Kiplagat & 4 others v Director of Public Prosecutions & 6 others; Attorney General & another (Interested Parties); Ali (Intended Interested Party) (Constitutional Petition 35 of 2021 & Petition E019 of 2021 (Consolidated)) [2024] KEHC 2245 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2245 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CONSTITUTIONAL PETITION 35 OF 2021 & PETITION E019 OF 2021 (CONSOLIDATED)

OA SEWE, J

MARCH 7, 2024

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLES 2(4), 10, 19, 20(1) & (2), 22(1), 23, 25, 27, 28, 47(1), 48, 49(1), 50(1) & (2), 157(11), 165(3) (B), 169, 172(C), 201(D), 227(1), 232(1), 236(A) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE CONSTITUTION

AND

IN THE MATTER OF THE CONSTITUTIONALITY AND STANDING OF THE SPECIAL MAGISTRATES AND THE COURT OF THE SPECIAL MAGISTRATE UNDER SECTIONS 3,4 AND 5 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, 2003

AND

IN THE MATTER OF THE CONSTITUTIONALITY AND STANDING OF SECTION 82 OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE PUBLIC PROCUREMENT & ASSET DISPOSAL ACT,2015; THE LEADERSHIP AND INTEGRITY ACT, 2012; THE PUBLIC OFFICER ETHICS ACT, 2009; KENYA MARITIME AUTHORITY ACT, 2006; AND FAIR ADMINISTRATIVE ACTION ACT, 2015.

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE TRANSITIONAL PROVISIONS UNDER PARAGRAPH 1 OF THE THIRD SCHEDULE OF THE PUBLIC PROCUREMENT AND

ASSET DISPOSAL ACT, 2015

AND

IN THE MATTER OF CRIMINAL CASE NO. 3 OF 2020
(REPUBLIC VS. JOEL KIPRONO BII & 11 OTHERS)

AND

IN THE MATTER OF THE KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES,2013

BETWEEN

COSMAS KIPLAGAT ..... PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS ..... 1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION ..... 2ND RESPONDENT

ANTI-CORRUPTION COURT ..... 3RD RESPONDENT

NANCY KARIGITHU, THE PRINCIPAL SECRETARY OF THE STATE DEPARTMENT FOR SHIPPING & MARITIME AFFAIRS ..... 4TH RESPONDENT

BOARD OF DIRECTORS OF KENYA MARITIME AUTHORITY .... 5TH RESPONDENT

AND

ATTORNEY GENERAL ..... INTERESTED PARTY

INSPECTOR GENERAL OF STATE CORPORATIONS .... INTERESTED PARTY

AS CONSOLIDATED WITH

PETITION E019 OF 2021

BETWEEN

ROBINSON MWANGI KARIGUH ..... 1ST PETITIONER

PETER KIMANI KINYANJUI ..... 2ND PETITIONER

JARED BIWOTT ..... 3RD PETITIONER

DENIS KIPKORIR NGENO ..... 4TH PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

ANTI-CORRUPTION COURT AT MOMBASA ..... 3RD RESPONDENT

AND

JUMA AHMED ALI ..... INTENDED INTERESTED PARTY

RULING

1. This ruling is in respect of the Notice of Motion filed by the proposed interested party, Juma Ahmed Ali, on 1st November 2022 (but erroneously dated 31st October 2021 instead of 31st October 2022; which is the date indicated in the Supporting Affidavit). It is expressed to have been filed under Rules 7(1) and 19 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 for orders that:

   (a) Spent

   (b) Juma Ahmed Ali be joined in this case as an interested party;

   (c) Juma Ahmed Ali be granted leave to be heard in respect of the application dated 22nd September 2022 as an interested party;

   (d) The Replying Affidavit by Juma Ahmed Ali filed with the application be admitted as properly filed and the same be considered by the Court in the determination of the application dated 22nd September 2022.

2. The application was premised on the grounds that Juma Ahmed Ali (hereinafter, "the applicant") is one of the accused persons in Mombasa Chief Magistrate's Anti-Corruption Criminal Case No. 3 of 2020: Republic v Joel Kiprono Bii & 11 others; and that while some of the accused persons in that case challenged their prosecution in this Petition, the applicant is among those that did not. It was further averred that an order was consequently obtained herein staying the proceedings in Criminal Case No. 3 of 2020; which order has caused the applicant great hardship, prejudice, suffering and anguish on account of the following factors:

   (a) He has been on suspension on half salary since the commencement of the criminal case in June 2020;

   (b) The criminal charges have been hovering over his head for over two years now;

   (c) The continued pendency of the charges has subjected him to great mental anguish because he is out of employment and cannot secure another job;

   (d) He did not challenge the criminal case through this Petition because he is keen to clear his name.

