



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CONSTITUTIONAL PETITION NO 1 OF 2020

IN THE MATTER OF ARTICLE 2 (6), 19, 20, 22, 23, 24, 28 AND 165 OF THE CONSTITUTION OF KENYA, 2010

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 11, 27, 28, 32, 44 OF THE CONSTITUTION OF KENYA,
2010**

AND

IN THE MATTER OF THE BIRTHS AND DEATHS REGISTRATION ACT CHAPTER 149, LAWS OF KENYA

AND

IN THE MATTER OF THE PUBLIC HEALTH CHAPTER 242, LAWS OF KENYA

AND

**IN THE MATTER OF THE UNCONSTITUTIONAL AND INDIGNIFIED BURIAL OF JAMES OYUGI ONYANGO
(DECEASED)**

BETWEEN

JOAN AKOTH AJUANG.....1ST PETITIONER

BRIAN THOMAS OYUGI.....2ND PETITIONER

MICHAEL OWUOR OSODO

THE CHIEF SIMUR KONDIEK

UKWALA LOCATION.....1ST RESPONDENT

MUTAHI KAGWE, CABINET SECRETARY

MINISTRY OF HEALTH.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER

HEALTH, SIAYA COUNTY GOVERNMENT.....4TH RESPONDENT

LAW SOCIETY OF KENYA.....INTERESTED PARTY

MALAIKA FOUNDATION...PROPOSED INTERESTED PARTY/APPLICANT

RULING

1. On 22nd April 2020 the applicant herein, **MALAIKA FOUNDATION** filed a Notice of Motion dated 21st April 2020 seeking the

following orders:

- a. *This Honourable Court be pleased to certify this application as urgent and heard ex-parte in the first instance.*
- b. *Upon hearing this application, the Honourable Court be pleased to grant leave to the Intended Interested Party Applicant to join this suit as the 2nd Interested Party and all the necessary service of processes be effected to either the Applicant or their appointed advocates on record.*
- c. *Upon granting prayer 2 above, this Honourable court be pleased to order the Petitioners, the Respondents and the 1st Interested Party to serve upon them the amended petition and all relevant documents by email or any other lawful mode of service.*
- d. *That the Honourable Court upon admitting the Intended Interested Party Applicant as the 2nd Interested Party, their attached written submissions and other relevant documents be marked as duly and properly filed and an order of service be made thereof.*
- e. *Cost of the Petition be in the cause.*

2. The application is predicated on the grounds that:

(a) the deponent herein Dr. Akoth Steve Ouma is a renowned Legal Anthropologist and a Human Rights Scholar [1] and an Activist and as such well vast with matters fundamental human rights and freedoms, culture, cultural rights and heritage and cultural expressions through traditional celebrations.

(b) the Applicant is an Independent Non-Governmental Organization known as Malaika Foundation, promoting human rights world over, and has an office within Siaya County and shall be represent the larger interest of the Luo community and will be placing before the Honourable court material that will in a greater extent deal with the issues culture, cultural rights and heritage and cultural expressions through traditional celebrations at the core of the present dispute herein

(c) the final orders this Honourable court is likely to issue will directly and indirectly affect and or have a net effect on the the cultural norms and values and traditional expressions and celebrations of the said Luo community which in turn goes at the core of fundamental human freedoms and human dignity.

(d) the intended interested party applicant presence in this suit intends to further effectually assist the court in resolving pertinent and or critical issues raised in the present petition.

(e) it is in the wider interest of justice; and further there will be no prejudice suffered by parties herein if this application is allowed.

(f) this application has been brought in good faith and without any delay.

3. The said application is further anchored on the affidavit sworn by **Dr. Akoth Steve Ouma** at Siaya on 21st April 2020 deposing that he is a renowned Legal Anthropologist and a Human Rights Activist and as such well vast with matters fundamental human rights and freedoms, culture, cultural rights and heritage and cultural expressions through traditional celebrations. That the Intended Interested Party Applicant, is a Non-Governmental Organization known as **Malaika Foundation**, promoting human rights world over, and has an office within Siaya County and shall be represent the larger interest of the Luo community and will be placing before the Honourable court material that will in a greater extent deal with the issues culture, cultural rights and heritage and cultural expressions through traditional celebrations at the core of the present dispute herein.

