others (Petition E012 of 2024)
[2025] KEHC 7208 (KLR) (13 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7208 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E012 OF 2024**

OA SEWE, J

MAY 13, 2025

BETWEEN

JAMES NYAMWATA MADARA PETITIONER

AND

BENJAMIN GITONGA 1ST RESPONDENT

FEISAL ABEI 2ND RESPONDENT

P MUNYAO 3RD RESPONDENT

BENJAMIN WANGAMATI 4TH RESPONDENT

**JOSEPH WELOBA (AS THE CURRENT MANAGEMENT BOARD OF
MEMBERS OF MOMBASA PARENTS CLUB) 5TH RESPONDENT**

ALI MOHAMED SALIM 6TH RESPONDENT

DR UZEL JEAN 7TH RESPONDENT

TAMIMI LEWA CHIBORORO 8TH RESPONDENT

DR BENJAMIN MUNYWOKI 9TH RESPONDENT

DOMINIC MUANGE 10TH RESPONDENT

BETTY MUCHIRI 11TH RESPONDENT

JANE ONYANGO 12TH RESPONDENT

TIMOTHY KIREMA 13TH RESPONDENT

CAROLINE CHEMUTAI 14TH RESPONDENT

ANGELA LENGERED 15TH RESPONDENT

MARY KERICH 16TH RESPONDENT



REBECCA LEMALOM 17TH RESPONDENT
YASIR ABDULKARIM (AS NEWLY ELECTED MANAGEMENT BOARD
OF THE MOMBASA PARENTS CLUB) 18TH RESPONDENT

RULING

1. Before the Court for determination are two applications for joinder of proposed interested parties. The first application in time is the Notice of Motion dated 22nd April 2024. It was filed by George Chuli the 1st proposed interested party through the law firm of M/s Otieno Otwere & Associates. The application seeks orders that:
 - (a) Spent
 - (b) That leave be granted to George Chuli, a member of Mombasa Parents Club to be joined as an interested party to these proceedings.
 - (c) That pending the hearing and determination of the application, the Court be pleased to issue temporary injunction restraining the 1st, 2nd, 3rd, 4th and 5th respondents or any other person acting on their behalf from hiring and firing the Principal and/or any other staff of Nyali School, borrowing monies, applying for loans and/or overdrafts on behalf of the school, organizing drama festivals, sports and/or any other curriculum activities and committing the clubs funds into contractual engagements with service providers.
 - (d) That pending the hearing and determination of the application, the petition and/or arbitration the Court be pleased to issue temporary injunction restraining the 1st, 2nd, 3rd, 4th and 5th respondents or any other person acting on their behalf from hiring and firing the Principal and/or any other staff of Nyali School, borrowing monies, applying for loans and/or overdrafts on behalf of the school, organizing drama festivals, sports and/or any other curriculum activities and committing the clubs funds into contractual engagements with service providers.
 - (e) That the Court do direct that the 1st, 2nd, 3rd, 4th and 5th respondents are only allowed to spend money strictly on day to day utilities and salaries of the staff until a valid board is in place.
 - (f) That the costs of the application be provided for.
2. The application was premised on the grounds that the proposed 1st interested party is a member of the Mombasa Parents' Club which owns and manages the Nyali School; and that the Club held its elections on the 16th March 2024 in which new members of the Management Board were elected. The 1st proposed interested party further averred that the petitioners challenged the elections by filing the instant Petition in which they obtained interim orders dated 29th March 2024. He added that the effect of the orders was to suspend the assumption into office of the newly elected Management Board; and that the outgoing members of the Management Board, comprising of the 1st, 2nd, 3rd, 4th and 5th respondents were to remain in office to oversee the running of the club.
3. The 1st proposed interested party further averred that the Court did not give directions on the scope and/or the limits of the duties and responsibilities which could be executed by the outgoing Management Board, hence his prayer that the duties be circumscribed in the manner proposed by him.
4. The 2nd application was filed jointly by three trustees and members of Mombasa Club, namely, Major (rtd) Moses Waweru, Daniel Tanui and Ali Mandhry. Their Notice of Motion dated 24th April 2024 is supported by the affidavit of Major (rtd) Moses Waweru. They prayed for orders that:



