



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**PETITION NO. 14 OF 2016**

***BETWEEN***

**HILLARY KIPCHIRCHIR.....PETITIONER**

***AND***

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

**INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**D.C.I.O. ELDORET SOUTH.....4<sup>TH</sup> RESPONDENT**

**ELDORET CHIEF MAGISTRATES**

**CRIMINAL COURT.....5<sup>TH</sup> RESPONDENT**

***AND***

**PETER KIBIRIGE CHEGE.....1<sup>ST</sup> INTERESTED PARTY**

**ALFAYO OTIENGA.....2<sup>ND</sup> INTERESTED PARTY**

**ERICK K. BARNGETUNY.....3<sup>RD</sup> INTERESTED PARTY**

**RULING NO. 2**

1. To the Kenyan Police, the petitioner is a dangerous and armed fugitive. As far as the petitioner is concerned, he is a law abiding citizen. He alleges that the Director of Public Prosecutions has initiated criminal proceedings illegally; and, is acting at the behest of one *Erick Barngetuny*, the 3<sup>rd</sup> interested party.

2. The petitioner has approached the court for protection. He filed the *original* petition on 27<sup>th</sup> July 2016. It was amended pursuant to retroactive leave of court obtained on 8<sup>th</sup> September 2016. There are two motions before the court. The first is the petitioner's *amended* notice of motion dated 12<sup>th</sup> August 2016. It was filed contemporaneously with the amended petition. In it, the petitioner seeks to restrain the respondents from arresting, detaining or charging him in *Eldoret Chief Magistrates Criminal Case Number 202 of 2016*. The court is named as the 5<sup>th</sup> respondent. That motion is contested by all the respondents and interested parties.

3. The second motion is dated 22<sup>nd</sup> November 2016. It is taken out on behalf of *Erick Barngetuny*, the 3<sup>rd</sup> interested party. He prays to be *removed* from these proceedings. He asserts that he is not a *necessary* party for the effectual and final determination of the petition. The latter motion is opposed by the petitioner. On 31<sup>st</sup> January 2017, I directed that both motions be heard together.

4. I will first consider the older motion of 12<sup>th</sup> August 2016. There are three key prayers. First, for a conservatory order to restrain the respondents from arresting, detaining or charging him in *Eldoret Chief Magistrate's Criminal Case Number 202 of 2016*. Secondly, an order in the nature of *prohibition* restraining the *DCIO Eldoret South Police Station*; or, any other Police Station; the Inspector General of Police;

and, the Director of Public Prosecutions from arresting or charging the petitioner without conducting a “fair, dispassionate and open investigation”. Thirdly, that a day be appointed for the petitioner to appear with his legal counsel before the police to “undertake the normal procedures including recording statements; or, to conduct appropriate investigations”.

5. The petitioner contends that his fundamental rights to a fair criminal process are being abused. He has sworn a number of depositions to support his view. I will deal with *three* of those affidavits *in extenso*. The first is dated 27<sup>th</sup> July 2016. At paragraphs 4 to 12, he avers-

*“4. That in January 2016, while away in Nairobi, I was informed of having been advertised [sic] in the newspaper as a wanted person by DCIO – Eldoret South vide Eldoret Chief Magistrate Court Cr. Case No. 202 of 2016. The same newspaper also stated that “he was armed and dangerous”. The same photograph was also relied upon by Erick Kipkemboi Barngetuny in Eldoret High Court Succession Cause No. 299 OF 2014, in the matter of the estate of the late Ezekiel Kiplelei Barngetuny.*

*5. That I later came to know that I was wanted for the attempted murder of Peter Kibinge Chege and Alfoyo Otienga on allegations that I tried to cause their death on the 27<sup>th</sup> day of December, 2015 within Eldoret at a place called Annex Shopping Centre.*

*6. That under the Constitution of Kenya, I [am] entitled to the presumption of innocence until the contrary is proven.*

*7. That the allegations of having committed a criminal offence, of being armed or not being armed are matters for investigations and eventually the truth will come out.*

*8. That arising from the said allegations ‘a shoot to kill order’ was issued, an [sic] information that I got through my aunt Ogla Jemeli Barngetuny, the source of information being DCIO, Narok acting for and on behalf of DCIO, Eldoret South.*

*9. That having been labeled a dangerous and armed criminal and shoot to kill order issued, I truly and legitimately feared for my life and went in to “safe refuge”.*

