



CMMM (Suing as Mother and Next Friend of the Minors) v Kimanzi & another; Board of Management, Lukenya Schools/Lukenya Academy Board of Management, Moi Forces Academy, Lanet (Interested Party) (Children's Appeal Case E001 of 2022) [2023] KEHC 18577 (KLR) (5 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18577 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CHILDREN'S APPEAL CASE E001 OF 2022**

TM MATHEKA, J

JUNE 5, 2023

BETWEEN

**CMMM APPELLANT
SUING AS MOTHER AND NEXT FRIEND OF THE MINORS**

AND

**GEORGE NGUI KIMANZI 1ST RESPONDENT
GAPLINK INTERNATIONAL 2ND RESPONDENT**

AND

**BOARD OF MANAGEMENT, LUKENYA SCHOOLS/LUKENYA
ACADEMY BOARD OF MANAGEMENT, MOI FORCES ACADEMY,
LANET INTERESTED PARTY**

JUDGMENT

1. The 2nd Respondent, Gaplink International, filed a Chamber Summons in the Subordinate court in Children's Civil Case No E050 of 2020 dated 31st August, 2021 in which it sought leave to be enjoined as an interested party on the grounds that it is a nonprofit making organization registered in Kenya to operate nationally in the year 2008 by the NGO's Co-ordination Board and whose mandate is to help marginalized citizens overcome the socio-economic challenges through enhancing capacities; to demand and advocate for democratic governance, accountable and transparent leadership, prudence and equity in resource management; appropriate response to needs of special population and peaceful co-existence, security and humanity; that these are championed in key thematic areas of democracy and governance, human rights, gender, legal aid services, peace building and conflict management and sustainable livelihood programs; and that the interested party is conversant and aware of the facts of the



case as it has been offering psychological counseling and therapy to the minors virtually and through telephone calls.

2. The application was supported by an affidavit of Tom Mboya Ochieng sworn on 31st August, 2021 and was opposed by the Appellant through grounds of opposition dated 7th September, 2021 and a Replying Affidavit sworn by the Appellant, Caroline Mutwa Mwendu Mwinzi on the same date. The interested party also swore a Replying Affidavit in response to the grounds of opposition.
3. The Application was canvassed via written submissions. The lower court, vide its Ruling dated 31st January, 2022 found the Application merited and allowed it with no orders as to costs.
4. Aggrieved by the said Ruling the Appellant filed the instant appeal on grounds That:
 1. The trial court erred in law and in fact by finding and holding that Gaplink International be joined as interested party in the suit.
 2. The trial magistrate made an error in law by ignoring all legal provisions governing joinder of a party as an interested party.
 3. The learned magistrate erred in law by joining as interested party an organization which has no stake and/or interest in the proceedings and which will not be affected by the decision of the court when it is made regarding custody of the minors herein.
 4. The learned magistrate erred in fact and in law by ignoring solid evidence of conflict of interest as presented by the appellant and as admitted by Gaplink International, which evidence was sufficient to impeach the application for joinder.
 5. The learned magistrate erred in law and in fact by joining as interested party a defense witness whose only addition to the suit is a counseling report already produced by the defence in the proceedings.
 6. The learned trial magistrate erred in law and fact by failing to appreciate that nature of the proceedings before her and more so the fact the suit had already been determined and is only at execution stage. The joinder has the prejudicial effect of reopening an already closed case.
 7. The learned trial magistrate erred in law by misapplying the rules on joinder of parties to a suit and allowed the application thereby occasioning grave prejudice upon the appellant.
 8. The learned magistrate erred in law and in fact by attaching unreasonably high probative value to the alleged involvement of Gaplink International in offering counseling to the minors yet the court has unfettered powers to call for independent counseling and/or therapy for the minors from independent and qualified child therapist/counselors.
 9. The learned magistrate erred in law by ignoring the fact that the Deponent for Gaplink international did not attach an Authority to swear, plead and/or sign on behalf of the organization as provided for under Order 4 rule 1(4) of the *Civil Procedure Rules*, 2010.
 10. The learned magistrate erred in law by allowing the application despite falling short of the mandatory requirements of law as provided under Order 32 Rules (1)(3) & (5) *Civil Procedure Rules*, 2010
 11. The learned magistrate erred in law and in fact to appreciate the evidence placed before her showing that the application for joinder was fatally defective both in substance and in form.



