



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 219 OF 2019**

DAVID NJAU WAMBUGU.....1<sup>ST</sup> PETITIONER

MARK PHILLIP WAMBUGU.....2<sup>ND</sup> PETITIONER

SAMUEL MUITA NJAU.....3<sup>RD</sup> PETITIONER

CHRISTINE WANJIRU NJAU.....4<sup>TH</sup> PETITIONER

JANET WANJIKU NJAU.....5<sup>TH</sup> PETITIONER

POLYCHEM EAST AFRICA LIMITED.....6<sup>TH</sup> PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT

THE CHIEF MAGISTRATE MILIMANI LAW COURTS.....3<sup>RD</sup> RESPONDENT

AND

HIGHCHEM E.A. LIMITED.....PROPOSED INTERESTED PARTY/APPLICANT

**RULING**

1. The Proposed Interested Party, Highchem E. A. Limited, filed a notice of motion application dated 13<sup>th</sup> June, 2019 under rules 7 and 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules, 2013 (“the Mutunga Rules”) seeking to be enjoined and allowed to participate in these proceedings. By way of the supporting affidavit sworn on the date of the application by Dr. Wachira Maina, the Managing Director of the Applicant, it is averred that the Applicant is the complainant in Criminal Case No. 391 of 2019, Republic v David Njau Wambugu and any orders issued in this petition will affect the Applicant.

2. The Applicant additionally avers that its admission to this matter will aid in the determination of this case as the petitioners have raised various claims against the Applicant which can only effectively be addressed by the Applicant itself. Further, that neither the petitioners nor the respondents would be prejudiced by the joinder of the Applicant in the matter.

3. Dr. Wachira Maina swore a supplementary affidavit on 23<sup>rd</sup> July, 2019 in which it is elaborated that the complaint to the police relates to theft of money and agency by the 6<sup>th</sup> Petitioner, Polychem East Africa Limited through its directors David Njau Wambugu, Mark Phillip Wambugu, Samuel Muita Njau, Christine Wanjiru Njau and Janet Wanjiku Njau who are the respective 1<sup>st</sup> to 5<sup>th</sup> petitioners in this matter. Further, that the 1<sup>st</sup> Petitioner made statements in the affidavit sworn on 10<sup>th</sup> November, 2019 in support of the petitioners’ case, which the Applicant deems to be misleading, particularly paragraphs 27, 28, 29, 30, 31 and 37. It is therefore the Applicant’s position that its presence is necessary to enable the court to ascertain the truth.

4. The Proposed Interested Party also filed submissions dated 23<sup>rd</sup> July, 2019 in support of the application. It is submitted that by virtue of the fact that the Applicant is the complainant in the criminal matter against the 1<sup>st</sup> Petitioner, the Applicant has a legal identifiable interest in this matter. The Applicant further asserts that its presence in this matter is necessary as the Director of Public Prosecutions (DPP) has not been furnished with all the necessary information and may not therefore adequately present the Applicant's case.

5. The Applicant relies on rules 2 and 7 of the Mutunga Rules, as well as the holding in the case of **Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR** in support of the proposition that a party seeking joinder in a constitutional petition should have a legal and identifiable interest and demonstrate a duty in the proceedings.

6. The Applicant further cites the decisions in **Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR**, and **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others and Michael Wainaina Mwaura (as Amicus Curiae) [2017] eKLR** where the courts determined that it is necessary for a party seeking to be joined to proceedings to demonstrate an identifiable and proximate interest.

7. The petitioners opposed the application through a replying affidavit sworn on 13<sup>th</sup> July 2019. At paragraph 10 of the replying affidavit, the 1<sup>st</sup> Petitioner particularises the grounds of opposition to the application by averring as follows:-

**“THAT I am further advised by our Advocates on record, which advice I verily believe to be correct that the Proposed Interested Party's Application is not merited for the following reasons;**

**a. The Application does not meet the threshold for joinder of Interested Parties set out by the Supreme Court in *Trusted Society of Human Rights Alliance v Mumo Matemu [2014] eKLR* and *Francis Kariuki Muruatetu & Another v Republic & 5 Others [2016] eKLR*.**

