



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 171 OF 2018**

**IN THE MATTER OF: ARTICLES 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 39, 47, 48, 50 AND 51 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 21, 24, 25, 26, 27, 28, 29, 39, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR THE ORDERS OF HABEAS CORPUS**

**BETWEEN**

**MBARAK KHALID BAKARI.....PETITIONER**

**AND**

**1. DIRECTOR OF PUBLIC PROSECUTIONS**

**2. INSPECTOR GENERAL**

**3. KENYA NATIONAL POLICE SERVICE**

**4. ATTORNEY GENERAL.....RESPONDENTS**

**RULING**

**The Application**

1. By a Notice of Motion application dated 2<sup>nd</sup> July, 2018, HAKI AFRICA the Applicant, seeks to be joined to these proceedings either as the 2<sup>nd</sup> Petitioner or as an Interested Party, and be granted an opportunity to participate in the proceedings by presenting evidence, challenging the Respondent's evidence, examine, cross-examine and re-examine witnesses and submit written and oral arguments in the petition.

2. The motion is premised on the grounds *inter alia* that the HAKI Africa is an organization that deals in promotion, protection and enforcement of human rights in Kenya; that HAKI Africa was one of the first entities to receive the Petitioner's formal complaint that forms the fabric of the case and has since been following up on it; that HAKI Africa has dealt with a number of similar cases and has information that may assist the court in determining this petition in a fair and just manner; that HAKI Africa seeks to be joined in these proceedings to offer their experience on the subject and to assist the court to reach a fair and objective determination of the questions in issue.

3. The application is supported by affidavit sworn by Hussein Khalid who describes himself as the Executive Director of HAKI Africa. The Applicant's case is that it is a civil society organization and its primary objective is to promote and protect human rights, rule of law and democracy in Kenya and elsewhere. The deponent avers that the Petitioner Mbarak Bakari reported to their office the arrest and or abduction

of his son Husni Mbarak Khalid Bakari on the 25<sup>th</sup> May, 2018 and advised him to immediately report the matter to the police which he did. On 28<sup>th</sup> May, 2018 the Petitioner and Mr. Hussein Khalid made enquiries about the arrest and or abduction of the Petitioner's son from the Mombasa County Commander at the Regional Police Headquarters and that the Mombasa County Police Commander denied that the police had a hand in the arrest and or abduction of the Petitioner's son but they had traced Husni's mobile phone to Mayungu which is past Malindi and that they had sent their officers to comb the area but without success.

4. The deponent further states that they have been following up a number of such disappearances, and in paragraph 6 of his affidavit gave 28 particular of such cases where citizens have disappeared with no trace.

5. The Applicant's case is that since the 1, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have failed so far to inform Kenyans, and HAKI Africa, of the whereabouts of these people, whether they are alive or dead, the Respondents are under a constitutional duty to protect the life and liberty of all Kenyans and therefore are under a duty to investigate and inform Kenyans where Husni is and where he is alive or dead. That it does not matter whether the arrest and or abduction was made by the police or criminals, the Respondents have to discharge their constitutional duty of telling Kenyans where Husni is. The Applicant states that at the time of arrest or abduction Husni was not robbed of any property and that the Petitioner has not received any demand for ransom from any person and that the circumstances of the arrest and or abduction are not in tandem with those of thugs and criminals. That HAKI Africa's concern in this petition is based on the following:

- (i) Unexplained arrests and or abductions are a clear violation of the victims' right to life and liberty.
- (ii) Given the increasing numbers of such cases, it appears that safety and security of Kenyans is not guaranteed.
- (iii) The Respondents are either unable to protect Kenyans or have neglected their duty to do so.
- (iv) The Respondents should take responsibility for such disappearances and should be penalized under the law.

### **The Response**

6. The 1<sup>st</sup> Respondent oppose the application vide ground of Opposition filed herein on 6<sup>th</sup> July, 2018. The 1<sup>st</sup> Respondent's case against the joinder of HAKI Africa herein is hinged on the argument that the proposed Petitioner/Interested Party has failed to set out in his application any identifiable or recognizable personal interest or stake that it has in the Habeas Corpus application and therefore lacks standing; that the proposed Petitioner/Interested Party has failed to demonstrate any prejudice it would suffer or how it would be affected by the decision of the court if it is not enjoined in the petition; that the proposed Petitioner/Interested Party has failed to demonstrate what expertise or special skill it possesses that the main Petitioner and the Respondents would lack in examination and cross examination of witnesses; that the proposed Petitioner/Interested Party seeks to introduce new issues outside that which the main Petitioner has presented which new issues will only cloud and convolute the petition and occasion delays and that the proposed joined neither serves public interest nor promotes the administration of justice.

### **Submissions**

7. Parties made oral submissions in court on 10<sup>th</sup> October, 2018. **Mr. Mwarandu** for the Applicant relied fully on the application and the Supporting Affidavit.

8. **Mr. Aboubakar** for the Petitioner also supported the application and submitted that the Applicant in law is supposed to show two things: interest; and prejudice to be suffered. Counsel submitted that there are four reasons that establish the interest of HAKI Africa – it is a civil society interest in promotion and protection of human life. Counsel submitted that right to life under Article 26, 27 and 29 are human rights. Secondly, counsel submitted that the Petitioner had reported the disappearance of Hussein to HAKI Africa and together they reported the matter to the police. Thirdly, counsel submitted that HAKI Africa has been involved in similar matters before, and that it is their duty to do similar work. Fourth, counsel submitted that HAKI Africa has demonstrated that it can help the court arrive at justice.

9. On the issue of prejudice, Mr. Aboubakar submitted that if it is denied the right to participate in these proceedings, the Applicant will have been denied the right to protect and promote human rights. Secondly, that the research done by the Applicant will not be available to this court. Thirdly, HAKI Africa if denied access herein will not justify the funds it receives from donors to do human rights work. Lastly, counsel submitted that a court may on its own motion join a party to proceedings.

