



REPUBLIC OF KENYA



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Masiga & another v Barasa; Ethics and Anti-Corruption Commission & another (Interested Parties) (Petition E021 of 2023) [2024] KEHC 13128 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13128 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
PETITION E021 OF 2023
S MBUNGI, J
OCTOBER 17, 2024**

BETWEEN

MAURICE MASIGA 1ST PETITIONER

ROBERT MUGASIA 2ND PETITIONER

AND

FERNANDES BARASA RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

PARLIAMENTARY SERVICE COMMISSION INTERESTED PARTY

JUDGMENT

1. On 17.10.2023, the petitioners herein, through their counsel filed an application under Certificate of Urgency on the following grounds: -
 - i. The respondent is the current governor of Kakamega County within the Republic of Kenya having been sworn into office on the September 15, 2022.
 - ii. The respondent is the former managing director of Kenya Electricity Transmission Company(KETRACO) before he unceremoniously resigned from office before the end of his tenure on 02.02.2022 following allegations of gross maladministration and misappropriation of public funds amounting to billions of tax payer money.
 - iii. The respondent blatantly refused to appear before the 1st interested party for investigations.
 - iv. The respondent has been previously summoned to appear before the 2nd interested party to answer to queries raised on the alleged fuds but instead chose to ignore the said summons.



- v. The petitioners urgently require an order of the court compelling the respondent to honor summons issued by the 2nd interested party to answer to queries on the loss of tax payers' funds amounting to billions of shillings.
 - vi. The petitioners urgently require a declaration of the court that the respondent is unfit to hold any other public office because he has grossly violated the constitution and other laws, and is guilty of gross misconduct.
2. Vide a substantive motion dated 16.10.2023, the petitioners sought that this court grant the following orders: -
- a. The petition be certified as of utmost urgency and service be dispensed with at the first instance.
 - b. That this Honorable Court be pleased to issue an order of mandamus compelling the Respondent to appear before the 1st and 2nd Interested parties to answer to queries on allegations loss of public funds pending hearing and determination of this suit.
 - c. That this Honorable Court be pleased to grant an order for the respondent to avail an updated statement of accounts to the 1st and 2nd Interested Parties up to the date of his unceremonious resignation from office as the managing director of Kenya Electricity Transmission Company (KETRACO).
 - d. That this Honorable Court be pleased to grant and order declaring the respondent unfit to hold a public office pending hearing and determination of the suit herein.
 - e. The cost of this Petition be borne by the Respondent.
3. The motion was supported by the following grounds: -
- i. The Petitioners noted overwhelming illegalities, irregularities and circumvention of the law that was done by the Respondent during his tenure at the Kenya Electricity Transmission Company Limited (KETRACO).
 - ii. The Respondent was appointed as the Managing Director of Kenya Electricity Transmission Company Limited (KETRACO) on 7th April 2016 with the mandate to implement the second five-year strategic plan as well as the new structure. He had served as Acting Managing Director & CEO since 1 August 2015. He was previously the Company's Chief Manager, Finance and Accounts.
 - iii. The Respondent served under the aforesaid capacity until Monday, 2nd February 2023 when he resigned hours before grilling by Members of Parliament in respect to mismanagement of public funds in KETRACO.
 - iv. The Petitioners have a leap of faith and believe in the Honorable Court to grant them relief sought hence this Petition.
 - v. The Respondent's acts of omission and blatant disregard of the law is an injustice against the applicants and to the taxpayers to who he had the mandate to deliver services to.
 - vi. The actions by the Respondent are geared towards robbing the citizens of the republic of Kenya on their hard-earned money paid in form of taxes in order to get improved services within the country.



- vii. The petitioners urge the Honorable Court to intervene and call the respondent to account as the respondent seems to ignore the fact that he grossly breached the provisions of the constitution which he ought to uphold and protect and within the scope of the said provisions.
 - viii. The Respondent has clearly misappropriated public funds and embezzled the same for his selfish gain and interest and just like all other culprits, he should and must be held accountable to the citizens of the Republic of Kenya.
 - ix. That the Petitioners are likely to suffer irreparable loss and damage if the orders sought herein are not granted.
 - x. It is fair and just that this application be allowed
 - xi. The Petition is brought in good faith.
 - xii. This Honorable court is seized with unfettered discretion to grant the orders sought.
4. The application was supported by an affidavit sworn by the 1st respondent, Maurice Masiga who stated that he is a human rights crusader under the aegis of Concerned Citizens Kenya – an advocacy and Human Rights defender lobby group.
 5. In his affidavit, the petitioner vastly laid out averments on the conduct of the respondent during the period he was working as the Managing Director at KETRACO.
 6. The constitutional foundation of the petition as submitted by the petitioners are articles 2(1),3(1),10, 27(1),27(2), 41(1),73, 226(5), 259(1) and article 22 as read together with article 258(1).

