



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**MISC APPLICATION NO.5 OF 2018**

**BERNARD SITATI.....APPLICANT**

**V E R S U S**

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

**SENIOR RESIDENT MAGISTRATE COURT GICHUGU...2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant who is the intended Interested Party, Thika Coffee Mills Limited, (to be referred to as the ‘Interested Party’) filed an application dated 11/5/2018 seeking an order that he be joined in this suit as an Interested Party.

2. The grounds for seeking the above orders are that criminal proceedings in **SRMCC No. 81 of 2018** is in reference to the theft of property belonging to the proposed interested party valued at Kshs.10 million. That they have a stake in the proceedings since they are victims of theft and they shall be adversely affected if the criminal proceedings are permanently stayed against the person who orchestrated the theft. That they shall provide prima facie evidence to demonstrate the respondent’s complicity in the theft. That the respondent has at all times been the employee of the interested party holding the position of general manager at Kigiri factory in Embu County. That it is imperative that they be enjoined to enable the Honourable Court to effectually and completely adjudicate upon and settle all questions which they are privy to as they are the complainants.

3. It is supported by the affidavit of Pius Mbugua Ngugi where the grounds have been expounded.

4. The ex-parte applicant filed replying affidavit stating that the application is an abuse of the court process as the case being a Judicial review this Court is not the right forum to ventilate the claims of a substantive nature. That the orders sought are incapable of being granted since the proceedings are seeking judicial review orders which are concerned with the process and not the merits of the case and they can only be admitted if they prove that the process affected him in anyway which they have failed to. That they have not adduced any material upon which the Court can determine whether they are directly affected by the proceedings.

5. The 1<sup>st</sup> respondent, director of Public Prosecutions did not oppose the application.

6. The application proceeded by way of written sub-missions. The Interested Party submits that he has interest in the suit and they should be admitted as they have met the standards of what constitutes an Interested Party. They rely on **Kingori –v- Chege and 3 Others (2002) 2 KLR** where it was held that:-

***“He must be a necessary party, he must be a proper party.... The ultimate order or decree cannot be enforced without his presence in the matter and his presence is necessary to enable the court to effectively and completely to adjudicate upon and settle all questions involved in that suit.”***

7. They submit that the applicant is the proper party being the complainant in the Criminal proceedings instituted in the Lower Court hence a vital party in the proceedings. The applicant further relies **on Article 22 (1) of the Constitution** which provides:-

***“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”***

**Article 48 of the Constitution** which provides

***“The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”***

Article 50(1) of the Constitution which provides:-

**“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”**

8. That the applicant is well within his Constitutional rights to make this application. The respondents will not suffer any prejudice. The applicant will assist the court to arrive at a more binding decision as he possesses all the relevant information.

9. For the ex-parte applicant it is submitted that the application is an abuse of court process as the proceedings before this court are seeking Judicial Review which are concerned with the process and not the merits of the case. That under **Order 53 rule 3(2) of the Civil Procedure Rules** the applicant ought to disclose to the court how he or she is directly affected by the order. That the decision whether to enjoin a party is an exercise of discretion and if no substantial purpose or benefit will be gained by the joinder of a person to the proceedings and may affect the expeditious disposal of the case the application will be declined. That the Interested Party has not met the threshold in the case of **Kingori –v- Chege**. The ex-parte applicant relies on **Republic –vs- Office of the Director of Public Prosecutions & 2 Others Exparte Sylvia Wairimu Njuguna also known as Sylvia Wairimu Muli**. Where it was stated, **‘that he or she is directly affected by the proceeding ought to bring himself or herself within the ambit of Judicial Review and ought not apply to be enjoined thereto with a view to transforming Judicial Review proceedings into ordinary Civil Litigation ----- the decision whether to enjoin a party is an exercise of discretion -----’**

He further relies on the Supreme Court decision in **Francis Kariuki Muruatetu & Another –v- Republic Pet. 15/2016** and Cited in **Republic –v- Retirement Benefits Appeals Tribunal & 952 Others Exparte Board of Trustees Teleposta Pension Scheme (2018) eKLR** where it was stated:-

**“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 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:**

**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.**

**The prejudice to be suffered by the Intended Interested Party in case if non- joinder must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.**

**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.”**

10. It is finally submitted that joining the Interested Party will not assist the court in resolving the issues before it.