**b. The Proposed Interested Party has not placed any or any sufficient material before the court to enable the court to exercise its discretion in its favour.**

**c. The Proposed Interested Party has not demonstrated any identifiable stake or legal interest in the proceedings.**

**d. All criminal prosecutions in Kenya are brought in the name of the 1<sup>st</sup> Respondent who is deemed to be the complainant. The Proposed Interested Party's role in the proceedings ended after it lodged a complaint with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. As such the Proposed Interested Party has no role to play in the present proceedings as its interest, if any, will be ventilated by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**

**e. The Proposed Interested Party has not demonstrated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents will be incapable or unwilling to present its side of the story in the instant Petition.**

**f. If the Proposed Interested Party is allowed to join these proceedings, it will merely be replicating the submissions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**

**g. The Managing Director of the Proposed Interested Party is the prosecution's principal witness in the criminal proceedings and his joinder in these proceedings will occasion a conflict of interest and will be prejudicial to the Petitioners.**

**h. The Petition and the Notice of Motion dated 7<sup>th</sup> June 2019 primarily challenge the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' exercise of their constitutional and statutory functions. In the circumstances, the question of violation of fundamental rights and freedoms and abuse of power and process by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are issues which do not require the participation of the Proposed Interest Party. The presence of the Proposed Interested Party is not necessary for purposes of making a determination on the said issues.**

**i. The joinder of the Proposed Interested Party will not assist the Court in adjudicating the issues in controversy but instead it will only serve to muddle up and obfuscate the issues and thereby render it difficult for the court to determine the real issues in controversy.**

**j. The charges preferred against the Petitioners arise out of a commercial dispute which is the subject of a civil suit instituted by the Proposed Interested Party being HCCC NO. 310 of 2017; *HighChem East Africa Limited vs. David Njau Wambugu, Polychem East Africa Limited & 3 others* (the Commercial Dispute). The said suit is pending hearing and determination before the Commercial and Tax Division of this honourable court....**

**k. Since the Proposed Interested Party has already ventilated its issues in the commercial dispute, no prejudice will be occasioned if it is not joined as a party to these proceedings as it has another avenue for agitating its grievances.**

**l. There is a real danger that if the Proposed Interested Party is allowed to join these proceedings, it will argue issues which have already been raised in the commercial dispute which dispute is being heard by a court of competent jurisdiction. This will embarrass the court currently handling the commercial dispute.**

**m. The Proposed Interested Party is not a necessary party to these proceedings and its joinder in these proceedings**

**will only serve to muddle up and obfuscate the issues and thereby render it difficult for the courts to determine the real issues in controversy.**

**n. The Proposed Interested Party has not set out the case and/or submissions it intends to make before the courts so as to demonstrate the relevance of those submissions to the issues in dispute.**

**o. The Application is brought in bad faith and is aimed at convoluting the issues and delaying the expeditious determination of the Petitioners' case."**

8. By way of written submissions dated 1<sup>st</sup> October, 2019 the petitioners submit that the first issue for determination is whether the Applicant has satisfied the criteria for joinder as an interested party. It is contended that the application does not meet the threshold for joinder of interested parties set out by the Supreme Court in the cases of **Trusted Society of Human Rights Alliance v Mumo Matemu [2014] eKLR** and **Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR**.

9. The first principle under this threshold is that there should be a personal interest or stake in the matter. It is the petitioners' contention that the issues raised in the petition challenge the constitutionality of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' actions and therefore it does not require the participation of the Applicant. Additionally, it is averred that the Applicant in its application has failed to demonstrate the personal interest or stake it has in the matter.

10. The petitioners further contend that the charges preferred against them stem from a commercial dispute which is pending hearing and determination in **Nairobi HCCC No. 310 of 2017; HighChem East Africa Limited v David Njau Wambugu & others**, where the Applicant has already ventilated its grievances. It is their contention that if the Applicant is allowed to join these proceedings, it will argue issues which have already been raised in the commercial dispute and that will embarrass the court currently handling the commercial dispute.