- (a) Spent
 - (b) Pending the hearing and determination of the application inter partes, the Court be pleased to arrest and defer its ruling due for delivery on 29th April 2024 in order for the applicants' position on the dispute to be ventilated and to assist the Court reach a just and fair decision in the circumstances.
 - (c) The Court be pleased to grant leave to the intended interested parties to join and to participate in the instant proceedings since they have an identifiable stake, legal interest and duty in the proceedings before the Court.
 - (d) That upon the Court granting leave to the intended interested parties, directions be given with regard to the parameter and scope of their participation in further proceedings as the Court shall deem fit and just in the circumstances.
 - (e) That no order as to costs be made against the intended interested parties in the interest of justice.
5. In their Supporting Affidavit, the three applicants averred that they are duly elected trustees and members of the Mombasa Parents Club which owns and operates the Nyali School through an elected Management Board. They added that, by dint of Clause 46 of the Club's Constitution, all land, buildings and other movable property, including investments and securities are vested in the trustees, who have an express and implied duty to safeguard the same at all times on behalf of the members and to safeguard the welfare of the students.
6. It was further the averment of the three applicants in the 2nd application for joinder that, immediately the newly elected Management Board took over office, it was observed that a state of anarchy set in; and that normalcy was only restored after the Court's intervention. That an order was then given that empowered the old Management Board to continue in office pending resolution of the dispute arising from the elections held on 16th March 2024. The applicants contend that, as custodians of the property of the Club and the school's wellbeing, they have since met and discussed the numerous challenges that have emerged from the disputed elections. They consequently resolved to step into the matter by seeking joinder to these proceedings with a view of assisting the Court in arriving at a decision that will serve the interests of justice.
7. Responses were filed to the two applications by the petitioner and the 6th to 18th respondents. The petitioner opposed the Notice of Motion dated 22nd April 2024 vide the Grounds of Opposition dated 29th April 2024. The petitioner contended that:
- (a) The application is an abuse of the court process and is misconceived.
 - (b) The application seeks to amend or appeal the orders of the Court issued on 29th March 2024 which is already the subject of the ruling scheduled to be delivered on 29th April 2024.
 - (c) The application seeks to curb the operations of the school while trying to limit the powers of the board running the school currently.
 - (d) The applicants have not demonstrated any loss that they will incur in their own personal capacity as members if the orders in force subsist.
 - (e) The application offends the provisions of Section 7 of the *Arbitration Act*.
8. Accordingly, the petitioner prayed for the dismissal of the application dated 22nd April 2024 with costs. He apparently filed no response to the 2nd application.



9. On behalf of the 6th to 11th and 16th to 18th respondents, a Replying Affidavit was filed herein sworn by Ali Mohamed (the 6th respondent). They opposed the last minute attempt by the proposed interested parties' Notice of Motion dated 24th April 2024 to seek joinder and arrest the ruling of the Court. They averred that the proposed interested parties have neither pleaded any specific or substantiated claim, nor demonstrated that they will suffer any prejudice, hardship, injustice or irreparable loss in the event the ruling is delivered as scheduled.
10. [10] The 6th respondent further averred, on behalf of himself and the 7th to 11th respondents and 16th to 18th respondents, that the trustees are merely out to portray the new Management Board in bad light. He averred that trustees have not shown that they have done anything to jeopardize the standing of the school since the orders of 29th March 2024. The 6th respondent and his co-respondents accordingly prayed for the dismissal of the Notice of Motion dated 24th April 2024.
11. On behalf of the 12th, 13th and 14th respondents, Grounds of Opposition were filed herein dated 29th April 2024 targeting the application dated 22nd April 2024. Their posturing was that:
 - (a) The Court having allowed the 1st to 5th respondents to continue in office, granting the orders sought in the application will unnecessarily curtail their discharge of their mandate as ordered by the Court.
 - (b) The application amounts to varying and setting aside the interim orders granted by Justice Mutai through the backdoor.
12. The two applications were urged orally on 29th April 2024. Mr. Otieno, counsel for the 1st proposed interested parties and Mr. Oloo, counsel for the three trustees, essentially reiterated their clients' averments in their respective Supporting Affidavits. The pith of their arguments was that the applicants have a stake in this Petition and therefore have made out a good case for joinder. In particular, Mr. Oloo submitted that the trustees are not here to take sides in the dispute, but to assist in bringing sanity to the management of the school pending resolution of the dispute; to which end they gave a proposal for the court's consideration upon their joinder. He relied on *Francis Karioko Muruatetu & another v Republic & 5 others* [2016] eKLR and *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others* [2014] eKLR.
13. Mr. Sitonik for the 6th to 11th respondents as well as the 16th to 18th respondents partially opposed the application dated 24th April 2024; and in particular prayer 2 thereof. He underscored the averment that the trustees have no role in the day to day operations of the Club and therefore will not be affected more than any other ordinary member of the Club. He also urged the Court to read mischief in the fact that the applicants opted to file their application too late in the day.
14. [14] Mr. Ahmed, who was holding brief for Mr. Wangila, counsel for the 1st to 5th respondents, opposed the applications for joinder. He too was of the contention that the applications had been filed too late in the day. He therefore associated himself with the submissions of Mr. Sitonik and urged for the dismissal of the application.
15. Mr. Oluga on his part supported the 2nd application for joinder dated 24th April 2024. He submitted that the trustees have a demonstrable interest in this matter. He however opposed the application dated 22nd April 2024 arguing that the proposed interested party has not only failed to annex documents to prove club membership but also failed to show what value he will add to the matter that is different from the evidence the parties on record, who are all members of the Club, propose to avail.
16. Mr. Shimaka, counsel for the petitioner, expressed no objection to the prayer for joinder as expressed in the application dated 24th April 2024. He however objected to Prayer No. 2 by which the proposed



interested parties seek that the ruling that was scheduled for 29th April 2024 be arrested. He submitted that there was no threat to the property of the Club and therefore there was no justification for the postponement of the ruling. The petitioner was however entirely opposed to the application dated 22nd April 2024. He associated himself with the arguments advanced in that regard by Mr. Oluga.