11. I have considered the application and the submissions. The issue for determination is whether the applicant has demonstrated sufficient interest to be enjoined as an Interested Party in the Judicial Review proceedings.

12. An Interested Party is one who is not a party to the proceedings and was not a party **‘ab initio’**. It is a party who at a certain stage of the proceedings applies to be enjoined or a party to the proceedings applies to join him before Judgment is delivered and who will be affected by the decision of the Court.

13. A person who seeks to be enjoined in the suit as an Interested Party must disclose to the court how he or she is directly affected as provided under **Order 53 rule 3(2) Civil Procedure Rules**. The proceedings are Judicial Review and as pointed out what the court deals with in such proceedings is the process and not the merit. The court exercises discretion to allow a party to be enjoined in the proceedings. The applicant must therefore place material before the court which will enable it to determine whether the applicant is directly affected as the party has a burden to prove that he is directly affected. This in my view is the major consideration when determining whether to exercise discretion in favour of the applicant.

14. The Court of Appeal in **Western Kenya Sugar Company Limited –v- Kenya Sugar Board & Another (2014) eKLR** stated:- The court should first decide whether the appellant had a prima facie case and if satisfied should have allowed the appellant to be heard on merits in opposition to the Judicial Review application. It was stated:-

**On the basis of those factors, the appellant was closely connected with the licensing of BSM and the appellant was a proper person to be heard in opposition to the judicial review application in the context of Rule 6 of Order 53.....**

**In conclusion we are satisfied that the High Court did not exercise its discretion judicially. It misapprehended the law on judicial review and the applicable test and ultimately reached a decision which is plainly wrong. The decision to deny the appellant a hearing in a matter which the appellant was so closely connected vitiated the subsequent proceedings.**

15. The applicant is required to show how he is closely connected, with the matter before this court.

16. It is therefore necessary that the applicant discloses to the Court how they are directly affected by the proceedings. In addition, the

applicant must go further and satisfy the Court that the issue they intend to canvass in the proceedings, which issues are relevant to the matter for determination before the Court, cannot possibly be adequately canvassed by any other party participating in the proceedings.

17. In this case, the applicants have stated that the respondent has been their employee, that they are victims of the theft and they shall be adversely affected if the criminal proceedings are permanently stayed against the person who orchestrated the theft. That they shall provide prima facie evidence to demonstrate the respondent's complicity in the theft.

18. In the criminal proceedings the exparte applicant was charged with **Stealing by servant under Section 281 of the Penal Code** as well as **Conspiracy to commit a felony contrary to Section 393 of the Penal Code**. The applicant herein being an employer of the exparte applicant therefore will be directly affected by the proceedings.

19. The Interested party has shown that he is part and parcel of the dispute to be litigated in the Judicial Review proceedings. The right to be heard is both Constitutional and Statutory. Applying the decision of the Supreme Court which the respondent relied on, it is in support of the Interested Party. He has made a formal application to be enjoined, has laid sufficient grounds by showing that he has an interest in the matter being the complainant in the Criminal proceedings and owner of the stolen goods. He has a clearly identifiable interest in the matter. The Interested Party has demonstrated that he will be prejudiced if he is not heard yet he will be affected by the proceedings. To deny the Interested Party an opportunity to be heard will be violation of his rights. The Interested Party has demonstrated his case in the submissions and in the affidavit since he is a victim of the theft and would be adversely affected if criminal proceedings are permanently stayed against the person who orchestrated the theft. These matters cannot be said to be a replication of what other parties will be presenting (and submitting) before this court.

20. My view is that these are matters which calls on me to exercise discretion in favour of the applicant.

21. In conclusion, I find that the application by the Interested Party has merits.

22. I order that the proposed Interested Party, Thika Coffee Mills Limited be enjoined in these proceedings as an Interested Party.

23. I award costs to the Interested Party payable by the applicant.

**Dated at Kerugoya this 7<sup>th</sup> day of March, 2019.**

**L. W. GITARI**

**JUDGE**