Facts of the Petition.

7. The petitioners stated that they noted overwhelming illegalities, irregularities and circumvention of the law that was done by the respondent during his tenure at the Kenya Electricity Transmission Company Limited(KETRACO).
8. The respondent was appointed as the Managing Director of KETRACO on 07.04.2016 with the mandate to implement the second five-year strategic plan as well as the new structure. He had served as acting Manager Director and CEO since 01.08.2015. He was previously the Company's Chief Manager, Finance and Accounts.
9. The respondent served under the aforesaid capacity until 02.02.2023 when he resigned hours before grilling by Member of Parliament in respect to mismanagement of public funds in KETRACO. The petitioners stated that they noted with great concern the lack of transparency at the firm leading to the payment of Kshs. 12.6 Billion to contractors over stalled and or cancelled projects. The petitioners stated that the firm under the leadership of the respondent paid up to Kshs.12.6 billion on four transmission lines: Lessos -Tororo, Bomet-Sotik, Mwingi-Kitui-Wote-Sultan Hamud, Nanyuki-Nyahururu-Olkaria.
10. The petitioners averred that project reports submitted to the auditor general indicated that Kshs 3,976,801,443/= was paid to contactors in respect to Bomet-Sotik, Mwingi-Kitui-Wote-Sultan Hamud, Nanyuki-Nyahururu-Olkaria transmission lines for contracts that were terminated.
11. The petitioners averred that the company in 2016 had spent up to Kshs.8.7 billion on the Lessos-Tororo line which later stalled after the contract was prematurely terminated leading to legal battles between the company and the contracting company. They submitted that in auditor general's report on the financial year 30th June 2020, a loan related to the contraction of Kamburu-Meru transmission



was transferred from Kenya Power And Lighting Company (KPLC) to Kenya Electricity Transmission company (KETRACO), on 19th October 2016 and as per the novation agreement, KETRACO was required to make bi-annual payments to the government of Kenya on account of outstanding interest at a rate of 2.5% per annum. The respondents stated that at 30th June 2020, the outstanding loan stood at Kshs. 2.55 billion or thereabouts and no payments had been made to the government which was a total breach of the novation agreement.

12. The petitioners averred that the Respondent facilitated the loss of Kshs. 18 Billion in the Marsabit Wind farm and the Loiyangalani-Suswa high voltage transmission line projects and part of the lost money included a payment of Kshs. 10.8 million that was paid to a company that immediately went into bankruptcy, occasioned by the failure of KETRACO to conduct financial due diligence as provided under section 68(1) of the PPDA Act of 2015.
13. The petitioners submitted that taxpayers, through the respondent lost the billions of shillings through his deliberate omissions and commissions, which led to delayed completion of the transmission lines which would have been beneficial to the citizens.
14. The petitioners stated that the respondent on diverse dates appeared before the Interested Party pursuant to a National Assembly's Public Investments Committee (PIC) report that called for further investigations on how KETRACO lost Kshs. 18 billion in the Marsabit Wind farm and the Loiyangalani-Suswa high voltage transmission line project under the watch and stewardship of the Respondent which report indicates that the Respondent led to the loss of taxpayers' money amounting to Kshs. 18 billion. The Petitioners stated that the money was paid to the investors behind the Lake Turkana Wind Power project after delays to connect the firm to the national grid once it was ready to start generation. The Kshs.18.4 billion was paid as penalties in the form of Deemed Generated Energy between May 2017 and September 2018 according to evidence adduced to the PIC Committee. As a result, the petitioners averred that the PIC recommended investigations against the Respondent for breach of contract management including failure to acquire transmission line way leaves on time and delay in signing additional contracts with the contractors who eventually built the power lines. The petitioners stated that PIC also recommended that the Respondent be held accountable for failure to conduct an independent risk analysis for the project. The Respondent further stated that according to the PIC, the breaches had delayed completion of the transmission line and exposed taxpayers to the delay penalties as stipulated in the contract with the wind farm investors.
15. The petitioners averred that records showed that the Respondent received an amount of Kshs. 19,836,802/= from the Ministry of Energy. However, records from the Ministry reflected an amount of Kshs.10,831,798,269/= resulting to an unexplained variance of Kshs.9,005,004,000/= . Further, the statements of profit or loss and other comprehensive income reflects amortized grant from Government income amounting to Kshs.2,192,104,000/= which differs with the current grant amortization reported in the previous year as grant income to be amortized over 12 months of Kshs.2,233,745,000/= resulting to an unexplained variance of Kshs.41,641,000/= . In the circumstances, the accuracy of grants receipts and amortized grant income thereof could not be confirmed.
16. The petitioners stated that the Auditor General's report showed that there was unsupported VAT Payable, averring that the statement of financial position as at 30th June, 2021 reflected trade and other payables balance of Kshs. 18,069,482,000/. However, the balance includes, VAT payable output tax amounting to Kshs. 1.163.953.516/= that was not supported by VAT returns duly acknowledged by Kenya Revenue Authority and therefore the accuracy and completeness of the VAT payable of Kshs.1,163,953,516/= could not be confirmed.