*10. That on further inquiries I came to know that the person involved or playing a central role in directing the police and pursuing me was one Erick Kipkemboi Barngetuny, a person I have been involved in bitter legal skirmishes involving the estate of my father, late Ezekiel Kiplelei Barngetuny in Succession Cause No.2329 of 2011, In the matter of Benjamin Barngetuny Bwaber (Deceased) and Succession Cause No. 229 of 2014, In the matter of the Estate of the late Ezekiel Barngetuny(Deceased) respectively.*

*11. That to me the criminal allegation [sic] against me had been hijacked by external forces for their own ends and in a sense to divert the use of the criminal process for extraneous or collateral purposes to “keep me away from litigating or urging for the fair distribution of the said estate”.*

*12. That I am entitled to a fair process, to a right to life, right not to be deprived intentionally, except to the extent authorized by the Constitution or other written law. The shoot to kill order was an extra judicial order and was not one contemplated in the Constitution of Kenya”.*

6. Those averments are disputed by the 3<sup>rd</sup> interested party. In paragraphs 6 to 12 of his replying affidavit sworn on 15<sup>th</sup> August 2016 he states-

*“7. That I came to know of the petitioner sometime [sic] in 2015 when he appeared to claim an interest in my later brother’s estate claiming to be his son.*

*8. That I know of my own knowledge that my sisters whom we are disputing over my late father’s estate are close confidants [sic] of the petitioner herein.*

*9. That sometimes [sic] in January this year, I received death threats from my siblings over the succession dispute in Eldoret High Court P & A NO 299 OF 2014 and I reported the said threats at Eldoret Police Station vide OB 31/13/01/16.*

*10. That due to the threats I received to [sic] above, I came across a notice by the Kenya Police Service on one of the daily newspapers indicating that the petitioner was wanted in relation to a criminal case being Eldoret CMCR NO 202 OF 2016.*

*11. That due to the threats above, I have received and the fact that the petitioner who had been termed as armed and dangerous was associated to the persons who had made threats against me, I genuinely feared for my life and made enquiries at Eldoret Police Station as to why the petitioner was wanted and I was informed that the petitioner was wanted for the shooting of two civilians whom I have now come to know are the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties.*

*12. That my fears have been confirmed by the sentiments of the petitioner particularly in paragraph 7 of his petition that he was informed by his aunt OGLA BARNGETUNY who is my sister that there was an advert in one of the dailies that he was wanted by police”.*

7. That affidavit; and, the replies by the 1<sup>st</sup> to 4<sup>th</sup> respondents generated the petitioner’s *further affidavit* sworn on 17<sup>th</sup> August 2016. The relevant paragraphs are 8 to 13-

*“8. That in any case I have never been subjected to any investigation and from the responses on record especially by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>*

respondents above, it is clear there was no reasonable and probable cause for mounting a criminal prosecution without any proper factual foundation or basis and therefore always suspect for ulterior or improper purposes and this is one such case.

9.....

10. That to start with No. 98716 PC. Tokaro Samson seems to be discussing other people since I am not 'Hillary Kipchirchir Lagat nor 'Stanley Tirop Teya'. I am not any of the above and I have already placed my national identity card on record.

11. That I do not know and I have not come in [sic] contact with one Stanley Kiprof Teya who was allegedly riding the motorcycle Reg. No. KMCP 692M.

12. That I have not and did not hold a gun and did not shoot the victims and if the said investigating officer is to be believed then where is the gun that I allegedly held against the victims? What is its serial number etc?

13. That to even show the malice and the "fact of manufacturer [sic] of criminal case against me", I am aware that PC Kokaro Samson is not telling the court the truth, indeed he is not telling the whole truth in that after the alleged incident the police went for [sic] Arap Kogo house, this is the Doreen Barngetuny husband [sic] and took away his pistol for ballistic examination. A case of running all over in a manner of speaking, an act of a "fishing expedition", firing in all directions in a misplaced aggression".

8. There are then the two impugned affidavits of Police Constable Samson Kokaro. One was sworn on 13<sup>th</sup> December 2016. In the relevant paragraphs, he deposed the following-

"4. That in Criminal Case No 202 of 2016 at Eldoret Chief Magistrate's Court, Erick Barngetuny is not a complainant or a victim.

4. That.....the victims [sic] are Alfayo Otanga and Peter Kibirige Chege who were shot by.....Hillary Kipchirchir Lagat and another, the accused persons in the Chief Magistrate's Court.

5. That during my investigation I did not find anything linking Erick Barngetuny with the case and he is not even a witness".

