



Nest Lounge & Grill v Directorate of Liquor Control and Licensing; Osino (Intended Interested Party) (Judicial Review E030 of 2023) [2024] KEHC 4478 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4478 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW E030 OF 2023**

OA SEWE, J

APRIL 11, 2024

IN THE MATTER OF AN APPLICATION BY FRANCIS WAICHOYA TRADING AS NEST LOUNGE & GRILL FORMERLY ABADARE BAR & RESTAURANT FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF SECTIONS 4(1), 4(3), 4(4) OF THE {{>/AKN/KE/ACT/2015/4 FAIR ADMINISTRATIVE ACTION ACT}}, NO. 4 OF 2015

AND

IN THE MATTER OF ARTICLES 10(1), 10(2) (B) AND 47(1) OF {{>/AKN/KE/ACT/2010/CONSTITUTION THE CONSTITUTION}} OF KENYA

AND

IN THE MATTER OF MOMBASA COUNTY LIQUOR LICENSING ACT, 2014

AND

IN THE MATTER OF UNLAWFUL HARASSMENT & INTIMIDATION BY THE DIRECTORATE OF LIQUOR CONTROL AND LICENSING

BETWEEN

NEST LOUNGE & GRILL APPLICANT

AND

DIRECTORATE OF LIQUOR CONTROL AND LICENSING RESPONDENT

AND

PAULINE AWINO OSINO INTENDED INTERESTED PARTY



RULING

- 1) This ruling is in respect of the application for joinder dated 15th December 2023. The said application was filed by Ms. P. A. Osino, Advocate, under Article 159(2)(a) of the Constitution of Kenya, as well as Sections 1A, 1B 3, 3A, 6 and 63(e) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya. The applicant also cited Order 1 Rule 10(2), Order 7 Rule 9, and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. She prayed for the following orders:
 - (a) Spent
 - (b) The Court be pleased to grant her leave to be jointed as an interested party in these proceedings;
 - (c) Spent
 - (d) That she be granted leave to file a Preliminary Objection to the application dated 28th September 2023 as the Court lacks jurisdiction in the matter of environment and planning.
 - (e) That she be granted leave to file a Replying Affidavit to that application.
- 2) The application was premised on the grounds that the proposed interested party had no prior knowledge of the existence of the application until 29th November 2023 when she received a letter from the Office of the Ombudsman who have been investigation her complaints against the applicant and the relevant government authorities. She pointed out that, although she has been adversely mentioned by the applicant in its application, she was never served with the pleadings filed in this matter. She added that she stands to suffer extreme prejudice should this application and heard and determined without her involvement. She took issue with the fact that the applicant has been selling alcohol and playing loud music all night long within a residential area without valid legal documents, thereby affecting the peace and well-being of the residents.
- 3) The application was premised on the Supporting Affidavit sworn by the proposed interested party on 15th December 2023, to which she annexed several documents to buttress her averments. They include correspondence between her and the applicant, as well as between her and the Ombudsman, among others; notably the letter dated 29th November 2023 from the Commission on Administrative Justice, otherwise known as the Office of the Ombudsman.
- 4) The application was resisted by the applicant. In an affidavit sworn on its behalf by Francis Waichoya on 4th March 2024, it averred that the intended interested party does not have any identifiable stake or interest in this matter, and that she has not placed any material before the court to demonstrate such interest. The applicant further objected to the joinder of the intended interested party on the ground that she has not satisfied the principles set out in the Supreme Court case Muruatetu & another v Republic; Kenya National Commission on Human Rights & 2 others (Interested Parties); Death Penalty Project (Intended Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated)) [2016] KESC 12 (KLR) (Civ) (28 January 2016) (Ruling).
- 5) The application was canvassed by way of written submissions, pursuant to the directions made herein on 29th February 2024. Thus, the proposed interested party filed written submissions dated 14th March 2024 in which she suggested the following two issues for determination:
 - (a) Whether, as the proposed interested party, she has a stake in the matter; and
 - (b) Who should bear the costs of the application.



- 6) The intended interested party reiterated the factual basis of the application and urged the Court to note that, in its application for leave, the applicant averred, at paragraph 14 of the Supporting Affidavit, that the respondent was being used as a proxy by its business competitors and detractors who had been on a witch hunt for a while. She further averred that, in support of that assertion, the applicant annexed a copy of a letter dated 18th September 2023 to demonstrate that her complaint was the basis for that letter. The intended interested party also made reference to other documents annexed to the applicant's Supporting Affidavit, some of which were written by her to the concerned authorities, in connection with the applicant's business.
- 7) Thus, it was the submission of the intended interested party that it is the applicant who introduced her into these proceedings by making wild allegations against her; and yet now seeks to have her blocked from participating therein. She cited Articles 27, 47 and 50 of the *Constitution* and reiterated the fact that she resides within the neighbourhood of the applicant's business premises; and therefore that she is directly affected by the manner in which the business is being operated. The intended interested party also made reference to *Communications Commission of Kenya & 4 others v Royal Medial Services & 7 Others* [2014] eKLR, *Benjamin K Kipkulei v County Government of Mombasa & Another* [2015] eKLR, *Francis Karioko Muruatetu & Another v Republic & Others* [2016] eKLR and Rule 2 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 as to the definition of an interested party. She accordingly urged that her application be joinder be allowed.
- 8) The applicant, on its part, proposed the following issues for determination:
- (a) Whether the intended interested party has a stake in the matter;
 - (b) Whether the intended interested party will suffer prejudice;
 - (c) What kind of submissions does the interested party intend to make before the Court and what would be the relevance?
- 9) The applicant similarly relied on *Francis Karioko Muruatetu (supra)* for an exposition of the elements that must be proved in an application of this nature, and submitted that the intended interested party has not laid the basis for her joinder. In the applicant's view, the intended interested party has neither established an identifiable stake nor shown that her presence is necessary to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit. In this regard, counsel for the applicant relied on *Skov Estate Limited & 5 Others v Agricultural Development Corporation & Another* [2015] eKLR and *Marigat Group Ranch & 3 Others v Wesley Chepkoimet & 19 others* [2014] eKLR.
- 10) Lastly, it was the submission of the applicant that it was imperative for the intended interested party to give an indication as to the submissions she intends to make herein. Counsel emphasized the applicant's assertion that if indeed the intended interested party has valid issues with the respondent or any other party, then the best course would have been for her to file her own separate suit for redress instead of seeking to ride on the instant suit in which her interest is only peripheral. For the foregoing reasons, the applicant prayed for the dismissal of the application for joinder.
- 11) Essentially, the application is expressed to have been brought under Order 1 Rule 10(2) of the *Civil Procedure Rules*, which provides:

