



**Abib t/a Abib and Associates Advocates v Director of Public Prosecution & 3 others; Law Society of Kenya (Interested Party); Sheik & 2 others (Intended Interested Party) (Petition 160 of 2019) [2023] KEHC 722 (KLR) (Constitutional and Human Rights) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 722 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CONSTITUTIONAL AND HUMAN RIGHTS**  
**PETITION 160 OF 2019**  
**HI ONG'UDI, J**  
**FEBRUARY 9, 2023**

**BETWEEN**

**ZAMZAM ABDI ABIB T/A ABIB AND ASSOCIATES**  
**ADVOCATES ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... 1<sup>ST</sup> RESPONDENT**  
**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 2<sup>ND</sup> RESPONDENT**  
**CHIEF MAGISTRATE'S COURT (MILIMANI LAW COURT) ..... 3<sup>RD</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**LAW SOCIETY OF KENYA ..... INTERESTED PARTY**

**AND**

**SALIM ALI SHEIK ..... INTENDED INTERESTED PARTY**  
**URBAN SOLUTIONS REAL ESTATE LTD ... INTENDED INTERESTED PARTY**  
**HALAL MEAT PRODUCTS LTD ..... INTENDED INTERESTED PARTY**

**RULING**

1. Before this Court are three applications for joinder by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> intended interested parties. The respondents herein were not opposed to the applications.



2. By way of a Notice of Motion application dated July 2, 2019 filed pursuant to Order 10 Rule 1 of the [Civil Procedure Rules 2010](#), Section 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law, the 1<sup>st</sup> intended interested party seeks the following orders:

- i. Spent.
- ii. That this Honourable Court be pleased to enjoin Salim Ali Sheikh, the applicant as an interested party in the instant petition.
- iii. That the costs of the application be in the cause.

The application is supported by his affidavit of even date and grounds on the face of the application.

3. He deposed that he has an interest in this matter having assisted the petitioner in a transaction which involved compensation by the National Land Commission. He entered into an undertaking dated November 30, 2018 with the petitioner. Payments were to be made to him, after a successful compensation award which he had pursued on behalf of the petitioner.

4. Despite the undertaking for remittance of Kshs 21,000,000/= to him, a cheque issued to him on January 29, 2019 was not honoured. He therefore reported the matter to the Police. As soon as the petitioner was summoned by the police, she filed this Petition. He avers that he is a crucial party in these proceedings.

5. By way of a Notice of Motion application dated August 19, 2019 filed pursuant to Order 10 Rule 1 of the [Civil Procedure Rules 2010](#), Section 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law, the 2<sup>nd</sup> intended interested party seeks the following orders:

- i. That this Honourable Court be pleased to enjoin the Urban Solutions Real Estate Ltd, the applicant as an interested party in the instant petition.
- ii. That the costs of the application be in the cause.

The application is supported by Fathudin Ali Mohamed, the 2<sup>nd</sup> intended interested party director's affidavit of even date and the grounds on the face of the application.

6. It was deposed that the petitioner represented the 2<sup>nd</sup> intended interested party and Halal Meat Products in lodging the twin compensation claim from the National Land Commission for the properties known as Ngong/Ngong/2221, 2628 and 2629 which were acquired compulsorily for construction of the Standard Gauge Railway. That after everything was done he advanced Halal Meat Kshs 100,000,000/= which was secured by transfer of Ngong/Ngong/2221 by Halal Meat to it.

7. The 2<sup>nd</sup> Intended interested party allegedly paid Kshs 4,883,500/=. It was later realized that the money was never used for the intended purpose. Upon this realization the 2<sup>nd</sup> intended interested party lodged a complaint with the police for investigation.

8. By way of a Notice of Motion application dated October 29, 2021 filed pursuant to Order 10 Rule 1 of the [Civil Procedure Rules 2010](#), Section 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law, the 3<sup>rd</sup> intended interested party seeks the following orders:

- i. That this Honourable Court be pleased to enjoin the Halal Meat Products Limited, the applicant as an interested party in the instant petition.
- ii. That the costs of the application be in the cause.