11. The petitioners additionally argue that the Applicant has not tendered any evidence to demonstrate that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are incapable of properly presenting its case. The petitioners are convinced that the replying affidavit filed by the respondents on 4<sup>th</sup> July, 2019 sufficiently puts forward the Applicant's side of the story and if joinder is allowed the Applicant will merely be replicating the submissions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

12. It is further asserted that the Managing Director of the Proposed Interested Party is the prosecution's principal witness in the criminal proceedings and his joinder in these proceedings will occasion a conflict of interest and will be prejudicial to the petitioners.

13. The court is urged to be guided by the decisions in **Republic v the Attorney General Ex-parte Kipng'eno Arap Ngeny HC Civil App. No. 406 of 2001; Victor Ndegwa Mburu & another v Racheal Wanjiru Kamatu & another [2018] eKLR**; and **Christopher Oganda Nyaruri v Director of Public Prosecutions & another; Esquire Investments Limited (Proposed Interested Party) [2018] eKLR**, where the courts held that joinder of the complainant in cases such as this is not necessary as the complainant and the State are on the same side and therefore the complainant's interests are taken care of by the State. Therefore it is the petitioners' position that the Proposed Interested Party has no role to play in the present proceedings as its interests, if any, will be ventilated by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

14. The second principle is that the prejudice to be suffered by the Proposed Interested Party in case of non-joinder should be clearly outlined and should not be remote. Once again the petitioners aver that the Applicant has not tendered any evidence in court to the effect that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are incapable of presenting their side of the story effectively. Additionally, the petitioners are of the opinion that if the Applicant is joined to the proceedings it will introduce new issues for determination which is prohibited as was determined in **Francis Kariuki Muruatetu** (supra).

16. The third principle is that an applicant must set out the case and/or submissions it intends to make before the court. It is submitted that the Applicant herein has not set out the case and/or submissions it intends to make before the court so as to demonstrate the relevance of those submissions to the issues in dispute. Moreover, the petitioners submit that the Applicant has failed to show that its case is any different from what the 1<sup>st</sup> and 2<sup>nd</sup> respondents have placed before the court.

16. The second issue proposed for determination by the petitioners is whether the court should exercise its discretion in favour of the Proposed Interested Party. The petitioners submit that the joinder of the Proposed Interested Party will not assist the court in adjudicating the issues in controversy but instead it will only serve to muddle up and obfuscate the issues thereby rendering it difficult for the court to determine the real issues in controversy.

17. The court is once again directed to the decision in **Francis Kariuki Muruatetu** (supra) where it was held that since the standard of proof is elevated in criminal proceedings as compared to civil matters, so should the threshold for admission of interested parties be in criminal matters and that courts should always guard against admitting third parties who may end up clogging the case of the petitioners in criminal matters.

18. On the issue of costs it is submitted for the petitioners that the Applicant should bear the costs of the application.

19. The DPP, the Director of Criminal Investigations (DCI) and the Chief Magistrate Milimani Law Courts being the respective 1<sup>st</sup> to 3<sup>rd</sup> respondents did not oppose the application. Their position on the application was formally placed on record by their counsel on 16<sup>th</sup> July, 2019.

20. The only issue to be determined is whether the Proposed Interested Party has met the threshold for admission to the proceedings. Rule 2 of the Mutunga Rules defines 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.”**

21. The Applicant herein insists that it has an identifiable stake in the proceedings being that it is involved in a criminal suit in which the respondents herein are pursuing a complaint made by it. The Applicant claims that any orders made in this matter will affect its interest in the criminal proceedings. Further, that the petitioners are misleading both this court and the respondents and it would be pertinent that the Applicant be joined to set the record straight.

22. The petitioners’ retort is that the Applicant has failed to put forward in a concise manner the interest it is seeking to secure or the identifiable stake it has in the matter. The petitioners are convinced that the respondents are capable of representing the interests of the Applicant sufficiently, as they are doing in the criminal proceedings brought against the petitioners.