9. The second affidavit of Police Constable Samson Kokaro was sworn on 12<sup>th</sup> August 2016. He deposes that one suspect was arraigned in court on the 8<sup>th</sup> February 2016. He was charged with attempted murder contrary to section 220 (a) of the Penal Code. He avers that since the petitioner was at large, the police applied for warrants of arrest in Chief Magistrates Criminal Case No. 202 of 2016. The efforts bore no fruit. As a result, the police placed the offensive newspaper advertisement for a *wanted person*. The deponent conceded that the advertisement indicated that the petitioner was "armed and dangerous". A copy of the advertisement is attached marked *EKB-11*. He however denies that the police issued a *shoot to kill* order.

10. There is then the replying affidavit of Erick Barngetuny sworn on 22<sup>nd</sup> November 2016. At paragraphs 3 to 6, he deposes-

"3. That I have no interest in the investigations nor [sic] the outcome of Eldoret Criminal Case No. 202 of 2016.

4. That I was only made aware of the criminal case by the advert placed by the Kenya Police indicating that the petitioner was being sought.....on account of being suspected to have shot the 1<sup>st</sup> and 2<sup>nd</sup> interested parties herein.

5. ....

6. That I am a stranger to the 1<sup>st</sup> and 2<sup>nd</sup> interested parties herein and only came to meet them when we appeared in court on 10<sup>th</sup> August 2016 when this matter was coming up for hearing".

11. The third relevant deposition of the petitioner was sworn on 3<sup>rd</sup> October 2016. In that affidavit, he ropes in yet another third party called Andrew Khatimba Mulovi. He deposes at paragraphs 5 to 8-

"5. I recently got information that the 3<sup>rd</sup> interested party herein unduly influenced some of Erick Barngetuny['s] family employees and relatives to record statements with the police against me.

6. That the said information has been deposed in the affidavit sworn on the 26<sup>th</sup> day of September, 2016 by one Andrew Khatimba Mulovi.

7. That in the said affidavit, Andrew Khatimba Mulovi acknowledges the fact that it is an offence to lie to court and he therefore wishes to go on record that he lied in his statement and that he does not want to be party to the concocted information presented to the police and the lower court (criminal court) and also to this court anymore.

8. That he has also stated that when the shooting incident at Annex took place the 3<sup>rd</sup> interested party caused him to record a statement with the police against Hillary Kipchirchir".

12. I am minded to set out paragraphs 3 to 6 of the deposition of Andrew Mulovi sworn on 26<sup>th</sup> September 2016. He avers-

“3. That I know it is a criminal offence to lie to court and it amounts to an offence of perjury and that I cannot be a party to a perjury.

4. That when an incident.....took place my employer one Erick Kipkemboi caused me to record a statement with the police due to the fact that prior to the incident I had allegedly met with Hillary Kipchirchir.

5. That the statement that I had seen [sic] Hilary Kipchirchir in December 2015 is not true.

6. That other relatives of Erick Barngetuny have also recorded statements against Hillary Kipchirchir at [sic] the police”.

13. I have also perused other depositions in this matter. They include that of *Alfayo Otienga* sworn on 15<sup>th</sup> August 2016; and, another by *Peter Chege* of the same date. They are the complainants in the criminal proceedings. In addition, there are *grounds of opposition* dated 15<sup>th</sup> August 2016 filed by the Attorney General.

14. The parties have filed elaborate submissions and lists of authorities. The petitioner’s original submissions and list of precedents were filed on 10<sup>th</sup> August 2016; an additional list was filed on 18<sup>th</sup> August 2016. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents filed their submissions and list of authorities on 18<sup>th</sup> August 2016. The Attorney General also lodged his on the same date. The 1<sup>st</sup> to 3<sup>rd</sup> interested parties filed their submissions and authorities on 18<sup>th</sup> August 2016. I am indebted to all the learned counsel for their diligence; their assistance; and, courtesy to the court. If I do not make direct reference to all the cited cases, it is *not* for their *lack* of relevance.

15. On 31<sup>st</sup> January 2017, I heard counsel for all the parties. I take the following view of the matter.

16. The substantive *amended petition* is yet to be heard. It would be prejudicial at this stage to make conclusive findings on the matter. See *Justin Manani v City Council of Nairobi*, Nairobi, High Court Misc. Appl. 208 of 2010 [2012] eKLR. That will be the true province of the trial judge.

17. Although a tome of materials have been placed before the court, there are only *two* live issues: Whether, *prima facie*, the police and Director of Public prosecutions have abused their powers in bringing charges against the petitioner; and, secondly, whether the arrest and prosecution of the petitioner should be put on ice until the hearing and determination of the substantive petition.