17. In respect to Undisclosed Amounts Due To Kenya Electricity Generating Company Limited, the petitioners stated that the statement of financial position as at 30th June 2021 reflected trade and other payables of Kshs. 18,069,482,000/=. However, the amount excluded a balance of Kshs.4,481,056,467/= in respect of transmission lines that were done during the financial year 2008/2009 or earlier by Kenya Electricity Generating Company (KenGen) and which were used in the furtherance of KETRACO'S business for revenue generation. Although KETRACO continued to generate revenue from the transmission lines, there was no evidence provided to indicate that they have been included as part of the plant, property and equipment. Further, although the transmission lines were financed through a loan, the Respondent had not recognized any interest charged on this loan since the takeover of the lines. Under the circumstances, the Auditor General noted the accuracy and completeness of the payables balance of Kshs. 18.069.482.000/= could not be confirmed.
18. On Trade and Other Receivables, the petitioners averred that the statement of financial position reflected trade and other receivables of Kshs.9,726,373,000/= which is net of amounts due from related parties balance of Kshs.3,911,771,000/=. Review of the financial records revealed unsupported adjustments of Kshs. 143,123,044/= and Kshs.1,169,443,245/= in respect of advance payments and litigation costs receivables respectively. Further, included in the trade receivables are balances of Kshs. 1,630,895,645/=,
19. Further, the petitioners stated supporting documents for Kshs.3,392,580,798/= and Kshs.1,008,597,136/= in respect of advance payment, litigation cost receivable and assets under construction advance payment respectively, were not provided for audit. In addition, supporting schedule for trade and other receivables includes VAT input receivable of Kshs.1,302,920,502/= that was not supported by VAT returns duly acknowledged by KRA. Under the circumstances, the accuracy and completeness of the receivables balance of Kshs.9.726.373.000/= could not be confirmed.
20. Further, they averred that amounts Due from Kenya Power and Lighting Company Limited reflected outstanding balances arising from services rendered to Kenya Power and Lighting Company Limited (KPLC) of Kshs.5,897,754,000/=. However, KPLC records indicated a balance of Kshs.5,546,379,000/= resulting in a variance of Kshs.351,375,000/=. Report of the Auditor-General on Kenya Electricity Transmission Company Ltd for the year ended 30 June, 2021. In addition, there was no evidence of a payment plan from KPLC for the outstanding amounts at the end of the financial year under review. In the circumstances, the full recoverability of the amounts due from Kenya Power and Lighting Company Limited could not be ascertained.
21. They submitted that the Auditor General's report on Unsupported Subsistence Allowances stated that the statement of profit or loss and other comprehensive income for the year ended 30 June, 2021 reflected administration costs of Kshs. 1,520,724,000/= which included other operating expenses amounting to Kshs.141,844,983/= in respect of subsistence allowances-domestic, subsistence allowance-Staff travel expense and subsistence allowances-International travel. However, the expenditure was not supported with the details of the activities, dates of the activities, approved work plans, boarding passes, copies of passports and evidence of surrender of imp rests.
22. The petitioner averred that Kshs. 141,844,983/= on other operating expenses could not be confirmed. Unaccounted for Grants the statement of financial position provided by the Respondent reflected recurrent grants of Kshs.6,816,300,000/= received from the Ministry of Energy. However, the Respondent did not provide documents to support how grants amounting to Kshs.3,407,118,173/= were accounted for. Further, review of the financial records revealed that the Nanyuki-Isiolo-Meru project was allocated an amount of Kshs.100,000,000/= during the year under review but only amount of Kshs. 59,429,226/= was incurred. However, records provided for audit indicated that the project



was completed in the year 2014. The Respondent did not explain why the project was allocated funds, yet it had been completed. In addition, it was noted that an amount of Kshs.2, 2522, 000/= was disbursed to four (4) projects that had no activities and the funds could not be accounted for. In the circumstances, the accuracy of expenditure on recurrent grants of Kshs.3, 407.118.173/= could not be confirmed.