12. The learned magistrate failed to take into consideration the admission by Gaplink International that they had initially represented the appellant in that same children's case.
 13. The learned trial magistrate erred in law by ignoring the principle that the interests of children are first and of paramount importance in all cases affecting them.
 14. The learned magistrate failed to appreciate the law vis-à-vis the material placed before her, all of which did not support the ruling made.
5. It was the Applicant's prayer that: -
1. The orders emanating from the ruling of Hon R Ombata (SRM) Joining Gaplink International as interested party in Children's Case No 50 of 2020 be set aside.
 2. Gaplink International be condemned to pay costs for their chamber summons application for joinder dated 31st August, 2021.
 3. Gaplink International be condemned to pay the costs of this appeal.
 4. Any other orders that this court may deem just and fit in the circumstances.

The appeal was canvassed through Written Submissions.

Appellant's Submissions

6. The Appellant submitted that the law on joinder as an interested party was solidified by the Supreme court in *Francis Karioko Muruatetu & Another v Republic & 5 others* [2016] eKLR where the court held that: -

“(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. Enjoinder 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:

1. 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.
2. 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.
3. 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.”

7. The Appellant relied on *Ephraim Kariuki Wambugu v National Land Commission & another; Njeru Wachira William (Proposed Interested Party)* [2021] eKLR where the court stated that the only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.
8. The Appellant also relied on *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others* [2014] eKLR where the court held inter alia that 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.
9. Counsel for the Appellant argued that the same principles apply in children matters as was restated in *In re NMH (Minor)* [2020] eKLR.
10. The Appellant submitted that the 2nd respondent does not meet the threshold to be enjoined as an interested party for the reasons that: -
 - # It has not shown any identifiable stake because it simply stated that their affiliate body conducted counseling of the minors which affiliation is denied for lack of a clear connection between the psychologist counseling, consortium and Gaplink International and that from the registration documents filed the two bodies are clearly distinct and separate.
 - # The 2nd respondent will not be affected by the decision of the court as they are not counterclaiming for custody.
 - # Its interest can be championed without them being made a party since the only thing they bring to the table is the alleged counseling report, which has already been filed in this suit. It was argued that there are other expert reports that have been filed in the case by children’s officers from Mwingi, Athi River and Nakuru. That those children officers are accredited experts in children matters and are within the reach of the children’s court for that purpose and further that the children’s court is empowered to call for its own independent report from an accredited child psychologist and therapist;
 - # and finally all the children herein are above 10 years of age and they can speak for themselves and the court has powers to interview them in order to reach a conclusion that will serve their best interest.
 - # The 2nd respondent will not be affected by the decision of the court.
 - # The 2nd respondent must not be a party for the court to make a determination of the issues in this suit.
 - # The 2nd respondent has not demonstrated any prejudice it will suffer if it is not made a party since the report it filed has hereinbefore been filed by 1st respondent.
 - # The appellant will suffer prejudice since the matter is at execution stage and will also incur unnecessary costs in defending the 2nd respondent’s application and the appeal.
11. It was the Appellant submissions that the 2nd respondent is in a position of conflict of interest. Why? Because it previously acted for the Appellant, then for the appellant’s husband (now deceased), then



the deceased's siblings who got hold of and filed the counseling report described by the appellant in her Replying Affidavit and which Counselor's Report was produced by the 1st respondent. It is argued that these circumstances make it a potential witness who may be required to appear before the children's court as the 1st respondent's witness. By joining it as an interested party simply complicates and will cause further delay of the matter.

11. The Appellant's Counsel argued that Application for joinder is fatally defective for want of authority to swear, plead and/or sign on behalf of the Organization as provided for under Order 4 Rule 1(4) of the [Civil Procedure Rules](#), 2010 and falls short of the mandatory requirements of the Law as provided under Order 32 Rules (1) - (5) of the [Civil Procedure Rules](#).
13. It was the Appellant's prayer that the Appeal be allowed with costs.

