



REPUBLIC OF KENYA



Otieno & 5 others v Ethics & Anti-Corruption Commission (Anti-Corruption and Economic Crimes Appeal E016 of 2025) [2025] KEHC 10766 (KLR) (Anti-Corruption and Economic Crimes) (23 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10766 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL E016 OF 2025**

LM NJUGUNA, J

JULY 23, 2025

BETWEEN

**BOB KEPHAS OTIENO 1ST APPLICANT
CAROLYNE CHEPKEMOI SANG 2ND APPLICANT
MAURICE ODIWUOR AMEK 3RD APPLICANT
EVERLYNE AWINO OGUTU 4TH APPLICANT
DAVID OBONYO MRERI 5TH APPLICANT
LILIAN ACHIENG OLOO 6TH APPLICANT**

AND

ETHICS & ANTI-CORRUPTION COMMISSION RESPONDENT

RULING

1. This court has been moved by the applicant, the Director of Public Prosecutions, vide an application dated the 13th June, 2025 under Article 157(4) & (11), Article 159, 165 of the *Constitution*, Sections 1A, 1B, 3, 3A of the *Civil Procedure Act*, Order 1 Rule 10(2) and 25 of the *Civil Procedure Rules*, and all other enabling provisions of the law.
2. The application is premised on the grounds set out on its face and it's supported by he annexed affidavit sworn by Faith Mwila, on the 13th June, 2025. The applicant has sought the following Orders;
 1. Spent



2. That the Office of the Director of Public Prosecutions be enjoined as an interested party in this court.
3. That upon grant of prayer 2, this Honourable Court expand time for filing of responses by the Interested party to the Application dated 3rd June, 2025.
3. The applicant avers that its mandate includes to institute and undertake prosecution of all criminal and related matters under Article 157 of the Constitution and pursuant to that mandate, the applicant instituted Criminal case number ACC 1 of 2021 in Homa Bay, which is the subject of this application, and Petition No. HCACEC E016 of 2025 also before the same court.
4. That the said matter involves embezzlement of Ksh. 99 million from the County Assembly of Homa Bay which is a matter of grave public interest and ought to be accorded the seriousness it deserves. That it has been on going and was due for further hearing on the 15th and 16th July, 2025.
5. That the proposed interested party is in full conduct of the matter and is well placed to file responses so as to shed light to the events that have transpired before the Chief Magistrate's court at Homa Bay. Further, that the interested party is best placed to demonstrate to this Honourable court the impact the Orders sought will have on the ongoing trial in Homa Bay ACC 1 of 2021.
6. That the continuation and determination of this suit in the absence of the interested Party possess risk of prejudice to the fair conduct of this matter, and the ongoing criminal proceedings, and the joinder of the applicant will not prejudice the respondent in any way but it will assist the court in determining all the issues in controversy.
7. The application is opposed *vide* a replying affidavit sworn by Bob Otieno Kephias in which he avers that it lacks merit and the same is a ploy for forum shopping and curved in a manner to delay the applicants from getting justice, and that the application has not met the threshold for the applicant to be enjoined.
8. That the application is full of falsehoods and inaccurate information which the applicant has presented to court to try and cure its indolence and inordinate laches; Firstly, the criminal case in Homa Bay was instituted by the Respondent in these proceedings being the Anti- Corruption Commission; the proposed interested party has not at any juncture prosecuted and/or participated in the prosecution of the said case in Homa Bay law court and the respondent has been solely prosecuting the case all through without the intervention of the proposed interested party, and it has concluded its case and the issue pending is Cross examination of the investigation officer.
9. That the respondent, EACC is by dint of Article 252 of the Constitution of Kenya 2010 as read with Section 11(2) of the EACC Act, an investigative agency who upon completion of its investigations, makes recommendations to the Director of Public Prosecutions to commence prosecution in accordance with Section 11(1) (b) of the EACC Act and Section 35 of the ACECA.
10. That whereas the Director of Public Prosecutions may assist or guide any investigative agency in carrying out its mandate, the Commission cannot direct the DPP on how to undertake its mandate and the application dated the 13th June, 2025 is akin to EACC directing the ODPP on how to conduct its constitutional mandate.
11. The respondent/applicant has further averred that a proposed interested party has to have an identifiable stake or legal duty/ interest in the proceedings before the court can make an order for them to be enjoined. That the issue of joinder of a party to a suit is purely discretionary and in exercising that discretion, the court must proceed judiciously.
12. The application was disposed of by way of written submissions which this court has fully considered.