“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 to effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”(Emphasis added)

- 12) It is manifest therefore that any person who wishes to be enjoined as one "whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit" can only join the suit either as a plaintiff or defendant on the basis of a demonstrable personal stake. Thus, I would agree with the viewpoint taken by Hon. Muriithi, J. in the case of *Brek Sulum Hemed v Constituency Development Fund Board & Another* [2014] eKLR, when he observed that:

“To be sure there is no procedure under the *Civil Procedure Act* and Rules for the joinder of interested parties and the practice of application for [sic] interested parties must have been developed by necessary implication...”

- 13) Nevertheless, I take the view that, in appropriate cases, joinder of interested parties would be permissible under the inherent jurisdiction of the Court, where sufficient cause is made for such joinder. Accordingly, I have resorted to Rule 1 of the *Mutungu Rules* for a definition of an interested party; and it states:

“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.”

- 14) In respect to the provision, the applicable principles were enunciated in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others* [2014] eKLR by the Supreme Court, and were later reaffirmed thus in *Francis Kariuki Muruatetu & Another v Republic & 5 Others* (*supra*):

“(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...”

- 15) The Court of Appeal took the same view in the case of *EG v Attorney General; David Kuria Mbote & 10 others (Interested Parties)* [2021] eKLR and held:
- (1) The core of the court’s power to join a party to any proceedings including at the appellate stage, as aptly discussed in *Hamisi Yawa & 36,000 others v Tsangwa Ngala Chome & 19 others* [2018] eKLR, is to bring on board a necessary party for purposes of determining the real issue(s) in dispute. Also, a joinder of a party is not an automatic right, but one which is granted upon exercise of the discretion of the court concerned. Nonetheless, the court exercises such discretion under defined parameters, that is, it must be satisfied that: -
 - a) The intended party has a personal interest or stake in the matter in question; and that interest is clearly identifiable and proximate enough and not merely peripheral.
 - b) The intended party’s presence would enable court to resolve all the matters in the dispute.
 - c) The intended party would suffer prejudice in case of non-joinder.
 - d) The joinder of the intended party will not vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings.”
- 16) With the foregoing in mind, I have considered the intended interested party’s application vis-à-vis the substantive application brought herein by the applicant. There is no gainsaying that the applicant is aggrieved by the respondent’s letter dated 18th September 2023. It is manifest that the applicant has relied heavily on a letter dated 1st September 2023 that emanated from the intended interested party which it deemed not only as malicious, but also as the basis of the respondent’s impugned letter dated 18th September 2023. It is that letter that embodies the decision that the applicant wishes to have quashed.
- 17) Although the applicant submitted that the intended interested party has not given an indication as to the submissions she intends to make if joined to these proceedings, her Supporting Affidavit is explicit as to why she is seeking joinder. In particular, she set out pertinent issues at paragraphs 19 to 26 thereof as well as paragraph 32. She also attached documents, cross-referenced at paragraph 33, to back up her assertions. Moreover, at pages 7 and 8 of her submissions, the intended interested party was explicit as to the fundamental issues raised by her. I am therefore convinced that the intended interested party has complied with the elements set out in *Muruatetu* and has therefore demonstrated sufficient interest in this suit to warrant her joinder.
- 18) I nevertheless consider it premature, if not altogether unwarranted, for the intended interested party to seek orders at this stage that she be granted leave to file a Preliminary Objection to the application dated 28th September 2023. I say so because, the role of an interested party is fairly circumscribed. Indeed, the Supreme Court pointed out in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2014] eKLR that:
- “A suit in Court is a ‘solemn’ process, “owned” solely by the parties. This is the reason why there are laws and Rules, under the *Civil Procedure Code*, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party,



this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.”

19) Hence, prayer 4 of the Notice of Motion dated 15th December 2023 is hereby declined.

[20] In the result, the orders that commend themselves to the Court and which I hereby grant in respect of the application dated 15th December 2023 are as hereunder:

- (a) That leave be and is hereby granted to the intended interested party, Ms. Pauline Awino Osino, to be joined as an interested party in these proceedings;
- (b) That leave be and is hereby granted to the interested party to file a Replying Affidavit to the applicant’s substantive application.
- (c) Each party to bear own costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11TH DAY OF APRIL, 2024

OLGA SEWE

JUDGE