4. Further, that the final orders this Honourable court is likely to issue will directly and indirectly affect and or have a net effect on the cultural norms and values and traditional expressions and celebrations of the said Luo community which in turn goes at the core of fundamental human freedoms and human dignity.

5. That the intended interested party applicant presence in this suit intends to further effectually assist the court in resolving pertinent and or critical issues raised in the present petition. That it is in the wider interest of justice; and further there will be no prejudice suffered by parties herein if this application is allowed and that this application has been brought in good faith and without any delay.

6. Apart from the petitioner and the interested party, all the Respondents opposed the application for joinder urging the court to dismiss the application.

7. Opposing the application by the 1st to the 3rd Respondents, a grounds of opposition dated 29th April 2020 contending that the proposed interested party is a private entity that has neither disclosed nor demonstrated any direct interest in the petition herein; that the **MALAIKA FOUNDATION** will not be affected by the determination of this honorable court on the petition made either way; that **MALAIKA FOUNDATION** has not demonstrated that its purported interest will not be well articulated unless he is enjoined and appears in the proceedings to champion his cause; and that the proposed interested party's application has not met the criteria set out by the Supreme Court on joinder of interested party; and that the application is bad in law.

8. On the part of the 4th Respondent, it filed a replying affidavit sworn by Dorothy Akinyi Owino, the County Executive Committee for

Health, Department of Health and Sanitation, in the County Government of Siaya. In the said affidavit, it was deposed that the proposed interested party is an amorphous body that would not add any value to the Petition herein as it has no legal standing to appear before this court or claim any human right and freedom hence it has no legal standing to bring this application to be enjoined in these proceedings. Further, it was deposed that the proposed interested party is a busy body that would unnecessarily convolute these proceedings with unnecessary matters and grounds that have hitherto not been contemplated by the parties already on record in the petition. That the petitioners have not pleaded which Luo Culture or tradition or belief has been violated to warrant the applicant herein to address any particular Luo Culture or custom or belief that was allegedly violated.

9. Further deposition was that the applicant has not demonstrated that it or Dr. Akoth Ouma is an expert in Luo Culture, customs and belief, and that the averments by the applicant are speculative and conjecture as they are not backed by evidence or substance. That the applicant has not demonstrated any value addition it will bring to this petition or prejudice that it will suffer if it is not enjoined to the petition. Further, that the applicant has not demonstrated that it has any interest in the petition to warrant its joinder to the petition. In addition, it was deposed that the Constitution is clear on Human Rights and freedoms and that it does not require any elaborate scientific exposition to expand and apply them and consequently the application for joinder adds no value.

10. The 4th Respondent concluded that the inclusion of the interested party as proposed will unnecessarily inflate costs of the petition to the detriment of the parties already on record. The 4th respondent urged this court to dismiss the application for joinder for want of merit.

SUBMISSIONS

11. The parties' advocates filed written submissions to canvass the application for joinder, which submissions I have carefully considered in line with the constitutional and case law dictates. The said submissions by the applicant, proposed interested party, the 1st to 3rd and 4th Respondents herein essentially echo the respective parties' depositions and grounds of opposition as well as the constitutional, statutory and case law cited in support of the respective positions. Whereas the applicant insists that it has an interest in the proceedings herein on the ground that it wishes to submit on cultural rights of the Luo Community as espoused in Article 11 of the Constitution, the Respondents oppose the application for joinder maintaining and contending that the Applicant has not demonstrated that it is a necessary party to the Petition and that its sole business is to convolute issues, unnecessarily complicate the Petition and bring issues that are neither here nor there. They all cited important decisions that speak to the subject and principles applicable in applications of joinder of interested parties to Constitutional Petitions. I find it unnecessary and of no value addition to reproduce the said submissions here for reasons that I will utilize the same principles in making my determination below.

DETERMINATION

The law on joinder of interested parties to constitutional petitions

12. Rule 2 of The Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) *Practice and Procedure Rules, 2013* defines an interested party as:

“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 the litigation;

13. Rule 7 (2) thereof provides that:

“A court may on its own motion join any interested party to the proceedings before it.