23. In the case of **Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others [2014] eKLR** the court cited with approval the case of **Meme v Republic [2004] 1 EA 124** where it was stated that a party may be enjoined in a matter if:-

**“(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 rights of a party who would otherwise be adversely affected in law;**

**(iii) joinder to prevent a likely course of proliferated litigation.”**

24. Furthermore, the Supreme Court in **Francis Kariuki Muruatetu** (supra) 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. 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.”**

25. The petitioners argue that there is no need for the joinder of a complainant as an interested party in a petition seeking to quash criminal proceedings as the State represents the complainant in such proceedings. Further, that the issue at hand is the exercise of constitutional powers by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the role of the complainant came to an end once the complaint was made to the police.

26. The arguments of the petitioners find support in the decision of **Christopher Oganda Nyaruri** (supra) where the Court upheld similar arguments by stating that:-

**“16. In the instant case, I find that it is not necessary to enjoin the applicant to this case for the following reasons; Firstly, it is not disputed that there is already a case before the Environment and Land Court pitting the applicant and the petitioner herein where, I believe, the real issues between the parties will be ventilated. Secondly, it is apparent to me that the instant petition is an offshoot of the matter before the Environment and Land Court as the petitioner seeks to stop the respondents from instituting criminal charges against him over the same land dispute. My take is that the instant petition is purely a matter between the respondent and the petitioner in which case, should the criminal proceedings be initiated against the petitioner, the applicants interests, as a complainant in the said case, would be well taken care of by the Director of Public Prosecution who is in charge of the prosecution and the Director of Criminal Investigation who is the investigative body in the said criminal proceedings.**

**17. The broader principles of joinder were enunciated in the case of Mai Mahiu Kijabe/Longonot/Co. Ltd v Ayub Mugo Njoroge & 5 Others Civil Suit No. 1672 of 2001, Unreported, [eKLR] in which the court held;**

**“It is a cardinal rule of procedure that any party who stands to be directly affected by any orders that may be made in any suit and or whose participation is necessary in a suit for effective adjudication of the matters in issue ought to be made a party in the suit or at least be notified about the existence of the suit.”**

**18. In the instant case, I find that the applicant is already aware of the existence of the present petition and that its interests have already been catered for by the respondents who are well versed investigations or the intended prosecution should the same be initiated. I find that the applicant may not, in the totality of the circumstances of this case, be a necessary party to this case. Moreover, the applicant has not demonstrated that the respondents will be incapable or unwilling to present the**

complainants side of the story in the instant petition.

19. To my mind, this petition primarily challenges the respondents' exercise of their Constitutional and statutory functions and not the evidence to prove the alleged fraud which will be determined by the criminal court should criminal charges be filed against the petitioner. I further note that the respondents filed detailed replying affidavit to the petition in which they explained the nature of the investigations that they conducted around the land dispute following a complaint filed by the applicant's managing director. The applicant has not stated that the said response is inadequate or wanting so as to necessitate their entry into the case."

27. The petitioners have urged this court to follow the above cited decision stating that it is the latest enunciation of the law on joinder of interested parties in constitutional petitions challenging the exercise of investigative powers by the police and prosecutorial powers by the DPP. However, in the case of **Timothy Isaac Bryant & 3 others v Inspector General of Police & 3 others [2013] eKLR** the Court held otherwise by stating that:-

**"[25] While the nature of proceedings in the above-cited case are different from the one before me, I do find the principles instructive. Thus, the underlying consideration is whether, as I stated in a ruling in *Samuel Muriithi Watatua v Republic Miscellaneous Criminal Application 185 of 2012*, 'the ends of justice would be better served by joining the Intended Interested parties to the suit, allowing them to ventilate their side of the story.' This is because, the Court does not dispense justice in a vacuum, rather, in the context of the reality that issues raised before it serve the interests of private parties or the public interest. The question is whether the Applicants/Interested Parties have satisfied this Court that they ought to be enjoined for the interests of justice to be served."**

28. What I gather from the holding above is that the nature of the proceedings does not matter when it comes to joinder of interested parties. What is important is whether by joining the interested party, they will bring forward information which is essential to the proper determination of the case.

