



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 57 OF 2020**

**OKIYA OMTATAH OKOITI.....PETITIONER**

**VERSUS**

**KENYA AIRWAYS PLC.....1<sup>ST</sup> RESPONDENT**

**THE MINISTRY OF TRANSPORT, INFRASTRUCTURE, HOUSING &**

**URBAN DEVELOPMENT.....2<sup>ND</sup> RESPONDENT**

**THE NATIONAL TREASURY.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**AND**

**THE KENYA CIVIL AVIATION AUTHORITY (KCAA)...1<sup>ST</sup> INTERESTED PARTY**

**ASSOCIATION OF AFRICAN AVIATION TRAINING ORGANIZATION-**

**KENYA CHAPTER.....APPLICANT/PROPOSED 2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. This ruling is in respect of the notice of motion application dated 19<sup>th</sup> February, 2020 through which the Proposed 2<sup>nd</sup> Interested Party/Applicant, Association of African Aviation Training Organization-Kenya Chapter, seek orders as follows:

**a) That the Application be certified urgent and heard *ex parte*;**

**b) That the Court be pleased to grant leave to the Applicant to be joined as an Interested Party in these proceedings and that they be allowed to file such documents as they may deem appropriate for the ends of justice to be met;**

**c) Costs be in the cause.**

2. The application is premised on the grounds set out on the face of the application and a supporting affidavit sworn on 20<sup>th</sup> January, 2021 by Joseph Ririani, the Manager of the Kenya School of Flying.

3. In the supporting affidavit it is averred that the Kenya School of Flying is a member of the Association of African Aviation Training Organization-Kenya Chapter (“the Association”) which is a stakeholder in the aviation industry in Kenya. It is stated that the members of the Association own and operate aviation training schools of high repute and caliber with all the attendant international recognitions and approvals.

4. It is deposed that the members of the Applicant will be affected by the decision of the Court in these proceedings and the Applicant ought to participate and make its arguments in the matter. It is on this ground that the Applicant prays for leave to be enjoined in this petition, adding that none of the parties will be prejudiced if it is allowed to participate in the proceedings.

5. On 26<sup>th</sup> January, 2021, the Petitioner, Okiya Omtatah Okoiti, informed the Court that he had no objection to the joinder of the Applicant as the 2<sup>nd</sup> Interested Party in the suit as it had established that it has a stake in the outcome of the matter as a player in the aviation sector.

6. The 1<sup>st</sup> Respondent, Kenya Airways PLC, opposed the application for joinder through grounds of objection dated 8<sup>th</sup> February, 2021 as follows:

**a) The Supporting Affidavit sworn by Joseph Ririani on 20<sup>th</sup> January, 2021 does not display a letter or mandate demonstrating authority given to the deponent permitting him to act, plead and sign documents and take-out necessary pleadings on behalf of the 2<sup>nd</sup> Proposed Interested Party in the matter.**

**b) The 2<sup>nd</sup> Proposed Interested Party has not set out any legitimate stake and sufficient grounds for its joinder into the proceedings herein. There is therefore no identifiable or proximate interest illustrated by the Proposed Interested Party to warrant joinder.**

**c) The 2<sup>nd</sup> Proposed Interested Party has neither disclosed nor demonstrated any prejudice that it will suffer should it not be allowed to participate in the proceedings.**

**d) The 2<sup>nd</sup> Proposed Interested Party has failed to set out the case it intends to make before the Court and demonstrate the relevance of those submissions and has further failed to demonstrate that its submission is not merely a replication of what the other parties will be making before the Court.**

**e) The application is bad in law, an abuse of this Honourable Court's process and should be dismissed accordingly.**

7. Through their counsel, the 2<sup>nd</sup> Respondent (the Ministry of Transport, Infrastructure, Housing & Urban Development), the 3<sup>rd</sup> Respondent (the National Treasury) and the 4<sup>th</sup> Respondent (the Attorney General) informed the Court on 9<sup>th</sup> February, 2021 that they were opposed to the application for joinder and they were relying on the 1<sup>st</sup> Respondent's pleadings and submissions.

8. On 26<sup>th</sup> January, 2021, counsel for the 1<sup>st</sup> Interested Party, the Kenya Civil Aviation Authority (KCAA), informed the Court that her client was not opposed to the joinder of the Applicant as the 2<sup>nd</sup> Interested Party.