1st Respondent's Submissions

14. On the 1st, 2nd, 3rd, 13th and 14th Grounds of Appeal, Counsel for the 1st respondent submitted that the Application for joinder as interested party was properly brought under Article 53(2) of the [Constitution](#) of Kenya, Section 4 of the [Children's Act](#) No 8 of 2001 and Sections 1A, 3 and 3A of the [Civil Procedure Rules](#).
15. Counsel submitted that the elements for one to be joined as an interested party in a suit were set out in the Supreme Court's Decision of [Francis Karioko Muruatetu & another v Republic & 5 others](#) (*Supra*).
16. He argued that the 2nd Respondent satisfied the elements set out in the above case for the following reasons: -
 1. It has been offering psychological support and counseling to the minors herein through its branch known as Counseling Psychologists' consortium.
 2. It has sufficiently demonstrated that it is in the best interest of the minors that it be enjoined.
 3. It is better placed in assisting the court to reach a determination based on its engagement in gender matters and human rights matters.
17. To support the above position reliance was placed on [Cyprian Andama v Director of Public Prosecution & another](#) [2018] eKLR where the court while determining whether to enjoin a party as an interested party cited Rule 7 of Mutunga Rules which provides that an interested party is a person who with leave of the court make an oral or written application to be joined as an interested party and a court may on its own motion join any interested party to the proceedings before it; and [Trusted Society of Human Rights Alliance v Mumo Matemu](#) [2014] eKLR where the Supreme Court held that an interested party is one who has a stake in the proceedings, though he or she was not a 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 herself appears in the proceedings, and champions his /her cause.
18. From the foregoing, Counsel submitted that joinder of a party to proceedings as an interested party is at the discretion of the court and urged this Court to be guided by Article 53(2) of the [Constitution](#) and to exercise its discretion in its favor.
19. Counsel cited the provisions of Sections 4 and 76(3)(b)(c)(d)(e) and (i) of the [Children Act](#) and urged this court to uphold the trial court's position that the 2nd respondent has an identifiable and proximate interest in the case at hand which is to promote the best interest of the minors herein based on its previous role in counseling the minors herein.



20. Regarding the 4th, 7th, 11th and 12th grounds, the 2nd Respondent submitted that the same should fail for the reasons that there was no evidence to show there was conflict of interest and that the 2nd respondent is a law firm that acted for the appellant in Children’s Case No 74 of 2021.
21. With respect to the 6th ground of the Appeal, it was submitted that the same should equally fail for the reason that the suit herein is pending hearing and determination.
22. With regard to the 8th ground 8, the 2nd respondent submitted that a party has to move the court in an application for the court to call for independent counseling and/or therapy of the minors. That at the time of filing an application to be enjoined as an interested party in this suit, the Appellant and other parties herein had not moved the court vide an application to have the minors placed under counseling and/or therapy while including sufficient grounds for seeking such an order and as such this was an afterthought on the part of the appellant upon delivery of the ruling and was made on 13th June, 2022 after filing of the instant appeal.
23. Regarding the 9th and 10th grounds, Counsel for the 2nd Respondent submitted that Order 4 Rule 1(4) of the *Civil Procedure Rules* is inapplicable to it as it is a non-government organization registered under section 10 of the *Non-Governmental Organizations and Co-ordination Act*. It is the 2nd Respondent’s view that this provision only applies to companies.
24. The 2nd Respondent’s sought that that the entire Appeal be found to have no merit and to be dismissed with costs to itself.
25. The Interested parties in the lower court did not participate in this appeal

Analysis and Determination

26. The issue for determination, after perusing the record, considering the rival Affidavits and the submissions on record is whether the 2nd Respondent indeed demonstrated the elements for joinder as and interested party as they are set out in the Supreme Court’s case *Communication Commission of Kenya & 4 Others v Royal Media Services Limited and 7 others* (2014) eKLR where the court stated:

“In determining whether the applicant should be admitted into the proceedings as an interested party we are guided by this court’s decision in *Mumo Matemo* case where the court at paragraph 14 and 18) held:

“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 seeks that his or her interest will not be well articulated unless he himself or she herself appear in the proceedings and champions his or her cause. Similarly, in the case of *Meme v Republic* (2004) EA 124, the High court observed that a party could be enjoined in a matter for the reason that:

- i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings
- ii. Joinder to provide protection for the right of a party who would otherwise be adversely affected in law.
- iii. Joinder to prevent a likely cause of proliferated litigation.

