



Ethics and Anti-Corruption Commission v Hartland Enterprises Limited & 4 others; Homabay County Assembly Service Board (Intended Interested Party) (Anti-Corruption and Economic Crimes Case E030 of 2022) [2023] KEHC 22510 (KLR) (Anti-Corruption and Economic Crimes) (20 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22510 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CASE E030 OF 2022
EN MAINA, J
SEPTEMBER 20, 2023**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

HARTLAND ENTERPRISES LIMITED 1ST DEFENDANT

JAMES MUMALI OYUKAH 2ND DEFENDANT

MARY PAULINE ODUOR 3RD DEFENDANT

FAITH ADHIAMBO APUKO 4TH DEFENDANT

PATRICK TONUI 5TH DEFENDANT

AND

**HOMABAY COUNTY ASSEMBLY SERVICE BOARD INTENDED
INTERESTED PARTY**

RULING

1. By the Notice of Motion dated June 28, 2023 the Homabay County Assembly Public Service Board seeks orders to be enjoined to these proceedings as an Interested Party.
2. The Application is made under Order 1 of the [Civil Procedure Rules](#) Sections 1 and 3 of the [Civil Procedure Act](#) and Articles 49,50 and 159 of the [Constitution](#).



3. The application does not state the grounds on its face but the supporting affidavit of Hon. Julious Gaya, Speaker of the Homabay County Assembly, discloses the following grounds:
 - a. That these proceedings involve a contract and documentations to which the County Assembly Service Board was party.
 - b. That the impugned transactions involved the 1st Plaintiff and the Intended Interested Party whose name has been mentioned in the proceedings severally hence a right of participation and or response arises.
 - c. That participation of the intended interested party will aid this court in determining the issues in controversy between the parties.
 - d. That the court has powers to make the orders sought.
4. The Applicant relied further on the amended written submissions dated July 19, 2023 in which they framed one issue for determination: -whether the intended interested party has met the conditions necessary for joinder as an interested party.
5. The Applicant contends that the Intended Interested Party has an interest in the matter in dispute by virtue of being mentioned in the pleadings and is entitled to be present so as to exercise its right of response; that the impugned contract dated July 10, 2019 was made between the Plaintiff and the Intended Interested Party and as such any payments, recovery or execution is likely to affect the Board; that the documents produced by the Plaintiff and the other defendants including the demand letter, the contract dated July 10, 2019 and the minutes dated May 29, 2023 all make mention of the Board; that the Intended Interested Party is a body corporate established under Section 12 of the County Government Act and by dint of Section 35 of the Act, proceedings for or against it should be filed in its own name; that the Board is a necessary party to the suit as the orders sought are likely to prejudice it; that the 5th Respondent has been accused of abuse of office and as her employer, the Board has the sole mandate to exercise disciplinary action against her and further that the opposition to this application by the Plaintiff is an attempt to micromanage this case.

Response by the Plaintiff/Respondent

6. The Plaintiff relied on a replying affidavit sworn on July 7, 2023 by Evans Gitonga and written submissions dated July 26, 2023. It vehemently opposed the application on grounds that:- that the Commission investigated allegations of embezzlement and/or misappropriation of public funds, conflict of interest and abuse of office by some public officials at the County Assembly of Homa Bay in regard to payment for construction of Homa Bay MCA's offices and upon conclusion of its investigations, it commenced these proceedings on behalf of the county Assembly of Homa Bay for recovery of a sum of Kshs 36,270,032.68 from the Defendants, jointly and severally; that the Defendants' individual actions or omissions and the role they played in the payment of Kshs 36,270,032.68 for works not done have been particularized in the Plaintiff; that the Plaintiff has no claim as against the current or the defunct Homa Bay County Assembly Service Board as an institution because the payments made to the 1st Defendant were not sanctioned by either Boards; that even if the impugned payment had been sanctioned by the defunct Board, liability lies on the individual board members but not the Board generally and therefore the presence of the Intended Interested Party is not necessary in these proceedings.
7. The Plaintiff further contends that the contract alluded to in the affidavit sworn by Hon. Julious Gaya is not in contention; that the performance, management and payment for work not done facilitated by



the 4th and 5th Defendants in their respective capacities as the Clerks of Homa Bay County Assembly during the period under investigation is the subject of the suit.