3. The grounds aforestated were explicated in the applicant's Supporting Affidavit, sworn on 31st October 2022. He averred therein that Article 50(2)(e) of *the Constitution* grants him the right to a fair and expedient hearing. He therefore contended that the stay of the criminal proceedings without his participation or opportunity to be heard is in violation of his constitutional right to fair hearing. Consequently, the applicant averred that it is in the interest of justice that the orders sought by him be granted. He annexed a copy of the Charge Sheet filed in Criminal Case No. 3 of 2020 as Annexure JAA 1 to his Supporting Affidavit.

4. In response to the application, the petitioners relied on the Replying Affidavit sworn on their behalf by Robinson Mwangi Karigu, (the 1st petitioner in Petition No. 19 of 2021). Relying on advice given by counsel, the 1st petitioner posited that joinder for purposes of Rule 7 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, can only be entertained in pending proceedings instituted under Article 22 of *the Constitution*. He therefore

averred that since there are no pending proceedings herein, the application is misconceived. The 1st petitioner pointed out that Petition No. 35 of 2021 as consolidated with Petition No. E019 of 2021 were concluded by a judgment of this Court delivered on 3rd June 2022.

5. It was further the assertion of the 1st petitioner on behalf of all the petitioners that they have a legal right to appeal against the aforesaid judgment, if aggrieved by it; and therefore they did not require the concurrence or authority of the interested party to prefer an appeal. They added that, since the interested party was not a party to the Petition, he is a stranger to the appeal as well and had no basis for impugning the same. Accordingly, the petitioners urged for the dismissal of the application with costs.

6. The application was likewise resisted by the Director of Public Prosecutions (the 1st respondent) vide the Grounds of Opposition filed on 17th April 2023. The 1st respondent thereby contended that:

   (a) The entire application is incompetent and lacking in merit;

   (b) The application is calculated at engaging the Court in an academic exercise;

   (c) The applicant failed to invoke the jurisdiction of the Court in good time;

   (d) The Court has already discharged its duties and pronounced itself and as such it is functus officio;

   (e) The applicant seeks to invite the Court to re-open the case, not for correction of clerical or arithmetic errors as envisioned in Section 99 of the *Civil Procedure Act* but to admit a new party to the proceedings after judgment;

   (f) The applicant has not demonstrated any impediment that he had in seeking to be enjoined to the Petition while it was live;

   (f) An appeal has already been lodged against the judgment of the Court that was delivered on 3rd June 2022 by Hon. Onyiego, J. and therefore the adjudication has been removed from this Court to the appellate court.

7. The application was canvassed by way of written submissions, pursuant to the directions given herein on 16th December 2022. Accordingly, the applicant filed written submissions on the 20th March 2023 reiterating that he is keen on proceeding with Criminal Case No. 3 of 2020; and that the petitioners are on the other hand keen on delaying the proceedings so as to pursue their appeal. The applicant pointed out that the specific purpose of joinder is to participate in the petitioner's application for stay pending appeal dated 22nd September 2022 which has the potential of affecting his rights. The applicant added that the Court's mandate is to do justice; and that that mandate should not be fettered by technical rules of procedure.

8. On behalf of the 1st respondent written submissions were filed herein on 17th April 2023. The 1st respondent thereby proposed the following two issues for determination:

   (a) Whether the intended interested party can be enjoined in Petition 35 of 2020 for hearing of the application dated 22nd September 2022; and

   (b) Whether the Court has jurisdiction to hear and determine the intended interested party's application dated 31st October 2022.

9. For the legal definition of "an interested party" the 1st respondent made reference to Black's Law Dictionary, Rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules as well as the decisions of the Supreme Court in Communications

Commission of Kenya and 4 Others v Royal Media Services Limited & 7 Others [2014] eKLR and Francis K. Muruatetu & Another v Republic & Others [2016] eKLR, among others. Thus, the 1st respondent was of the view that, since the applicant did not participate in this Petition prior to the delivery of judgment, his change of heart is ill advised and has come too late in the day.

10. The foregoing notwithstanding, counsel for the 1st respondent conceded, at paragraphs 9(b) and (c) of her written submissions that the applicant has clearly demonstrated a personal interest in the matter which is not peripheral; as well as the prejudice he is likely to suffer in connection with the application dated 22nd September 2022. She, consequently, had no objection to the admission of the applicant for purposes of the hearing and determination of that application; but asserted that such hearing can only happen in the right forum.