17. I have given due consideration to two applications, the averments set out in the parties' respective affidavits as well as the arguments advanced by learned counsel for each of the parties. Since both applications raise cross cutting issues, I propose to deal with them in the manner adopted by learned counsel. Accordingly, the single issue for determination traversing the two applications is whether the proposed interested parties have provided sufficient justification for their joinder. The Court's ruling on this critical issue will invariably determine what appropriate consequential orders ought to issue in the matter.
18. The applications were filed under Rule 7 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, (hereinafter, "the Mutunga Rules") which states:
 - (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.
19. An interested party, for the purpose of the aforesaid provision of the law is defined in Rule 1 of the Mutunga Rules as follows:

"interested party" means 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."
20. [20] Hence, in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2014] eKLR, the Supreme Court held: -

"[18]...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..."
21. Similarly, in *Francis Karioko Muruatetu & another v Republic & 5 others* (supra), the Supreme Court reiterated the applicable elements thus: -

"(37) 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:

 - 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.

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..."

22. In the instant case, the applicants moved the Court by way of formal applications. In respect of the application dated 22nd April 2024, the basic facts presented are that the applicant is a member of Mombasa Parents Club. Other than complaining that the order of 29th March 2024 did not circumscribe the exact functions of the interim Management Board, the applicant did not state what else he proposed to bring on board that the other members who are parties to the suit cannot articulate.
23. Besides, as pointed out by Mr. Oluga and Mr. Shimaka, the applicant did not even furnish basic proof by annexing his membership documents to demonstrate that he is indeed a paid up member of the Club. It is my considered view therefore that the first intended interested party has not shown an identifiable stake in either the pending interlocutory applications or the Petition. I therefore find no merit in the application dated 22nd April 2024.
24. As for the 2nd application dated 24th April 2024, other than being members of the Club, the three applicants are Club trustees. In the Supporting Affidavit sworn by Major (rtd) Waweru, the three applicants set out their stake as trustees. For instance, at paragraph 13 of the Supporting Affidavit, it was deposed that as custodians of the Club's property they are concerned that some unknown persons affixed placards on the school gates and sprayed graffiti on the school wall warning the outgoing chairman and his team to keep away. They expressed concern at the state of anarchy that has enveloped the school and therefore have shown that they have an interest in the protection of the school property including the wellbeing of the pupils pending resolution of this dispute.
25. In addition, the applicants in the application dated 24th April 2024 have exhibited a Resolution of the Trustees dated 19th April, 2024 as Annexure "MW-3" as proof, not only that the Club's Board of Trustees met and approved their proposed participation in these proceedings; but also approved the issues they intend to ventilate should their application be allowed. The details thereof are to be found at paragraphs 15 to 19 of their Supporting Affidavit.
26. I am therefore satisfied that the applicants in the 2nd application have demonstrated sufficient interest in this suit to warrant its joinder as well as the prejudice they stand to suffer in the event of non-joinder. I note too that their application was not opposed save for their prayer for arrest of the Court's ruling. The concerns raised about their indolence were, in my view, sufficiently explained by their counsel.
27. It is significant to mention, as was pointed out in *Judicial Service Commission vs Speaker of the National Assembly* (supra), that, unlike an *amicus curiae*, an interested party "...may not be wholly indifferent to the outcome of the proceedings in question...he may not be wholly non-partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings."
28. In the result, while I find no merit in the application dated 22nd April 2024, which I hereby dismiss with no order as to costs, there is merit in the application dated 24th April 2024. The same is hereby allowed and orders granted as follows:



- (a) That leave be and is hereby granted to the intended interested parties, Major (rtd) Moses Waweru, Daniel Tanui and Ali Mandhry, to join and to participate in the instant proceedings as the 1st, 2nd and 3rd interested parties.
- (b) That the three interested parties be served forthwith with the parties' pleadings to enable a response along with submissions, if any, within three days from the date hereof.
- (c) The parties on record be at liberty to file and serve further responses and submissions, if need be, within 3 days of service.
- (d) That the costs of the application be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 13TH DAY OF MAY,
2024**

OLGA SEWE

JUDGE