14. The Black's Law Dictionary 9th Edition, page 1232 defines an ***interested party*** as ***“A party who has a recognizable stake (and therefore standing) in the matter.”*** It also defines a ***“Necessary Party”*** as ***“a party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings.”***

15. The broad principles which govern disposal of an application for joinder of interested parties are that the court can, ***either*** on an application made by any interested party ***or*** on its own motion direct any person as party to be enjoined in the proceedings.

16. The elements to be satisfied where a party seeks to be enjoined in proceedings as an interested party are: the intended interested party must have ***“an identifiable stake” or legal interest or duty in the proceedings.”***

17. 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 into 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.***

18. In ***Amon v. Raphael Tuck and Sons Ltd., 1956 - 1 All ER 273*** it was held that a person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights. In ***Dollfus Mieg et Compagnie S.A.V. Bank of England, 1950-2 All ER 605 at p. 61,*** it was observed that in determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party, ***the true test lies not so much in an analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established.*** It is therefore apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be ***legal, identifiable or demonstrate a duty*** in the proceedings directly identifiable by examining the questions involved in the suit.

19. Regarding the exercise of the courts discretion on its own motion in applications of this nature, like all discretions, it must be exercised based on sound judicial principles. See *Yahaya Kariisa v. Attorney General & A'nor*, S.C.C.A. No.7 of 1994 [1997] HCB 29.

20. The main purpose of joining parties is to enable the court to deal with matters brought before it fully and exhaustively and to avoid a multiplicity of suits. It is a fundamental consideration that before a person can be joined as a party, it must be established that the party has an interest in the case. In addition, it must be clearly demonstrated that the orders sought in the case in question would directly and legally affect the party seeking to be enjoined. These considerations were augmented by the Supreme Court of Uganda in *Departed Asians Property Custodian Board v. Jaffer Brothers Ltd* [1999] I.E.A 55. where the court held:

“...for a party to be joined on ground that his presence is necessary for the effective and complete settlement of all questions involved in the suit, it is necessary to show either that the orders sought would legally affect the interest of that person and that it is desirable to have that person joined to avoid multiplicity of suit, or that the defendant could not effectually set up a desired defence unless that person was joined or an order made that would bind that other person.”

21. In law, standing or *locus standi* is the term for ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case. Standing exists from one of the following:-

a. *that the party is likely to suffer adverse effect,*

b. *that the harm suffered is likely to affect others who might not be able to ask the court for relief,*

c. *That the party is granted standing by the law see (Lee, Evan; Mason Ellis, Josephine (December 3, 2012). The Standing Doctrine's Dirty Little Secret." Northwestern Law Review. 107, 169).*

22. In the case of *Judicial Service Commission – vs – Speaker of the National Assembly & Another {2013} eKLR*, the court, referring to the definition of an interested party under The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules as defined above stated that:

“From the foregoing it is clear that an interested party is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings.”

23. In *Mumo Matemu vs. Trusted Society of Human Rights Alliance and 5 Others* (supra) the court held as follows: -

“Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion or sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. the standard guide for locus standi must remain the command in Article 258 of the Constitution.”

24. I add that the purpose of joinder of parties is to avoid multiplicity of suits. It is a mandate of the court that as far as possible, all matters in controversy between and among the parties should be completely and finally adjudicated upon and all arrays of legal proceedings concerning any of the matters in issue be settled and avoided in future. In this regard, it would be appropriate and in the interest of justice that all matters touching and concerning the subject matter of the petition herein be determined finally and completely adjudicated upon to avoid litigating over the same matters again.

25. The question therefore is whether as claimed by the applicant and contested by the respondents, the applicant should be enjoined to this petition as an interested party. The crux of the Petition is the alleged indecent, inhuman and cruel manner in which the deceased James Oyugi Onyango was buried at his home under the alleged command and authority of the Respondents herein following his at Matibabu Hospital, with the Respondents allegedly claiming that the deceased had died of the dreaded Covid-19 virus and that therefore his body had to be interred expeditiously to avoid the virus spreading to other people and members of his family; and that it was in the public health interest that the disposal of the deceased had to be carried out in the manner that it was disposed of, without the intention of offending anybody.