23. The petitioners averred that the Respondent being aware of looming danger cunningly stepped down on a Monday when he was expected to appear before the National Assembly Public Investments Committee (PIC) on Tuesday 3rd February, 2023 having sufficient knowledge that his contract was due to end in April the same year 2023.
24. On account of his resignation and subsequent election as the Governor of Kakamega County, the petitioners stated that the respondent has totally ignored and failed to honor summons to appear before the parliamentary service commission to answer and clarify sensitive issues raised in the auditor's report.

Legal Foundation

25. The petitioners stated that by mismanagement of public funds, the Respondent is in violation of Article 232 of *the Constitution* on values and principles of public service that requires efficient, effective and economic use of resources.
26. By neglecting to respond to queries of PIC Committee and other well-meaning citizen such as the petitioner, the Respondent Violated Article 232, 70. (e) and (f) of *the Constitution* which enjoins state organs to be accountable for administrative acts and to ensure transparency and provision of timely, accurate information.
27. By willfully disregarding advice and recommendations of the PIC Committee, the Respondent violated the principles of the rule of law and good governance which are values articulated in Article 10(2) of *the Constitution*.

Respondent's Replying Affidavit.

28. The respondent vide a replying affidavit dated 07.02.2024 stated that he had been previously sued over the same events by a petitioner alleging membership to the petitioners' entity called Concerned Citizens Kenya and the same was wholly withdrawn on 02.09.2023 at the consent of the parties.
29. The respondent stated that the petition herein is an attempt at reinstating the withdrawn petition through the backdoor and that the said entity is a ring run by his political enemies through filing of suits devoid of the public interest and solely with intent to blackmail the respondent.
30. The respondent averred that he had personally never been investigated by the Ethics and Anti-Corruption Commission(EACC) and charged over events relating to his tenure at KETRACO, seeking that the petition herein was instituted in bad faith and should be struck out with costs.
31. The court directed that the petition be canvassed by way of written submissions.
32. The petitioners did not file submissions.
33. The interested parties never participated in the matter.



Respondent's submissions.

34. Vide his submissions dated 26.03.2024, the respondent submitted that the petition is premature as the petitioners herein sought for a declaration that the respondent committed acts of corruption and embezzlement of public funds while at the same time contradictorily praying for an order of mandamus to compel the interested parties to criminally investigate and if culpable instruct the DPP to criminally prosecute the respondent for the alleged violations.
35. On whether the petition is enable in the manner advanced, the respondent submitted that this court is divested of jurisdiction for purposes of determining the issues in contest and the same should have been lodged at the anti-corruption and economic crimes division of the High Court and not this Constitutional Division. The respondent further submitted that he has never been under personal investigations by the 1st Interested Party.
36. The respondent further submitted that the 1st petitioner had not demonstrated any authority whatsoever to sue on behalf of the 2nd petitioner as required under Order 2 Rule 13(1) and (2) of the Civil Procedure Rules, rendering the 2nd petitioner's claim inconsequential and a candidate for dismissal.
37. The respondent submitted that the affidavit in support of the petition is defective as the petitioners cannot of their own knowledge prove the serious accusations made in the supporting affidavit, and did not annex any documentary evidence to their affidavit in support of the petition citing the case of James Ndung'u Kero vs Chief Land Registrar, Director of Survey & Attorney General (Environment & Land Case E046 of 2021)[2022] eKLR.
38. The respondent also submitted that the interested parties have been wrongfully enjoined citing Trusted Society of Human Rights Alliance vs Mumo Matemu & 5 others (2014) eKLR.
39. On whether this petition is an abuse of the process of the court, the respondent submitted in the positive, stating that the petition herein is a replica of a similar withdrawn petition instituted in the interest of a common entity called the Concerned Citizens Kenya seeking similar prayers, urging the court to dismiss the same with costs.

Analysis and Determination.