The application is supported by Zainabu Mohammed, the 3<sup>rd</sup> intended interested party director's affidavit of even date and the grounds on the face of the application.

9. It was deponed that the 3<sup>rd</sup> intended interested party has proprietary interest over property Ngong/Ngong/2221 contrary to what the 2<sup>nd</sup> interested party has deponed. It's her averment that indeed the 3<sup>rd</sup> intended interested party is the registered proprietor of the said property.
10. In response to the application by the 1<sup>st</sup> intended interested party dated July 2, 2019 the petitioner filed a replying affidavit dated October 4, 2019. She denied all the allegations saying the claim was purely a civil dispute pending before the Commercial Division HCC No. 91 of 2019 (OS). She denied ever seeking the applicant's assistance in obtaining the compensation claim. That the professional undertaking was discharged since the promises of payment by the National Land Commission were never fulfilled. Further that the order sought in the petition do not affect the applicant.
11. In response to the 2<sup>nd</sup> interested party's application dated August 19, 2019, the petitioner filed a replying affidavit dated October 4, 2019. She equally denied all the allegations arguing that the applicant had no locus in the matter as the deed dated May 20, 2016 was a forgery, and her firm never issued it. Furthermore the claim of Kshs 100,000,000/= was neither here nor there. She denied representing the applicant.
12. In response to the 3<sup>rd</sup> intended interested party's application dated October 29, 2021 she filed grounds of opposition dated May 10, 2022. In the grounds she states that the addition of all the applicants has no probative value. The same is intended to dissuade the Court from determining the real issues and causing unnecessary delay. That the same is incompetent and an abuse of the Court process.

#### **The interested party's case**

13. The interested party in response, opposed the 1<sup>st</sup> intended interested party's application through the following grounds of opposition dated October 16, 2019:
  - i. The application is an afterthought, bad in law, a waste of judicial time and undermines the constitutional imperative of timely resolution of disputes by courts of law.
  - ii. The intended interested party has failed to demonstrate the exceptional circumstances that would warrant its joinder. This is since joinder is not automatic based on the fact it lodged the complaint with the 2<sup>nd</sup> respondent.
  - iii. The intended interested party has no stake in the proceedings as will not be affected by the decision of the Court.
  - iv. The intended interested party has not demonstrated a clearly identifiable and proximate interest in the case and so no prejudice will be suffered in the event of non-joinder.
  - v. The intended interested party does not fall within the definition of an interested party as defined in the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*.
  - vi. The application is frivolous and incompetent as it does not disclose the constitutional provision it is brought under.

It relied on the same grounds in opposing the 2<sup>nd</sup> intended interested party's application.



## Submissions

14. The 1<sup>st</sup> intended interested party did not file any submissions.

### The 2<sup>nd</sup> intended interested party's submissions

15. In support of his application, this party filed written submissions dated October 22, 2019 through the firm of S.O. Owino & Associates Advocates. Counsel submitted that the issues for determination to be:
- i. Whether the intended interested party had an identifiable stake in the matter.
  - ii. Whether non-joinder will cause prejudice to the intended interested party.
  - iii. Whether the issues raised by the petitioner are different from those raised by the intended interested party.
16. On the first issue, Counsel answered in the affirmative, stating that the petition is premised on the interested party's complaint as lodged with the 2<sup>nd</sup> respondent. He submitted that the orders sought in the petition were geared towards stopping the 2<sup>nd</sup> respondent from carrying out investigations into the complaint hence their grant would highly prejudice the intended interested party. He therefore submitted that the interested party has a stake in the matter which is capable of protection as held in the case of *Trusted Society of Human Rights Alliance v Mumo Matemu* (2014) eKLR. He equally relied on the case of *Civicon Limited v Kivuwatt Limited & 2 others* (2015) eKLR in support. He urged the court to allow the application to settle all issues in the matter.
17. On the second issue, Counsel submitted that owing to the case made out, non-joinder of the interested party would be highly prejudicial to the party. He finally submitted on the third issue stating that the petitioner had failed to disclose facts concerning the petition such as the Ksh 4,883,500/= which is said to have been obtained by false pretenses by the petitioner.
18. In further submissions dated June 8, 2022, counsel while relying on the *Black's Law Dictionary*, 9<sup>th</sup> Edition's definition of an interested party stated that it is one who has a recognizable stake in the matter. Further that the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules adds that this party should either have an identifiable stake in the suit or duty in the proceedings.
19. According to Counsel the 3<sup>rd</sup> intended interested party does not qualify as a necessary party in the instant suit. In support of this position he cited the case of Kenya Medical Laboratory Technicians and Technologists Board & 6 others (supra) that affirmed this argument. Similar reliance was placed on the Supreme Court case of Communications Commission of Kenya (supra). Counsel as such argued that the intended interested parties had failed to demonstrate a clear and identifiable interest in the pending suit and also failed to meet the set requirements.