We ask ourselves the following questions



- a. what is the interested party's stake and relevance in the proceedings and
 - (b) will the interested party suffer any prejudice if denied joinder...".
27. These points were reiterated in Francis Karioko Muruatetu that the party must demonstrate personal interest at stake that is identifiable and proximate; the clear prejudice it will suffer if not joined and its submission setting out its position different from those of any other parties.
 28. The 2nd respondent states that it has established these elements on the following grounds which I quote here for clarity.
 1. It has been offering psychological support and counseling to the minors herein through its branch known as Counseling Psychologists' consortium.
 2. It has sufficiently demonstrated that it is in the best interest of the minors that it be enjoined.
 3. It is better placed in assisting the court to reach a determination based on its engagement in gender matters and human rights matters.
 29. So what were the issues before the children's court?
 30. Caroline Mutwa Mwendu Mwinzi filed Nakuru Children's Case No 50 of 2020 against the husband (now deceased) Joseph Kamau Kimanzi seeking orders inter alia the legal and actual custody of their children, access to one of the minors who was in the custody of the father (the defendant); and for the defendant to provide maintenance for the children.
 31. In a defence dated 11th March 2021 the defendant sought that the matter be resolved through an order for joint custody to both parents, actual custody to the plaintiff, which the defendant getting free unlimited, unhindered access to the children with liberty to take them out on vacations, holidays in and out of the country; he also sought that the plaintiff (the appellant) to shoulder 50% of the financial requirements for the maintenance of the children.
 32. Apparently this defence prompted an amended plaint dated 24th March 2021 seeking actual custody of the minors, joint legal custody of the minors, unlimited access by the defendant and a detailed list of what was required for the maintenance of the children. Unfortunately, the father (defendant) passed away on 2nd April 2021 before the matter could be heard.
 33. It comes out from the pleadings that this was a family in turmoil and the children needed counseling even before the demise of their father. The children were taken for counseling under an organization known as Counseling Psychologists Consortium which the 2nd respondent claims is its branch. After their father passed on, this organization continued to provide counseling services for the children. The counselors who counseled the children filed their reports in the replying affidavit of the 2nd Respondent to the application for joinder.
 34. Upon the demise of their father the children were taken into custody by the brothers and sisters of their father and have been held by them to the exclusion of their mother hence the suit and from the record, the matter has grown tentacles pulling the even schools where the children studies are enrolled.
 35. As the matter stands, it appears to me that the key issue for determination in the Children's Court is who between the appellant and her in-laws should have the custody of the children.
 36. It is in this mix that the 2nd respondent came in to be joined as an interested party.



37. In allowing the application for joinder by the 2nd respondent as an interested party in the impugned ruling delivered on 31st January 2022, the learned trial magistrate relied on Order 1 of the [Civil Procedure Rules](#). She argued that the court on its motion could add “a party if such a party is necessary for the determination of the matter – and whose presence is necessary in order to enable the court to effectively and completely adjudicate upon, settle all questions involved in the suit”. On that basis she found and held that:

“The intended interested party also has a branch known as the counseling psychiatrist consortium (CPC) which offers professional and psychological counseling services to the society and therefore because of the intended overall engagement in gender matters and human rights matters they are better placed to assist the court in reaching a determination in this matter ... [and that it demonstrated it has] an identifiable proximate interest in the case which is promotion of the best interest of the minors herein given the previous role in counseling the minors herein”

38. It is therefore clear that according to the learned trial magistrate the personal interest of the 2nd respondent is to promote the welfare of the minors herein through their action of counseling to children. This is what the 2nd respondent states as well, that their stake in this case is fact that they offered counseling to these children.

39. It is not in doubt that these children need counseling. According to the pleadings, plaint and defence by the parents of the three children the issue was custody and maintenance. To arrive at that point the family was going through the throes of a breaking up family; the children became children in need of care and protection and their issue of safeguarding their welfare came into focus. It is now established that when families become dysfunctional children suffer psychological trauma that they may carry through their lives with devastating effects. Hence it is a notable thing that the parents sought psychosocial support for the children when they did.

40. It is not in doubt that the actions of the 2nd respondent may be well intentioned because the custody battle has now shifted to be between the mother of the children and the relatives of the father. The children appear to have been reduced to something akin to the rope used for tag of war, denied access to their mother, and kept with their relatives.