26. On the part of the petitioners, they claim that the manner of disposal of the deceased's body violated the right of the deceased and his family members, the petitioners included as well as the Luo cultural norms and customs on disposal of the dead. It is for that reason that the petitioners sought in their prayer No. 1 of the petition the following prayer:

“A declaration do and is hereby made that the rights of the late James Oyugi Onyango to a decent burial under international law, the Constitution and Luo Culture as well as the rights of the Petitioners together with the deceased's loved ones have been violated by the Respondents.”

27. The petitioners claim that their Luo cultural norms which are protected and guaranteed under Article 11 of the Constitution were violated by the manner in which the deceased James Oyugi Onyango was buried.

28. My humble view is that in an application to join proceedings as a party, the court should not delve into the merits of the factual basis for the proposed joinder. The settled principle of law is that if in the opinion of the court the applicant is a proper or necessary party within the meaning of Order 1 Rule 9 and 10 of the Civil Procedure Rules he/she should be admitted into the proceedings.

29. It is for that reason that the instant motion for joinder this court does not anticipate the applicant to file a substantive Petition. It follows that the privilege to be enjoined as a party especially on application to joinder and where the court is to exercise discretion, the party so enjoined would be restricted to filing an affidavit setting out facts or simply file submissions on the applicable law and practice, to assist the court determine the dispute fully and completely.

30. It is trite that Cultures and traditional celebrations and practices are protected in Article 11 of the Constitution and are to be promoted subject in my humble view, to those cultures and traditional practices not contravening the Constitution; being repugnant to justice and morality or inconsistent with the Constitution.

31. That being the case, and as the applicant herein claims that as a public benefit organization involved in the promotion of human rights and wishes to place before this court factual issues of culture, cultural rights and heritage and cultural expressions through traditional celebrations which are at the core of this petition, this court finds that the presence of the proposed interested party is not speculative and or that the applicant is a busy body with nothing relevant to offer to this court. In my humble view, it would be unfair, unjust and speculative of this court to dismiss the applicant as a busybody without giving it an opportunity to articulate before the court what it believes to be assistive to the court to completely and effectually determine the issues raised by the petitioner.

32. This court is not persuaded as contended by the Respondents that the applicant/ proposed interested party seeks to bring a totally new cause of action against the respondents. This is because, what is advanced as per the affidavit in support of the application and the submissions is simply an enhanced articulation of the issues raised in the petition.

33. 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.

34. From a plethora of decisions cited to this court, I agree with Mativo J in **Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR** that Judicial decisions, particularly in such instances, do more than merely decide disputes between, or determine the guilt or innocence of, individuals. They decide how the law of the land is applied to all.

35. The learned judge further observed, and I concur, that:

“Against this background, it is perhaps unsurprising that independent evidence and submissions on the scope and impact of the law may assist judges to reach a fairer and more sustainable result. Thus, interested party's interventions are of great value in litigation because they at times enable the courts to hear arguments which are of wider import than the concerns of the particular parties to the case.”

36. Further, it is the view of this court that the applicant has demonstrated that it has a legal and identifiable interest and also a duty to participate in the proceedings, which interest and duty are directly identifiable by examining the questions involved in the petition.

37.

38. On this ground alone, this court would be inclined to exercise its discretion on its own motion to enjoin the applicant/ proposed interested party and the second interested party to this petition.

39. Accordingly, I make the following final orders:

a. That Malaika Foundation be and is hereby enjoined in these proceedings as the second interested party;

b. That the Deputy Registrar of this court shall forthwith serve upon the second interested party all documents already filed by the parties, by email and the said second interested party is granted three days of today to file and serve its affidavit and written submissions upon all the other parties to the petition. Any party wishing to file response submissions shall do so within three days of service. Pending such compliance this court hereby sets judgment date in the main petition to be 12th June 2020 via online means.

c. I make no orders as to costs.

Dated, signed and delivered at Siaya this 15th day of May 2020 via zoom with all parties advocates in attendance.

R.E. ABURILI

JUDGE