13. In my considered view, there are only two issues for determination;
- a. Whether the proposed interested party has raised sufficient grounds to warrant joinder in HCACEC E016 of 2025.
 - b. Whether the respondent/appellant herein will suffer any prejudice upon joinder of the proposed interested party.

Analysis And Determination

14. The applicant has moved this court by way of an application to be enjoined as a party to the proceedings herein, under the provision of Order 1, Rule 10(2) of the Civil Procedure Rules which provide as follows:-

“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 effectively and completely to adjudicate upon and settle all questions involved in the suit, be added.”

15. It is trite law that a court may, even on its own motion, add a party to a case if such a party is necessary for the determination of the issues in controversy or whose presence is necessary to enable the court to effectively and completely adjudicate upon and settle all questions in the suit.
16. The proposed interested party is established under Article 157 of the Constitution as an independent office and enjoying the status of all independent Commission and Offices under the Constitution of Kenya 2010.
17. Under Article 157(6) (a) of the Constitution;
- (6) The Director of Public Prosecutions shall exercise State Powers of prosecution and may-
- a. Institute and undertake criminal proceedings against any person before any court (other than court martial) in respect of any offence alleged to have been committed.
18. The functions and the Powers of the office of the Director of Public Prosecutions are spelt out *vide* Act No. 2 of 2013 as provided for in the Constitution besides making provisions for all other matters incidental to the execution of the mandate of the office. Pursuant to those functions and powers, the proposed interested party upon review of the evidence presented to it by the respondent (EACC), made a decision to charge and subsequently charged the appellants in the matter now cited as Homa Bay ACC E001 of 2021 *Republic v Otieno Bob Kephos & 5 others* and under its delegated authority pursuant to Section 22 of ODPP Act, appointed counsel to prosecute the matter who has been appearing since the trial commenced.
19. From the facts before this court, the ODPP has called 25 witnesses in the case, with the investigating Officer having been stood down awaiting cross examination by the respondents/appellants. It, therefore, goes without saying that the interested party having prosecuted the lower court matter, any appeal arising from those proceedings cannot proceed in the absence of the party conducting the proceedings, and which is also the party that made the decision to charge in the first place.
20. The court has read and has understood the arguments advanced by the respondent/appellant in this matter which in my view, and with all due respect, do not have any legal basis. The respondent seems



to argue that the lower court matter is being prosecuted by the EACC and not the interested party and he has termed the interested party's application as a dubious, illegal and un-procedural means through which the applicant seeks to amend the pleadings by bringing a party that was not and has not been a party from the commencement of the proceedings.

21. As the court has observed herein above, Article 157 (6) of the Constitution gives the sole mandate to the DPP to institute and undertake criminal proceedings against any person before any court (other than the court martial) in respect of any offence alleged to have been committed. The DPP has also been given delegated authority pursuant to the provisions of Section 22 of the ODPP Act. In my considered view, if the DPP opts to delegate his authority, that does not mean and cannot be taken to mean that he has ceded his authority to another person/party. He still retains his Constitutional mandate to institute and undertake criminal proceedings.
22. In fact, it was even an anomaly in the first place for the respondent/appellant to institute the appeal without the Director of Public Prosecutions. The office of the DPP does not have to prove any legal interest in the matter when it is the only Constitutional office that is mandated to prosecute criminal cases and when it is the office that is prosecuting the lower court case albeit through delegated authority which the law allows it to do.
23. In view of the foregoing, I do not see any prejudice that the respondent/appellant may suffer by allowing the DPP to be enjoined as an interested party in these proceeding.
24. In the end, I find that the application has merits and the same is allowed as prayed. The interested party to file its response to the application dated the 3rd day of June 2025, within 14 days from the date of this ruling.
25. It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 23RD DAY OF JULY 2025

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L.M. NJUGUNA

JUDGE

In the presence of:-

Mr. Oriwa for the Applicant/appellant

Miss Mwangi for ODPP

Court assistant – Adan

