



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.397 OF 2018

IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 4,7,9,13,19,22 & 119(1) (k) OF THE CHILDREN'S ACT, 2001

AND

IN THE MATTER OF CONTRAVENTION and or ALEGED CONTAVENTION OF RIGHTS OF THE CHILD

BETWEEN

PETER SOLOMON GICHIRA.....1ST PETITIONER

FAITH NURU.....2ND PETITIONER

MIRIAM MWENI MUTUA..... 3RD PETITIONER

VERSUS

KENYA NATIONAL EXAMINATIONS COUNCIL.....1ST RESPONDENT

KENYA INSTITUTE OF CURRICULUM DEVELOPMENT.....2ND RESPONDENT

TEACHERS SERVICE COMMISSION.....3RD RESPONDENT

AMB. AMINA CHAWAHIR MOHAMED,

CABINET SECRETARY MINISTRY OF EDUCATION.....4TH RESPONDENT

THE HON. ATTORNEY-GENERAL.....5TH RESPONDENT

RULING

Proposed Interested Party Application

1. The petitioner herein through a petition dated 18th November 2018 is concerned with the recent events that have witnessed an increase in the number of teenage pregnancies in school going children in primary and secondary school. The petition also touches on the implementation of a comprehensive sex education program in primary and secondary schools in the country. The reliefs sought are in regard of offering of special examinations, development of a comprehensive sex education policy and counselling of pregnant teenagers.
2. The proposed interested party through a notice of motion dated 23rd July 2019 prays to be enjoined in the instant petition to participate as an interested party and that prayer No.4 of the instant petition be reserved and postponed until the proposed interested party has been enjoined in the suit and filed its response and submission thereto.

3. The proposed interested party case is that proposed interested party is an ecumenical organization of Christian professionals drawn from different denominations and sharing common values on life, family, religion and governance; that its key partners are the umbrella church organizations in Kenya; including the National Council of Churches in Kenya (**NCCCK**), Kenya Conference of Catholic Bishop (**KCCB**) and Evangelical Alliance of Kenya (**EAK**), which bodies draw membership of about 80% of Kenyan population.

4. That the proposed interested party affiliated Christian groups sponsor thousands of education institutions within the Republic of Kenya and are an important stakeholder whose presence will assist the court in determining the matters in dispute herein. That the proposed interested party learned late about the present proceedings after reading a news account in the local diaries and it has encountered difficulties in obtaining court documents in the matter to enable it file its documents. It is proposed interested party's case that it is in the interest of justice that it be allowed to join these proceedings to represent the interest of various Christian groups in Kenya.

5. The proposed interested party's application is supported by supporting affidavit of Anne Mbugua sworn on 23rd July 2019.

Petitioner's Response

6. The petitioners are opposed to the granting of the proposed interested party's application; in which the petitioner has raised 11 grounds of opposition.

Response by 1st, 2nd, 3rd, 4th and 5th Respondents

7. The 1st to 5th Respondents have not filed any response to the proposed interested party's application and are not opposed to granting of the proposed interested party's application.

Analysis and Determination

8. have considered the proposed interested party's application, affidavit in support, the petitioner's written submissions and oral submissions as well as the petitioners oral submissions and from the aforesaid there arises only one issue for consideration thus:-

1) Whether the proposed interested party has met the threshold for its enjoinder as an interested party?

9. The governing principles for the joinder of a party to a constitutional matter as an interested party are clearly codified in the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) Practice and Procedure Rules 2013 (also called or referred to as the *Mutunga Rules*). **Rule 2 of the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) Practice and Procedure Rules 2013** defines an interested party in the following terms:-

"...."Interested party" means 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

10. Rule 7 of the same Rules donates power to this court to admit a person as an interested party in the proceedings before it in the following terms:-

"7. Interested party

(1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.

(2) A court may on its own motion join any interested party to the proceedings before it."