8. In the written submissions, Learned Counsel for the Plaintiff contends that under Order 1 Rule 9 of the *Criminal Procedure Rules* the Plaintiff has the discretion to choose who to sue or not to sue; that the subject matter of this suit is the fraudulent payments of Kshs 35,117,320/= and Kshs 31,597,605/= respectively made to the 1st Defendant by the 4th and 5th Defendants, in their capacities as the Clerks to the Homabay County Assembly and if successful the effect will be the restoration of public funds fraudulently paid to a private contractor; and that the said orders shall not be prejudicial to the Intended Interested Party and none has been demonstrated to this court. Learned Counsel for the Plaintiff/Respondent placed reliance on the case of *Republic v Central Bank of Kenya & Others* [2016] eKLR; where in dismissing an application for joinder as an Interested Party by the Kenya Tea Development Agency Holdings Limited the court stated:-

“In my view, for a party to be joined to the proceedings under Order 53 Rule 3(2) aforesaid the Applicant ought to disclose to the court how he or she is directly affected by disclosing upfront its legal position in the matter and what it intends to place before the court that makes his case distinct from the case presented by the other parties to the proceedings in other words, there ought to be material disclosure of the intended case.”

9. Counsel stated that the application is an attempt by the 5th Defendant to drag the Board, in which she is the Secretary, into the proceedings after her application to be removed from these proceedings was dismissed by this Court through a ruling delivered on February 23, 2023; that the Intended Interested Party has failed to demonstrate how its presence in this suit shall assist the Court to effectually and completely adjudicate and settle all the questions in controversy.

Issue for Determination:

10. Whether the Homa Bay County Assembly Service Board should be enjoined to this case as an Interested Party

Analysis and determination

11. Under Order 1 Rule (10) (2) of the *Civil Procedure Rules*, this court has power to, at any stage of the proceedings, order the joinder of a party whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. The Rule states:-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

12. In the case of *Attorney General v David Ndi and 73 others* (Petition 12 (E016) of 2020) [2021] K ESC 17 (KLR) (9 November Ruling) (Being an application by Party of National Unity (PNU) to be enjoined as an Interested Party) the Supreme Court enunciated the guidelines on joinder of interested parties it had laid in the case of *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others* SC Petition (Application) No 12 of 2013 and in the case of *Francis Kariuki Muruatetu & Another*



v Republic & 5 others (SCK Petition No 15 of 2015 as consolidated with Petition No 16 of 2015 [2016] eKLR and stated:-

- “1. An applicant for joinder as interested party had to satisfy the Supreme Court that they had satisfied the legal requirements for joinder under rule 24 of the Supreme Court Rules, 2020.
 2. The guiding principles applicable in determining an application to be enjoined as an interested party in were:
 - a. one had to move the court by way of a formal application. Enjoinment was not as of right, but was at the discretion of the court; hence, sufficient grounds had to be laid before the court, on the basis of the following elements:
 - i. the personal interest or stake that the party had in the matter had to be set out in the application. The interest had to be clearly identifiable and had to be proximate enough, to stand apart from anything that was merely peripheral.
 - ii. The prejudice to be suffered by the intended interested party in case of non-joinder, had to also be demonstrated to the satisfaction of the court. It had to also be clearly outlined and not something remote.
 - iii. A party’s application had to set out the case and/or submissions it intended to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that those submissions were not merely a replication of what the other parties would be making before the court.
 3. The applicant had not met the threshold for admission as an interested party as it had failed to establish a personal interest or stake that was proximate enough to occasion any prejudice to it, if not enjoined in the proceedings.”
13. The Intended Interested Party contends it is a necessary party to this suit as the orders sought are likely to be prejudicial to it; that it is the one that sanctioned the impugned payments and that as the 5th Respondent has been accused of abuse of office as her employer, it is the right entity to exercise disciplinary action against her.
 14. In considering the application, this court shall adhere to the aforestated guidelines by the Supreme Court.
 15. From a perusal of the pleadings in this case it is evident that the case against the 1st to 5th Defendants is brought by the Commission Plaintiff to recover funds alleged to have been irregularly paid to the 1st Defendant, resulting in a loss to the Homa Bay County Assembly in which the County Assembly Service Board is a part. The Plaintiff has brought the civil recovery suit pursuant to its statutory mandate under Section 11(1) (j) of the *Ethics and Anti-Corruption Commission Act* which gives it power to institute such suits on behalf of public organs/entities/bodies.



16. The above being the case, there is absolutely no risk that the Intended Interested Party may be prejudiced should the suit be successful. This is given that the commission is acting in its interest and on its behalf.
17. That being the employer of the 5th Defendant, the Board is vested with power to discipline her would not vitiate the recovery proceedings as the same are not a disciplinary process.
18. In my considered view should any member of the Service Board be minded to take part in this case then it should be as a witness for such Defendant(s) as they please but not as Interested Party as the interest or brief of the Intended Interested Party is already being watched by the Plaintiff.
19. My so saying finds support in the case of *Werrot & Co Ltd and others v Andrew Douglas Gregory & others* (1998) (UR), where the court observed: “..... that a person has relevant evidence to give on some of the questions would only make him a necessary witness.”
20. Accordingly, it is my finding that the Intended Interested Party’s application dated June 28, 2023 has no merit and it therefore fails and is hereby dismissed. There shall be no order for costs.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 20TH DAY OF SEPTEMBER 2023

E N MAINA

JUDGE