41. This is demonstrable from the report filed by the 2nd respondent, where at some point one of the children expressed the belief that the mother had bewitched the father. Reading through the report’s recommendations it exhibits a clear bias towards the children’s alleged refusal to live with their mother. While this may be the case, it is not for the 2nd respondent to take a position. The report bears no indication of what the 2nd respondent was doing to deal with those issues that would definitely affect the child -mother relationship, that went into the root of parental care and guidance, the rights of both the child and the parent to access each other unless it is demonstrated it is not in the best interests of the child. In this scenario what is this identifiable, proximate interest for the 2nd Respondent? The 2nd respondent drew serious conclusions from one interview with the children and without any demonstrated effort to deal with the presenting and underlying issues, proceeded to unleash their reports hence escalating an already inflamed situation.

42. In my humble view the promotion of the best interest of the child is seen where the party doing so, makes clear deliberate, visible efforts to safeguard the welfare of that child while upholding that child’s rights. The rights of these children to their privacy, and confidentiality of their counseling sessions, the views they held at a point of high trauma have not been safeguarded.



- 43. It is on the foregoing set of facts that I make the finding that the 2nd respondent has not demonstrated any personal interest in the matter or that the 2nd Respondent will suffer any prejudice in the event that the court determines the matter. Neither has the 2nd Respondent shown that its involvement will be necessary for the settlement of all issues in the matter or that if they do not participate they have a right to file a suit on the same issues. They have not shown what they will lose or gain if the case is decided either way.
- 44. A counselor is in the category of service providers in the justice chain. In fact, the *Children Act* No 29 of 2022 clearly recognizes the crucial roles counselors and psychiatrists play in both the administration of, and access to justice for children. A counselor may end up as a witness, the expert witness for the court and the report they prepare is a report that court is empowered to ask for and to even reject. In the new *Children Act* section 97 and in the repealed law section 78 – it states;

“A court while considering any question with respect to a child under this act may require to have presented to it a report either orally or written as the court may direct ... the court may direct that such report be prepared by such persons or person as the court may designate”.
- 45. In the new Act there are many provisions now that require the provision of psychological counseling, psychotherapy to children when it is so appropriate. The court cannot be bound to be guided by one expert. The 2nd respondent has not demonstrated that without themselves on board the court will not be able to settle all the issues. In any event the children can change counselors just like doctors etc. Hence, we cannot set a precedent where the counselor for the reason only that they offered counseling services, and continue to do so, would want to become a party to the suit. They are experts who come on board to assist the court and exit or are exited as is appropriate.
- 46. The 2nd Respondent cannot seek to be interested parties in every single case that their counselor’s offer counseling for victims/or persons whose cases are in court; what happens to the confidentiality of those cases, for the integrity of the process of healing for the children and the families? Offering psychological and psychosocial support in a case does not create a personal interest to warrant joinder in a case. The 2nd respondent’s good intentions to safeguard the best interests of the children ought to be guided by Article 53 of the *Constitution*. In any event in this matter it is not the 2nd respondent who offered counseling, there were individual counselors who offered counseling and those individuals have not demonstrated that they have any personal interests or/ stake in this matter to warrant the joinder.
- 47. Before I end there was the issue of conflict of interest. It is not denied that the 2nd respondent acted for the appellant in circumstances that are related to the facts of this case, and to the children in this matter where she alleged abuse of herself by the deceased husband. The respondent argues that it acted as a law firm, but is coming now as a counselor. That may be the case but the respondent cannot separate the two because on the nature of matter. Whichever way one looks at it, the appellant’s concerns that the 2nd appellant is conflicted cannot be ignored.
- 48. In the end, I find that the appeal is merited as there is not arguable ground upon which the 2nd respondent can become an interested party in this matter.
- 49. The appeal is allowed with costs to the appellant.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 5TH DAY OF JUNE 2023

.....
MUMBUA T. MATHEKA



JUDGE

In the presence;

C/A Mwiwa

Sabaya& Associates, Advocates for the Appellant

Karanja Mbugua & Company Advocates for the 1st Respondent

Konosi & Company Advocates for the 2nd Respondent