11. On whether the Court has jurisdiction to hear and determine the application dated 31st October 2021, counsel for the 1st respondent was of the posturing that the application dated 22nd September 2022 can only be entertained before the appellate court as the Court is now functus officio. She placed reliance on Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR and Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR to buttress her argument that the Court cannot sit and adjudicate on issues relating to the merits of the Petition; and that the only side of the arena available is rectification of errors as provided for in Section 99 of the *Civil Procedure Act*. She accordingly prayed for the dismissal of the application dated 31st October 2021.

12. In the light of the foregoing, the two issues arising for determination are as follows:

    (a) Whether the court is functus officio in the circumstances; and if not

    (b) Whether the applicant has made out a good case for joinder as an interested party.

A. On whether the Court is functus Officio:

13. The principle of functus officio was considered by the Supreme Court in Raila Odinga & 2 others v Independent Electoral & Boundaries Commission, Ahmed Issack Hassan, Uhuru Kenyatta & William Samoei Ruto (Petition 5, 4 & 3 of 2013) [2013] KESC 8 (KLR) (Civ) (24 October 2013) (Ruling), where court cited with approval an excerpt from an article by Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832 stating:

> "The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

14. Similarly, in Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) (supra), the Court of Appeal held as follows on the functus officio doctrine:

> "Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th

Century. In the Canadian case of Chandler vs Alberta Association OF Architects [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);

> "The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:
>
> > Where there had been a slip in drawing it up, and,
> >
> > Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp., [1934] S.C.R. 186"

15. Hence, it has often been pointed out that the court does not become functus officio merely because it has delivered a final decision in civil proceedings, for it retains the jurisdiction to correct errors under the slip rule and for review under Section 80 of the *Civil Procedure Act*.

In this regard, I agree entirely with the position taken in Leisure Lodge Ltd v Japhet Asige and another [2018] eKLR that:

> " On the question that this court is functus officio, I do find that a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings even after a final judgment is delivered provided such proceedings do not amount to re-trying the cause but geared towards bringing the litigation to an end. That is the reason, the court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under Section 94 of the Act. In Mombasa Bricks & Tiles Ltd & 5 Others vs Arvind Shah & 7 Others [2018] eKLR, this court said of the doctrine of functus officio:-
>
> > "I understand the doctrine, like its sister, the res- judicata rule to seek to achieve finality in litigation. It is a way of a court saying, 'I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level'. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.
>
> It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes.
>
> As was held by the court of Appeal in Telkom Kenya Ltd vs John Ochanda, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.
>
> Put in the context of the application before me, I do not consider the Decree/holder to ask the court to rehear and make a decision about the disputes in the file on the merits.
>
> I understand the decree-holder /applicant to be saying that the judgment of the court that gave timelines for compliance remains unattended by the judgment debtor. That is not merit based decision on the dispute that has been determined in the suit. The decree holder is merely asking the court to remind the judgment -debtor that they have a judgment debt to

settle as far as delivery of share certificates is concerned. That has more to do with moving the file towards closure and making the judgment final rather than re-opening the dispute for determination on the merits. I decline to hold that the court has become functus officio. This is because I consider that there are several proceedings that can only be undertaken after judgment and not before.

The following are just but examples:
Application for stayApplication to correct the decreeApplication for accountsApplication for execution including garnishee applicationsApplications for reviewApplication under section 34 of the ActIf one was to accede to the position taken by the judgment debtor that the court is functus officio then it would mean that the provisions of law providing for such proceedings are otiose or just decorative and of no substance to the administration of justice. As far as the application before the court is concerned, the court is well seized of power and jurisdiction to entertain and determine same on the merit and based on materials availed".

16. Thus, I have perused the Court record and noted that, for all intents and purposes, this suit has been heard and determined. The final judgment of the Court was delivered on 3rd June 2022 in respect of this Petition, Petition No. 35 of 2021, as consolidated with Petition No. 19 of 2021. The final outcome was thus:

> "...the petitions herein and the cross petition thereof have not met the threshold for constitutional redress to warrant grant of the respective reliefs sought and accordingly, they are dismissed. Given the nature of the suits which border on public interest litigation, each party shall bear own costs..."

17. Being aggrieved by the decision of the Court, the petitioners in Petition No. 19 of 2021 filed a Notice of Appeal dated 20th June 2022, evincing their intention to appeal in respect of part of the judgment dated 3rd June 2023. They thereafter filed the Notice of Motion dated 22nd September 2022 for orders, inter alia, that pending the hearing and determination of their appeal to the Court of Appeal, the Court be pleased to issue conservatory orders staying any further proceedings in Criminal Case No. 3 of 2020.