29. The question is whether the Applicant has passed the test for joinder as set down by the Supreme Court in **Francis Kariuki Muruatetu** (supra). In fact the Applicant's counsel suggested, which proposition I am not averse to, that the test for joinder of interested parties in constitutional petitions as set out in the Mutunga Rules is not as stringent as that found in the rules of the Supreme Court which guided the decision in the **Francis Kariuki Muruatetu** case. I think the decision of the Supreme Court provides general guidelines as to what should be considered by a court in allowing or rejecting an application for joinder by an interested party. The law that guides this court in determining an application for joinder in a constitutional is the Mutunga Rules.

30. The first question therefore is whether the Applicant has an identifiable stake in his matter. As pointed out by the Applicant, the petitioners in their supporting affidavit sworn on 10<sup>th</sup> November, 2019 specifically raise particular issues concerning the Applicant. It is the Applicant's averment that in paragraph 27(o) the petitioners claim that the Applicant has not tendered evidence to prove that the 6<sup>th</sup> Petitioner is their agent and therefore the claim of stealing is unsupported. Further, that in paragraph 37 the petitioners accuse the Applicant of influencing the respondents by exerting pressure through the publication of articles in the media. On the foregoing, it is evident that the Applicant does indeed have some interest in clarifying the adverse statements made about it.

31. The second question is whether the Applicant will suffer any prejudice if they are not joined to the proceedings. This prejudice must be clearly outlined and should not be remote. The Applicant states that it may suffer prejudice if the orders granted in this petition negatively affect the criminal case. This averment does not meet any opposition. The petitioners through these proceedings seek to obliterate the criminal trial before the 3<sup>rd</sup> Respondent. Their success will indeed prejudice the Applicant who is the complainant in the trial.

32. It is important to appreciate that in the post-2010 constitutional era a complainant in a criminal trial is no longer a bystander whose fate entirely lies with the prosecutor. The eminent role of a complainant in a criminal trial is secured by Article 50(9) of the Constitution and the Victim Protection Act, 2014 which was enacted pursuant to the said constitutional provision. I hold the view that the rights accorded to victims of crimes, and in particular complainants, in criminal trials extend to participating in any proceedings, like the instant petition, which seek to terminate the criminal trial. The interest of a complainant in a matter like this is proximate and the success of the petition will directly affect the rights of the complainant. The suggestion that the 1<sup>st</sup> and 2<sup>nd</sup> respondents will take care of the interests of the Applicant is therefore without merit.

33. The petitioners have urged this court to find that the interests of the Applicant will be adequately taken care of by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Such a proposal overlooks the right of the Applicant to be heard in a matter that directly impacts on its interests. In my view, it is immaterial that the Applicant will reiterate the pleadings and arguments of the respondents. What is important is that the Applicant has been given an opportunity to have its say on the matter before a decision is made by the court. Let it not be said that the court may have decided otherwise had the Applicant been allowed to make its submissions in the matter.

34. The third principle is whether the Applicant disclosed its case and arguments in the application for joinder. The requirement that an applicant should set out the submissions it intends to make before the court and demonstrate the relevance of those submissions was established by the Supreme Court in **Francis Kariuki Muruatetu** (supra). The Supreme Court also held that the submissions cannot be replications of the submissions already before the court. It appears that the Proposed Interested Party in its application, supporting affidavit, supplementary affidavit and submissions has failed to concisely set out the submissions or the case that they wish to argue before court. However, the Proposed Interested Party claims to have information which the petitioners have failed to disclose and which the respondents are not aware of. They submit that the information will help the court to better determine the matter.

35. It is indeed correct that the Applicant has not raised with any specificity the exact arguments that it shall submit or the inaccuracies which it wishes to shed light upon. However, the right to a hearing in my view supersedes such failure. The court can as well ask the Applicant to file further affidavits and submissions to bring forth the information it has. Whereas it would be tidy for an applicant to provide the details of

its case in the application and submissions, failure to do so is not a good reason for rejecting a deserving case for joinder.

36. Considering what I have stated in this ruling, it follows that the Applicant's application for joinder succeeds. The application is therefore allowed as prayed. In my view, the petitioners ought to have joined the Applicant in the matter at the time of the institution of the case. Nevertheless, I direct each party to meet own costs in respect of the application.

**Dated, signed and delivered at Nairobi this 3<sup>rd</sup> of April, 2020.**

**W. Korir,**

**Judge of the High Court**