10. **Mr. Mutuku** for the 1<sup>st</sup> Respondent opposed the application and filed Grounds of Opposition on 6<sup>th</sup> July, 2018 stating that HAKI Africa has not demonstrated interest in this matter which is identifiable in the application of Habeas Corpus to satisfy this court to be joined as a party. Counsel submitted that if HAKI Africa has information which may assist this court, they should volunteer the same as witnesses. In any event, counsel submitted, the Applicant will not suffer any prejudice if the application is denied. What they will lose is donor funding and they cannot be prejudiced.

11. **Mr. Jami** for 1<sup>st</sup> Respondent submitted that it is admitted fact by HAKI Africa that their interest in this matter to be joined is merely for funding. Further, HAKI Africa has annexed alleged outcome or conclusions of investigations they have carried out in the past. Mr. Jami questioned whether HAKI Africa has powers of investigations. Counsel submitted that HAKI Africa can appear here as witnesses.

12. **Mr. Wachira** for Attorney General submitted that the court can issue summons to a party who can help in clearing some issues. This means that any party seeking to join the case must prove personal connection on stake to proceedings. Mr. Wachira submitted that there is no identifiable interest by HAKI Africa. Yet they seek to play a pivotal role in this petition as Petitioner or Interested Party. Counsel questioned the value of adding HAKI Africa to these proceedings.

## Determination

13. I have considered the application together with counsel submissions. The issue for determination, in my view, is whether HAKI Africa has shown sufficient interest to be joined to these proceedings either as a Petitioner or as an Interested Party. The point to begin from is the constitutional imperative that access to court should not be unreasonably denied. Further, under Rule 7 of (Protection of Rights and Fundamental Freedoms) the Mutunga Rules, this court can on its own motion admit a party to proceedings which involve Human Rights. That notwithstanding however, joinder of a party to proceedings is now a well adjudicated matter. Court has taken the view that once a party shows sufficient interest in a matter before the court, this court must admit that party to proceedings unless such admission may cause serious prejudice to other parties or cause embarrassment to the proceedings. The issue was extensively canvassed in **Francis Kariuki Muruatetu & Another vs. Republic Supreme Court Petition No. 15 of 2015**. The Respondent heavily relied on this authority to oppose the application herein. In that case the Supreme Court, in considering an application by an Interested Party to join the proceedings, observed as follows:

**“[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.***

[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.

[42] Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. *An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court.* One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.

[44] We also note that criminal matters occupy a different platform from that of civil proceedings. Criminal proceedings directly touch on the personal fundamental rights and freedom of an individual, particularly the right to *liberty*. Consequently, just as the standard of proof is elevated in criminal matters (beyond reasonable doubt), so should the threshold for admission of interested parties be in criminal matters as compared to civil matters, where proof is on the balance of probability. Just as Mr. Ngatia urges, the Court has to guard against third parties (such as interested parties and *amici curiae*) proliferating the issues brought by the petitioners. In criminal proceedings, the accused should ordinarily be informed before hand of the case against him/her. Therefore, the court should always guard against admitting third parties who may end up clogging the case of the petitioners in criminal matters.

[45] Parties, particularly Katiba Institute, cited Article 22 of the Constitution as allowing them to join this matter so as to protect the public interest. Article 22 provides:

***“(1) 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.***

***“(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –***

***(a) a person acting on behalf of another person who cannot act in their own name;***

*(b) a person acting as a member of, or in the interest of a group or class of persons;*

*(c) a person acting in the public interest; or*

*(d) an association acting in the interest of one or more of its members”.*

**[46] Clearly, this Article cannot be a basis for admission of an interested party to any existing proceedings, where such a party has not shown a personal stake/interest in the matter, and only seeks to champion the public interest. The said article allows a party acting on behalf of another, or of the public, to ‘commence or institute’ a matter before a Court of law. Article 22 is not a formula for the admission of interested parties to any and all Court proceedings.”**

14. Citing the said Supreme Court authority, the Respondents submitted that HAKI Africa had not shown sufficient interest in this matter to be admitted as either a Petitioner or as an Interested Party.

15. The overriding issue in this application is proof of an interest by HAKI Africa. They allege that at the initial stages, they were the party that were approached by the Petitioner in an attempt to find the missing person. They also allege that they have information which may assist the court to reach a fair decision in the matter.

16. In the opinion of this court, these factors alone make HAKI Africa a possible witness in this petition. Their past experiences in handling similar cases of missing persons equally make them effective witness herein. Except that HAKI Africa is a human rights body with interest in protecting lives, there is no sufficient cause shown why they cannot do above as witness in this matter. A denial of right to appear in these proceedings does not appear to me to impair the rights of HAKI Africa or indeed to cause them any prejudice. The admission by HAKI Africa that they get donor funding when they appear in these kind of proceedings only makes it appear that HAKI Africa’s interest is to get the said donor funds. Because this is an admitted fact, it makes the position of HAKI Africa a private and very personalized issue which should not form a basis of admission to these proceedings.

17. It is the finding of this court that HAKI Africa has not shown a sufficient interest or stake in these proceedings. Whichever information HAKI Africa seeks to provide in these proceedings, it can do so as a witness if the Petitioner or the Respondents chose to call it as one.

18. In the premises the application before the court is dismissed for lack of merit. Costs shall be in the cause.

**Dated, Signed and Delivered at Mombasa this 14<sup>th</sup> day of November, 2018.**

**E. K. OGOLA**

**JUDGE**

In the presence of:

Petitioner in person

Mr. Ngoya for Respondent

Mr. Kaunda Court Assistant