18. It was in reaction to the application dated 22nd September 2022 that the applicant filed his application for joinder. As has been pointed out herein above, that application simply seeks orders that the applicant be joined in this case as an interested party; that he be granted leave to be heard in respect of the application dated 22nd September 2022 as an interested party; and that his Replying Affidavit filed with the application be admitted and deemed properly filed for consideration by the Court in in connection with the application dated 22nd September 2022.

19. Clearly therefore, the applicant is not seeking to reopen the suit for a merit hearing as was submitted by the petitioners and the respondents; but to be heard in respect of the post judgment application for conservatory orders. In my view therefore, the court is not functus officio in that regard. Indeed, Rule 32 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provides: -

(1) An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed.

(2) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling and the court may issue such orders as it deems fit and just.

(3) A formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct.

20. In the same vein, Order 41 Rule 6(1) of the Civil Procedure Rules is explicit that:

> "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside."

21. The jurisdiction is not just to the appellate court, but also to the court appealed from; and therefore the argument by the 1st respondent that the application can only be entertained in the appellate court lacks traction. Moreover, it is trite that other than stay orders, the Court has the power to issue injunctive orders pending appeal with a view of preserving the subject matter of the appeal, where necessary. Hence, in Erinford Properties v Cheshire County Council [1974] 2 AllER 446 it was held that:

> "No human being is infallible and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistent with this decision, recognize that his decision might be reversed and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal."

22. The Erinford Principle was followed by the Court of Appeal in Madhupaper International Ltd v Kerr [1985] eKLR wherein it was acknowledged that in such circumstances the intended injunction pending appeal was premised on the principle that:

> "when a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal if successful is not nugatory."

23. It is for the foregoing reasons that I find no merit in the submission that the Court is functus officio in respect of the application for joinder dated 31st October 2021.

B. On the merits of the application for joinder dated 31st October 2021:

24. The applicant approached the Court under Rule 7 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules. It states that:

(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.

25. 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..."

26. 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..."

27. In this case, the applicant has demonstrated that there is a criminal case pending against him, being Mombasa Chief Magistrate's Anti-Corruption Case No. 3 of 2020; and that the case has caused him immense anguish as it has been pending for over two years. He further explained that he is on suspension and is being paid half a salary. The applicant further indicated that he is keen on having the criminal case prosecuted to its logical conclusion. Hence, although he was not initially a party to this petition, he has demonstrated an identifiable stake in the pending application dated 22nd September 2022.

28. Indeed, in Bellevue Development Company Limited v Vinayak Builders Limited & another [2014] eKLR, held: -

> (42) Joinder of parties is possible after judgment. I will give some example where such joinder of parties is permitted; 1) in cases of representative suits; or 2) substitution of one or more parties, for instance, in case of death, or incapacity of a party or change of status of a party; or 3) in execution process. In the broader sense, it is deemed to be a kind of joinder of parties where a contemnor was not a party in the suit where judgment has already been entered and for which he is being cited for contempt of court. Equally, it is a joinder of parties where an objector raises objection to execution under Order 22 rule 51 of the CPR.

29. Further, faced with a similar circumstance, the Court of Appeal in the case of EG v Attorney General; David Kuria Mbote & 10 others (Interested Parties) [2021] eKLR, allowed an application for joinder of an interested party to be enjoined in a pending appeal based on the finding that the outcome of the appeal would affect the intended interested party. Hence, at paragraph 14 of its determination, the Court of Appeal held:

> " Further, bearing in mind the objective and composition of the applicant coupled with the crux of the appeal, we find that the outcome of the appeal, whatever it will be, will definitely affect the applicant and its members as contemplated under Rule 77(1) of this Court's Rules. As such, we have to pay regard to the rules of natural justice and in particular, giving a person who is likely to be affected by a decision, the right to be heard before the decision is made. See Mbaki & Others vs. Macharia & Another [2005] 2 EA 206.

30. It is in the light of the foregoing that I find merit in the application dated 31st October 2021. The same is hereby allowed and orders granted in respect thereof as hereunder:

    (a) That the applicant, Juma Ahmed Ali, be and is hereby enjoined in this case as an interested party;

    (b) That the applicant, Juma Ahmed Ali, be and is hereby granted leave to be heard in respect of the application dated 22nd September 2022 as an interested party;

    (c) That the Replying Affidavit filed by Juma Ahmed Ali herein be admitted as properly filed for consideration by the Court in the determination of the application dated 22nd September 2022.

    (d) That the cost of the application to abide the outcome of the application dated 22nd September 2022.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 7TH DAY OF MARCH 2024

OLGA SEWE

JUDGE