Madara v Gitonga & 17 others; Waweru & 2 others (Interested Parties); Said (Proposed Interested Party) (Petition E012 of 2024) [2024] KEHC 7561 (KLR) (19 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7561 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION E012 OF 2024

OA SEWE, J

JUNE 19, 2024

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 MOMBASA PARENTS CLUB) ..... 5TH RESPONDENT

ALI MOHAMED SALIM ..... 6TH RESPONDENT

UZEL JEAN ..... 7TH RESPONDENT

TAMIMI LEWA CHIBORORO ..... 8TH RESPONDENT

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 THE NEWLY ELECTED MANAGEMENT BOARD OF THE MOMBASA PARENTS CLUB) ..... 18TH RESPONDENT

AND

MOSES WAWERU ..... INTERESTED PARTY

DANIEL TANUI ..... INTERESTED PARTY

ALI MANDHRY ..... INTERESTED PARTY

AND

FAHMI SALIM SAID ..... PROPOSED INTERESTED PARTY

RULING

1. Before the Court for determination is the Notice of Motion dated 11th June 2024. It was filed by the proposed 4th interested party, Mr. Fahmi SalimSaid under Article 53(1)(b) of the *Constitution*, Sections 8 and 13 of the *Children Act* No. 9 of 2001, Section 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, Rules 3(8), 23, 24 and 25 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* and Order 1 Rule 10 of the *Civil Procedure Rules* for the following orders:

   (a) Spent

   (b) That the proposed interested party be enjoined to this suit.

   (c) That pending the hearing of the application, the court do partially discharge vary or set aside the orders granted on 23rd May 2024 and instead issue an order allowing the old board to resign and a parent-run caretaker committee be appointed in its place on an interim basis allowing the said committee to manage the School/Club on an interim basis.

   (d) That the Court be pleased to appoint the CECM of Education, Mombasa County as custodian of the abovementioned caretaker committee pending the hearing and determination of the arbitration process.

   (e) That the Court be pleased to partially discharge, vary and/or set aside the order dated 23rd May 2024 and instead issue an order directing the school to operate under the said parent-run caretaker committee to allow pending fees to be paid, which will ensure the running of the day to day operations of the school, pending the hearing and determination of the arbitration process.

   (f) That the Court be pleased to grant an order restraining the old board and the newly elected management board from interrupting the day to day operations of the school pending the hearing and determination of the arbitration process.

   (g) That the costs of the application be costs in the suit.

2. The application was supported by the affidavit the proposed 4th interested party, sworn on 11th June 2024, in which he stated that he is a parent/member of the School and therefore competent to make the deposition. The proposed interested party then gave a detailed background of the dispute and why

the orders sought ought to be granted. Thus, at paragraph 30 of the Supporting Affidavit, the proposed interested party averred that unless the orders sought are granted:

(a) the School will close down its operations until the determination of the intended arbitration, a process that is yet to start but is unlikely to produce a solution amicable to the parties.

(b) The students will be denied their constitutional right to education due to closure of the School.

(c) The staff, both teaching and non-teaching are likely to be forced to seek employment elsewhere due to financial constraints and the inability to meet their financial obligations as a result of unpaid salaries.

(d) The public reputation of the School will be adversely affected and will fail to attract new enrolments due to the uncertainty of the operations at the School.

3. The application was urged orally on 14th June 2024 by Ms. Juma, counsel for the proposed interested party. While the application was conceded to by counsel for the petitioner, the 1st to 5th and 12th to 14th respondents, as well as counsel for the three interested parties, it was resisted by the 6th to 11th respondents as well as the 16th to 18th respondents.

4. The Court has had occasion to rule on three similar applications and held that although expressed to have been filed under Section 3A of the *Civil Procedure Act* and Order 1 Rule 10 of the *Civil Procedure Rules*, the procedure for joinder of an interested party is provided for 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.

5. The Court also pointed out that an interested party, for the purpose of the aforestated 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."

6. I therefore reiterate what the Supreme Court stated in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2014] eKLR, that:

> " [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..."

7. In the previous similar applications, the Court also made reference to *Francis Karioko Muruatetu & another v Republic & 5 others* [2016] eKLR, in which the Supreme Court reiterated the applicable principles for joinder as interested party as hereunder:

> "(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..."

8. In the instant application, the proposed interested party has simply stated that he is a parent/member of the School. He did not say he is a member of the Club that runs the School. Even assuming that he is a member of the Club, it is notable that not a single document was annexed to the Supporting Affidavit to vouch for his membership. He was therefore not explicit as to the proximate nature of his interest to that of the parties already on record. Indeed, counsel for the proposed interested party conceded that they intend to raise no new issue from what has already been presented before the Court.

9. The Court has had occasion to rule on similar applications dated 22nd April 2024 and 24th April 2024 brought by parents/members and trustees of the Club. The issues that the proposed interested party intends to raise have already been presented before the Court by the parties; and therefore there is no need for joinder of additional parents simply on the basis of membership of the School.

10. More importantly, the Court made it clear in its ruling dated 17th May 2024 that, given the urgency of the matter, no further or other applications for joinder would be entertained. That order stands and is yet to be set aside. The Court is therefore *functus officio* in that particular respect.

11. 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), the Supreme 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."

12. 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 v 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:
> >
> > 1. Where there had been a slip in drawing it up, and,
> > 2. Where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. v . J.O. Rose Engineering Corp.,* [1934] S.C.R. 186"

13. For the foregoing reasons, I find no merit in the Notice of Motion dated 11th June 2024. The same is hereby dismissed with no order as to costs; granted the public spirited nature of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19TH DAY OF JUNE, 2024.

OLGA SEWE

JUDGE