### The 3<sup>rd</sup> intended interested party's submissions

20. The firm of Mutonyi Mulama and Company Advocates on behalf of the 3<sup>rd</sup> intended interested party filed written submissions dated February 18, 2022. Counsel noted that the only issue for determination was whether the Court should enjoin this party as an interested party. He submitted with reference to the impugned property Ngong/Ngong/221 that any orders issued by this court would affect the said property and in turn its client. On this premise, Counsel stated that the 3<sup>rd</sup> intended interested party was a necessary party to enable this Court make a definitive decision in its determination.



21. In support of this point, Counsel relied on the Court of Appeal case of *Pravin Bowry v John Ward & another* (2015) eKLR where it was held that a party may be joined in a suit because the party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause. Similar reliance was placed on the cases of: (i) *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* (2017) eKLR (ii) *Communications Commission of Kenya and 4 others v Royal Media Services Ltd & 7 others* (2014) eKLR.
22. On whether the intended interested party would suffer prejudice if not enjoined, Counsel submitted that indeed the party would suffer prejudice, since it had an interest in the impugned property and would be directly affected if the orders sought are granted.

### **The Petitioners submissions**

23. The petitioner through the firm of Abib and Associates Advocates filed written submissions dated February 18, 2020 in response to the 1<sup>st</sup> and 2<sup>nd</sup> intended interested parties' application. Counsel begun by stating that the petition relates to the violation of the petitioner's rights by state agencies being the 1<sup>st</sup> and 2<sup>nd</sup> respondents while the intended interested parties are merely complainants against the petitioner which is unrelated.
24. She submitted that for the interested parties' application to succeed they were required to demonstrate their interest in the petition, the prejudice they stood to suffer if not enjoined and the new issues that they would raise. In view of these three elements counsel submitted that the intended interested parties had not satisfied the elements for joinder in the instant petition. He urged this Court to dismiss the applications.

### **Analysis and determination**

25. I have considered the three applications and submissions of the parties and in addition the documents and authorities cited. The only issue raised for determination is:
 

Whether the intended interested parties/applicants have satisfied the need for joinder in the instant petition as interested parties.
26. The guiding principles upon which Courts make findings on an application for joinder of interested parties are now fully settled. I appreciate that the parties have highlighted and relied on the relevant law and authorities that outline the principles required to be fulfilled in answering the question before this Court.
27. The law for joinder of interested parties for *Constitutional petitions is set forth in the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 referred to as the Mutunga Rules*. The Mutunga Rules under Section 2 define an 'interested party' as:
 

'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'.
28. The Supreme Court in the case of *Trusted Society of Human Rights Alliance*(supra) echoed this principle by stating as follows:

“ 18. Consequently, 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...”

29. The addition of a joinder such as an interested party is provided for under Rule 5 (d) (ii) of the *Mutungu Rules*. It states that:

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 just—

- (ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

30. The applicable principles in an application for joinder as an interested party were set out in the Supreme Court decision of *Francis Kariuki Muruatetu Ltd & Another V Republic & 5 others* (2016) eKLR where it underscored the principles as follows:

- 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.

31. Furthermore, at Paragraph 41, the Supreme Court noted as follows:

“(41) Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties’ before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.”