40. I have looked at all the material placed before me. I note that the petitioner never filed submissions. Therefore, this determination has been made without the assistance of the petitioners' submissions.
41. The issue for determination is whether the petitioners have made out a case to warrant the court to grant the prayers sought.
42. The respondent, in his submissions submitted that this court did not have the jurisdiction that the matter should have been filed before the High Court anti-corruption and economic crimes division in Nairobi and not before this court sitting as a constitutional court.
43. The respondent relied on the case of Pius Wanjala Vs Ethics And Anti-corruption Commission; Sicily Kariuki, Cabinet Secretary Ministry Of Health And Another (2021) eKLR where the court held as follows: -

“...15. The petition before this court is not brought by an employee against his employer. It is brought by a suspect of alleged criminal offence against an independent commission mandated to by law to investigate the alleged criminal offences. The primary issue in the



petition is not the employment relationship but the investigations of the employees work related misconduct by a third party as opposed to the employer.

18. Having found that the dispute herein is not between employer and employee, that the primary issue is not employment, and that nothing in law bars institution of criminal investigation and/or proceedings against an employee who is suspected of having committed criminal offence, I find and hold that this court lacks jurisdiction to determine the petition herein.

24. Having considered the Gazette Notices published by the Honorable Chief Justice to establish the Anti-Corruption and Economic Crimes Division of the High Court, and set out its mandate and upon considering the Petition filed by the Petitioner, I am satisfied that the Petition is the proper substance for determination by the Anti-Corruption and Economic Crimes Division of the High Court which has the mandate to hear and determine the same...”

44. Article 165 of *the Constitution* of Kenya provides for the jurisdiction of the High Court as follows: -
the High Court shall have--

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of--
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.
- (4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
- (5) The High Court matters—
 - (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution;
or



- (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
45. As per the Gazette Notice No.10263 issued in the year 2016, the Hon. Chief Justice gave directions as follows: -

Practice Directions For The Anti-corruption And Economic Crimes Division Of The High Court

In Exercise of the powers under section 5 of the *Judicial Service Act* No. 1 of 2011, and section 16 of the *High Court (Organization and Administration) Act*, No. 27 of 2015, it is notified for the information of the general public that in the interest of the effective case management and expeditious disposal of cases in the Anti-corruption and Economic Crimes Division of the High Court, the Chief Justice makes the following Practice Directions:

Application

1. These Directions shall apply to Anti-Corruption and Economic Crimes Division established in the High Court of Kenya.
 2. All new cases relating to corruption and economic crimes shall be filed in the Principal Registry of the Division at Nairobi for hearing and determination.
46. From the reading of article 165 of *the Constitution*, the High Court has jurisdiction over any matter touching on integrity of a public or state officer brought under any statute or any article of *the constitution* regardless of where it is sitting. However, in view of the practice directions given by the Chief Justice in gazette notice No. 10263 of 2016, for organized and proper management of the hearing of such cases, it is always prudent to file them at the Principal Registry of the Anti-Corruption and Economic Crimes High Court Division in Nairobi for hearing and determination.
47. The respondent also raised the issue whether the 1st petitioner had authority of the 2nd petitioner to sue on his behalf. I have looked at the pleadings. I have not seen any such authority which is contrary to Order 1 Rule 13(1) & (2) of the Civil Procedure Rules 2010 which imposes a mandatory obligation on any party intending to sue on behalf of another in the following manner:
- “(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.
 - (2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”
48. Thus the 2nd petitioner’s petition is a nonstarter. The same is dismissed ab initio with costs to the 1st respondent.



49. The 1st respondent attacked the affidavit in support of the petition saying that it was defective. He cited order 19 rule 4 of the Civil Procedure Rules which states “Every affidavit shall state the description, true place of abode and postal address of the deponent, and if the deponent is a minor shall state his age” and submitted that the affidavit sworn by the 1st petitioner did not include the postal address of the deponent.

50. To buttress that submission, he cited the case of Halima Bare & 13 Others -vs- Maendeleo Ya Wanawake Organization [2004] 1 eKLR where the court found and held that:

“The deponents’ description is an important part of an affidavit... Order 18 rule 4 provides that:

“4. Every affidavit shall state the description, true place of abode and postal address of the deponent and if the deponent is a minor shall state his age.”

Clearly demonstrated by the above is that describing the deponent as a party in the proceedings is not enough nor is the address of the legal counsel adequate. The postal address must be that of the deponent, a feature which, is absent in all the affidavits under scrutiny. ... the affidavit of Lorna Matewa does contain matters of hearsay and fails to disclose the source of information of matters which she herself is not capable of proving. I consider the defects herein to be major. The irregularities herein are not restricted to the form but go to the evidential value of the affidavits themselves. In view of the gravity of the defects and omissions herein I would not even think of a possibility of receiving the affidavits filed herein, which must be struck off and expunged from the record.”