9. Through submissions dated 13<sup>th</sup> February, 2021, the Applicant asserts that Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 ("Mutunga Rules") define an interested party as one who has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings. It is the Applicant's case that the court has wide and unfettered discretionary power to grant orders of joinder even *suo motu* as per Rule 5(d)(ii) of the Mutunga Rules.

10. It is the Applicant's case that contrary to the 1<sup>st</sup> Respondent's argument, Rule 7(1) of the Mutunga Rules does not require the authority of an association's management before it can be enjoined in a petition. The Court is therefore urged to keep formalities at a minimum and not be restricted by procedural technicalities as it dispenses justice.

11. The Applicant submits that it is the umbrella body for all flying schools operating in Kenya and the only source of expertise in the aviation field. It is stated that the petition deals with the unilateral decision of the 1<sup>st</sup> Respondent to lock out all local aviation training schools, including members of the Applicant, in its operations in favour of South African based training institutions. It is thus urged that whatever decision is made by the Court will affect the Applicant's members.

12. The Applicant implores the Court to grant it leave to join and participate in the proceedings as stakeholders as they have a proximate interest in the matter. It is additionally submitted that the Applicant's knowledge and expertise in the subject matter will compliment and illuminate the Petitioner's averment that several pilots have received training from its member schools. Further, that the Applicant will add value and enrich this Court's quest to do substantial justice in the matter.

13. In conclusion, the Association submits that it will suffer great injustice and prejudice if its application is rejected. Further, that its members stand to suffer economic ruin should they be denied the opportunity to participate in the training of the 1<sup>st</sup> Respondent's pilots as they have done over the years.

14. In submissions dated 4<sup>th</sup> March, 2021, the 1<sup>st</sup> Respondent contends that the Applicant has no *locus standi* before this Court as a party's capacity goes to the root of proceedings. It is the 2<sup>nd</sup> Respondent's position that the failure to establish the authority of the Applicant to sue in this matter confirms lack of *locus standi*. According to the 1<sup>st</sup> Respondent, the averment by Joseph Ririani in the supporting affidavit that he is an office-bearer cannot be equated to authority to commence proceedings. The decision in **Republic v County Government of Embu Exparte Embu County Liquor Dealers Association [2014] eKLR** is cited in support of the assertion that a court should strike out a matter if the affidavit sworn in its support is defective.

15. Turning to the substance of the application, the 1<sup>st</sup> Respondent contends that the Applicant has not satisfied the threshold for joinder of an interested party as stipulated in the Supreme Court case of **Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR**. According to the 1<sup>st</sup> Respondent, the issues raised in the petition are whether it is a public entity by virtue of being funded by the Kenyan government; whether the funds from the government were used in the pilot training programme; and, whether the pilots training programme ought to have been subjected to the Public Procurement & Asset Disposal Act, 2015. It is the 1<sup>st</sup> Respondent's case that the Applicant has no expertise in public procurement and management of public funds.

16. The 1<sup>st</sup> Respondent submits that being a stakeholder does not give a party an automatic right to join proceedings as the party has to have a real stake or interest in the suit. It is argued that the presence of the Applicant in the suit will not assist the Court in the settlement of any of the questions raised the proceedings.

17. The 1<sup>st</sup> Respondent additionally submit that the Applicant has not placed before the Court the pleadings and submissions it intends to present if it is allowed to join the proceedings. The 1<sup>st</sup> Respondent supports its submissions by citing the decisions in the cases of **Elizabeth Nyambura Njuguna & another (suing as the Legal representatives of Njuguna Mwaura Mbogo) v E. K. Banks Limited & 2 others; Edward Kings Onyancha Maina (Interested Party) [2019] eKLR** and **Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others [2014] eKLR**.

18. It is further submitted that the Applicant has not demonstrated in detail how it will be prejudiced if it is not allowed to join the petition as an interested party and how it will be affected by the Court's decision. This assertion is supported by the case of **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2014] eKLR**. The Court is thus urged to find that the Applicant has not met the threshold for joinder and dismiss the application.

19. The only question for the determination of this Court in this ruling is whether the Applicant has met the conditions for joinder of an interested party in a constitutional petition.