32. To be joined as an interested party is therefore not a matter of right and neither is it automatic. Any joinder to, or appearance in proceedings is discretionary and each case must be examined on its own merits and circumstances as against the set principles. In every application for joinder the paramount consideration for the Court will be the interest of the primary parties.

33. In the instant case, the applicants maintained that the intended criminal investigation and prosecution thereof of the petitioner was premised on the following:

- i. A defaulted payment to the 1<sup>st</sup> intended interested party owing to a professional undertaking entered into with the petitioner for the payment of Ksh 21,000,000.



- ii. The claim by the 2<sup>nd</sup> intended interested party of advancing Halal Meat Ksh 100,000,000 which was secured by transfer of Ngong/Ngong/2221 to the party. Moreover, the claim that the petitioner obtained by false pretenses Ksh 4,883,500 for the legal service of the transfer which was never effected.
  - iii. The 3<sup>rd</sup> intended interested party's claim that the transfer of Ngong/Ngong/2221 to the 2<sup>nd</sup> intended interested party was a false allegation as it is the sole registered owner of the property. Further that the advancement of Ksh 100,000,000 was also false.
34. The applications were not contested by the respondents. On the flipside the petitioner and the interested party opposed the applications terming the intended interested parties as unnecessary busy bodies who had not satisfied the requirements for joinder as interested parties. The question that begs an answer is whether the applicants have satisfied the set principles for them to be allowed to join the proceedings as interested parties. The key words in the applications and supporting affidavits is that the petitioner's and respondents' case is as a result of the interested parties' complaints hence making them necessary parties. It is the applicants' case similarly that they will be affected by the outcome of these proceedings and therefore ought to participate in the suit.
  35. Considering the applications as they stand, it is clear that the stake or interest of the applicants in the matter was not disclosed. It is not stated how the decision in this case will affect them. In my considered opinion, the applicants' case is generally based on an emphasis of independent bodies mandate and conjecture of what may happen if the orders sought in the petition are granted.
  36. A perusal of the instant petition makes it clear that the case is brought against the 1<sup>st</sup> and 2<sup>nd</sup> respondents owing to their mandate as investigative and prosecutorial bodies. The contention in the petition is based on violation of the petitioner's constitutional rights by the respondents. Although the intended interested parties may have instigated the 1<sup>st</sup> and 2<sup>nd</sup> respondents' processes, there is no link between the petitioner's prayers and the intended parties need to be enjoined in the suit.
  37. It is imperative to state that the intended interested parties claim as drafted, forms part of the heart of what will be the 1<sup>st</sup> and 2<sup>nd</sup> respondent's case in the trial Court if successful. The instant petition is not concerned with whether the intended criminal investigations and prosecution are right or wrong or will be successful. It is concerned with whether the petitioner's rights were violated by the 1<sup>st</sup> and 2<sup>nd</sup> respondent's in carrying out their mandate. As guided by the Supreme Court in the case of *Francis Kariuki Muruatetu Ltd* (supra) this Court in reaching its decision should be mindful of the primary party's case and how it will be affected by such an application.
  38. Will this Court be able to reach a definitive determination in the petition without the intended interested parties? The answer is yes. As explained above there is no dispute as between the 1<sup>st</sup> and 2<sup>nd</sup> respondents' mandate and the complaints that were made by the intended interested parties. Evidently the two are independent of each other. In view of this, the inclusion of the applicants in this case will not add any value to the arguments of the primary parties. The applicants simply want to support the respondent's case without bringing any new information and submissions forth. In the circumstances, I am inclined to conclude that the applicants have not established the grounds for admission as interested parties, in this petition.
  39. The above being my finding I come to the conclusion that the applications for joinder dated July 2, 2019, August 19, 2019 and October 29, 2021 respectively lack merit and I dismiss them with costs.

Orders accordingly.



**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 9TH DAY OF FEBRUARY, 2023 IN  
OPEN COURT AT MILIMANI, NAIROBI.**

**H. I. ONG'UDI**

**JUDGE OF THE HIGH COURT**