51. Order 19 rule 3 of the Civil Procedure Rules 2010 provides as follows: -

“

“(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents, shall (unless the court otherwise directs) be paid by the party filing the same.”

52. The respondent further cited the case of Lames Ndung’u Kero -vs- Chief Land Registrar, Director Of Survey & Attorney General (Environment & Land Case E046 of 2021) [2022] KEELC 1446 (KLR) (16 February 2022) (Ruling) where it was held that:

“The purpose and import of a supporting affidavit are to explain, clarify, expound, illustrate in greater detail the facts relied on in an application. Further, it introduces evidence in support of the depositions in it in form of annexures. The intention and purpose of a supporting affidavit is to bring out a nexus between the prayers and the grounds an application as well as to introduce documentary evidence to prove facts that are asserted by the applicant.”

53. I have looked at the affidavit sworn by the 1st petitioner in support of the petition. The 1st petitioner does not aver that the averments contained in his affidavit are known to him as a fact, neither does



he disclose the sources of the information he avers in the affidavit. He has not attached any single document to prove his averments. Therefore, I agree with the 1st respondent's assertions that the affidavit is defective. It does not meet the tests set under the *Oaths and Statutory Declarations Act* Cap 15. I thereby strike off the affidavit in support of the petition. This follows that if the affidavit is struck off, the petition cannot stand.

54. Nevertheless, I proceed to consider the other issues raised by the 1st respondent. The 1st respondent submitted that the interested parties were wrongfully enjoined in the petition for no leave of the court was sought. He referred the court to the following: -

In *James Dung'u Kero -vs- Chief Land Registrar, Director Of Survey & Attorney General (Supra)* the court held that:

“the learned state counsel introduced three (3) interested parties to the suit... The Attorney General did not seek leave of the court to introduce them as parties to the suit. It was un-procedural to do so. order 1 rule 10 of the Civil Procedure rules and rules 2 and 7 of *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (*Legal Notice No 117 of 2013*) provide for the manner of joinder of persons wishing to be introduced as interested parties to suits. What the Attorney-General did in this process was nothing but backdoor ushering of parties into a suit. Therefore, they are improperly enjoined as parties to the suit. Enjoinment of parties is not as of right.

To make the matter clear, an interested party was defined in the case of *Trusted Society of Human Rights Alliance o Mumo Matemu & 5 others* [2014] eKLR, where the court stated as follows: “...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 or she herself appears in the proceedings, and champions his or her cause...” 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.

Persons wishing to be enjoined as interested parties should satisfy the criterion set out in the above case and buttressed by the Supreme Court in *Francis Kariuki Muruatetu & another o Republic & 5 others*, *Petition 15 as consolidated with 16 of 2013* [2016] eKLR.”

55. The other issue raised by the 1st respondent is that the petition was an abuse of the process of the court for a similar petition had been filed against him by a person from the same entity; that is ‘Concerned Citizens Kenya’ which was withdrawn by consent. The petition was based on similar allegations like



the instant one and also sought similar prayers. On this one, I will differ with the 1st respondent. This petition and the withdrawn petition were not brought on behalf of Concerned Citizens Kenya. The petitioners stated that they work under Concerned Citizens Kenya. Anyone working under the organization can file a petition on their own and individual capacity.

56. I have looked at the prayers sought. Prayer (a), (b), and (d) can only issue upon presentation of evidence to the court's satisfaction by a petitioner. In this case the petitioner has not provided any evidence to prove the allegations contained in his petition.
57. On prayer (c), the 1st interested party and the Director of Public Prosecution have their mandate set out in *the constitution* and enabling statutes, and the court cannot compel them to discharge their mandate. The petitioner, like any other citizen has a right to make a complaint with the two institutions for their action.
58. The upshot of the above, the petition is found to be devoid of any merit. The same is dismissed. Costs to the 1st respondent.
59. Right of appeal 30 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 17TH DAY OF OCTOBER, 2024.

S.N MBUNGI

JUDGE

In the presence of :

Mr. Seith holding brief for Mr. Seleka for Mr. Lutta for the 1st respondent.

Petitioners – absent

Ms. Jinai for the petitioners absent.

Court Assistant – Elizabeth Ang'onga