11. In the case of **Kenya Medical Laboratory Technicians and Technologists Board & 6 others Versus the Attorney General & 4 others [2017] eKLR**, the court considered an application for joinder of an umbrella body of private universities in Kenya in a Constitutional Petition on a dispute over the regulation of academic programs in universities. The court outlined the test for joinder of an interested party in the following terms:-

"The test is not whether the joinder of the person proposed to be added as an interested party would be according to or against the wishes of the petitioner or whether the joinder would involve an investigation in to a question not arising on the cause of action averred by the petitioner. It is whether the intended interested party has an identifiable stake, or a legal interest or duty in the proceedings." (Emphasis mine)

The court proceeded to allow the application in the following terms:-

"The crux of the dispute is control and regulation of academic programs and whether or not is the statute applies to programs offered by private universities or public universities are to mean issue that will be determined at the hearing. On this ground alone, the court would be inclined to exercise its discretion and enjoin the applicant on its own motion."

The court further stated:-

"From my analysis above, the applicant has demonstrated a legal and identifiable interest and also a duty to participate in the proceedings. An interested party may also be added to the case by the court itself, where it appears to the court that it is

desirable to do so to resolve a dispute or an issue. I hold the view that the presence of the applicant will assist the court to resolve the issues raised in this petition."

12. In the case of **Francis Karoki Muruateti & others vs Republic of Kenya National Commission on Human Rights and 3 others (2016) eKLR** the court states:-

"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. 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." (Underlining mine).

13. From the submissions and authorities relied upon by the parties herein it turns out that an order for one to be enjoined as an interested party, there is a need for the applicant to demonstrate that it has an identifiable stake in the matter under consideration. What is before this court is a petition concerning the increased teenage pregnancies in school going children at primary and secondary school levels as well as a call for the implementation of comprehensive sex-education policy in primary and secondary schools and the offering of special examinations to candidates who are pregnant at the time they are sitting national examinations. The proposed interested party herein has no doubt it has identified itself as an ecumenical organization of Christian professionals drawn from different denominations and sharing common values of life; family, religion, education and governance.

14. It is noted that the affidavit of Anne Mbugua has identified the proposed interested party key partners whose bodies draw membership from about 80% of the Kenyan population and sponsor several schools within the Republic. It further averred that **KCCB** and its related institutions alone sponsor over 30% of all formal basic education institutions in Kenya. The proposed interested party has specified interest in the proposed program in the petition on sexual and reproductive health program in schools curriculum.

15. From the proposed interested party's pleadings and more specifically from the supporting affidavit which has not been controverted by the petitioner by way of filing a Replying affidavit, I am satisfied that the proposed interested party has an identifiable stake in the present proceedings. I am satisfied that the proposed interested party's affiliated organization as sponsors of a significant number of academic institutions including primary and secondary schools in the Republic of Kenya should be afforded an opportunity to air their views having an increased pregnancies in school-going children, offering of examination to pregnant school going children as well as the implementation of any comprehensive sex education in primary and secondary school. This being a constitutional petition where with leave of the court, a person may make an oral or written application to be enjoined as an interested party and even where court can on its own motion join any interested party to the proceedings before it, I find in view of the nature of the petition this is a suitable case for which the proposed interested party deserves to be enjoined. I find no merit in the petitioners grounds of opposition to deny the enjoining of the proposed interested party.

16. To the extent of my findings, I find that the proposed interested party's application dated 23rd July 2019 meritorious and proceed to make the following orders:-

a) The proposed interested party's application is allowed, the proposed interested party is enjoined in the instant petition as 1st interested party.

b) The proposed interested party do file its response to the petition within 14 days from the date of this ruling.

c) Prayer No.3 of the Notice of Motion dated 20/7/2019 is granted pending 1st interested party's compliance with the court's order number (b) above.

d) Costs of the application be in the cause.

Dated, signed and delivered at Nairobi this 5th day of March, 2020.

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J .A. MAKAU

JUDGE