20. The principles which guide courts in determining an application for joinder of an interested party are now well settled. The parties in this matter have highlighted and relied upon the relevant law and authorities that outline the conditions required to be fulfilled for one to be admitted to proceedings as an interested party.

21. The Mutunga Rules provides the law on joinder of interested parties in constitutional petitions. Rule 3(1)&(2) stipulate that the rules apply to all proceedings made under Article 22 of the Constitution with the main objective being to facilitate access to justice for all persons as required by Article 48 of the Constitution.

22. Rule 2 of the Mutunga Rules 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"**. This definition was echoed by the Supreme Court in **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2014] eKLR** thus:

**"17. Suffice it to say that while an interested party has a 'stake/interest' directly in the case, an amicus's interest is its 'fidelity' to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.**

**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."**

23. The addition of a party, such as an interested party, to a petition is provided for in Rule 5(d)(ii) of the Mutunga Rules as follows:

**5. The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties-**

**(d) 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—**

**(i) ...**

**(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.**

24. The applicable principles in an application for joinder as an interested party were set in the Supreme Court decision of **Francis Kariuki Muruatetu (Supra)** 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."**

25. Furthermore, the Supreme Court observed in the same judgement that:

**“[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.”**

26. Joinder as an interested party is therefore not as a matter of right. An application for joinder will therefore be examined on its own merits and circumstances as against the established principles governing admission to proceedings. It is always important to appreciate that a case belongs to the primary parties and any party that seek to join the proceedings as an interested party must demonstrate a clear connection between the applicant and the case. Not every Tom, Dick and Harry will be admitted to proceedings simply because of an averment of an interest in the matter where such an interest cannot be clearly discerned.

27. The affidavit sworn by Joseph Ririani in support of the application discloses that the application is brought by one of the members of the Association. It is also deposed that Joseph Ririani is one of the office bearers and founder of the Applicant.

28. The Petitioner and the 1<sup>st</sup> Interested Party are not opposed to the application. The respondents based their opposition to the application on the grounds that there is no evidence that the Association has authorized the institution of the application and that the application does not meet the criteria for joinder of an interested party in a constitutional petition.

29. With regard to the averment by the 1<sup>st</sup> Respondent that the Applicant has no *locus standi* to institute the petition, it is noted that Joseph Ririani states that he swears the supporting affidavit in his capacity not only as an office bearer but also as a founder member of the Applicant. In my view, Joseph Ririani ought to have disclosed more information. Being an office bearer and founder member is not sufficient authority to commit the Association to litigation. He ought to have disclosed the office he holds and the minutes authorizing him to involve the Association in this petition. However, in view of Article 159(2)(d) of the Constitution which requires this Court to administer justice without undue regard to procedural technicalities, I will proceed to consider the application on its merits.

30. The question that follows is whether the Applicant has satisfied the set principles for it to be allowed to join the proceedings as an interested party. The key words in the application and supporting affidavit are that the Association is a stakeholder in the aviation industry as its members operate aviation training schools. It is the Applicant's case that its members will be affected by the outcome of these proceedings and it therefore ought to participate in the case so as to give its input as a major stakeholder.

31. Looking at the application as it stands, it is clear that the stake or interest of the Applicant in the matter is not disclosed. It is not stated how the decision in this case will affect the members of the Applicant. Everything is left to conjecture and it appears that the Applicant expects the Court to fill in the gaps in its case.

32. In its submissions the Applicant argues that it will compliment and illuminate the Petitioner's averment that several pilots have received training from its member schools. This statement is not found on its pleadings and it is a principle of law that submissions are not pleadings. Whatever the case, the Petitioner's averment that the members of the Association have successfully trained many pilots is not in dispute. The inclusion of the Applicant in this case will therefore not add any value to the arguments of the principal parties. The Applicant simply wants to come and support the Petitioner's case without putting any new information and submissions on the table. In the circumstances the Applicant has not established grounds for admission as an interested party.

33. In summary, the Applicant has not made out a case for admission to these proceedings as an interested party. The outcome is that the application for joinder is without merit. The application is therefore dismissed.

34. The parties will meet their own costs in respect of the application.

**DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF JULY, 2021.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**

**DATED, COUNTERSIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF JULY, 2021.**

**J. A. MAKAU,**

**JUDGE OF THE HIGH COURT**