18. The essence of the petitioner’s case is that his rights to liberty; and, to equal protection of the law are under siege. The claims are on a three-strand: First, that the police have carried out shoddy and malicious investigations; secondly, that though petitioner is innocent, his life is now endangered by the impugned advertisement for a *wanted person*; and, thirdly, that the law enforcement agencies or the Director of Public prosecutions are acting illegally by doing the bidding for Erick Barngetuny or related forces.

19. I agree with the submission by the petitioner’s learned counsel, *Mr. Arusei*, that it is inherently unconstitutional to bring criminal proceedings to achieve an ulterior or collateral purpose. It would be an abuse of power. See *Republic v Commissioner of Police and another ex parte Michael Monari & another* [2012] eKLR. I am also guided by the decision in *Republic v Attorney General ex parte Kipngeny Arap Ngeny*, Nairobi, High Court petition 151 of 2013 [2014] eKLR. In the latter, it was held-

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.

20. I can however safely state the following: Article 157 of the Constitution grants the office of the Director of Public Prosecutions the mandate to prosecute criminal matters. See *Republic v DPP & 2 others ex parte Indimuli & others*, Eldoret, High Court JR 5 & 59 of 2016 [2016] eKLR, *Jane Jelagat Rotich v The Magistrates Anti-Corruption Court Eldoret & others*, Eldoret, High Court Misc. Crim. Appl. 47 of 2014 [2015] eKLR. However, that power is to be exercised *judiciously* and without *interference* from any person. See *Meixner & another v Attorney General* [2005] 2 KLR 189, *Christopher Kiiru v Inspector General of Police & 3 others*, Mombasa, High Court, Petition 38 of 2013 [2015] eKLR.

21. The allegations of *interference* by Erick Barngetuny must thus be taken very seriously. *Meixner & another v Attorney General* [2005] 2 KLR 189 was dealing with the old powers of the Attorney General to bring criminal proceedings. Those powers have now been donated by the new Constitution to the Director of Public Prosecutions. The holding of the court in *Meixner* nevertheless remains relevant-

“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3) (a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (Section 26 (8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of that discretion if the Attorney General, in exercising his discretion, is acting lawfully. The High Court however, can interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to protection by law enshrined in section 77 of the Constitution.”

22. From the supporting affidavit of the petitioner sworn on 27<sup>th</sup> July 2016 and his two further depositions that I referred to, the following picture emerges. He works for the Kenya Armed Forces. The Director of Public Prosecutions has preferred against him the charge of *attempted murder* contrary to section 220 (a) of the Penal Code. The petitioner has not taken plea. He states that in January 2016 his attention was drawn to the newspaper advertisement for a *wanted person* (exhibit EKB-11). It was issued by the DCIO, Eldoret South, and stated that

“he was armed and dangerous”.

23. The petitioner alleges that the photograph was relied upon by the 3<sup>rd</sup> interested party in Eldoret High Court Succession Cause No. 299 OF 2014, *In the matter of the estate of the late Ezekiel Kiplelei Barngetuny*. The petitioner’s case is that no proper investigations have been carried out, and the charges are trumped up. In particular, he alleges that the 3<sup>rd</sup> respondent is *controlling* the hand of the Director of Public Prosecutions.

24. As I stated, those matters fall within the true province of the trial court at the hearing of the main petition. *At the moment*, I see no concrete evidence showing that the law enforcement agencies are acting under the *direction* of the 3<sup>rd</sup> respondent; or, that the investigations are *sloppy*. I say that very carefully to avoid prejudicing the trial court.

25. At this stage, there is *conflicting* affidavit evidence. For example, Erick Barngetuny has out rightly denied being the hidden hand in the prosecution. Police Constable Samson Kokaro has sworn a deposition dated 12<sup>th</sup> August 2016. He deposes that one suspect was arraigned in court on the 8<sup>th</sup> February 2016. He was charged for *attempted murder*. He avers that since the petitioner was at large, the police applied for warrants of arrest. The petitioner concedes in his deposition that he went into “*safe refuge*”. The efforts to arrest him bore no fruit. That was the genesis of the newspaper advertisement for a *wanted person*. The deponent conceded that the advertisement stated that the petitioner was “*armed and dangerous*”. He however denied that the police issued a *shoot to kill* order. It will be for the trial judge to find out whether there is a *real* threat to the life of the petitioner. At the moment there is no evidential material in the affirmative.

26. I am alive that there are underlying family feuds over the estate of *Ezekiel Kiplelei Barngetuny* (deceased) in Succession Cause No.2329 of 2011, *In the matter of Benjamin Barngetuny Bwaber (Deceased)* and Succession Cause No. 229 of 2014, *In the matter of the Estate of the late Ezekiel Barngetuny (Deceased)*. It is also evident that the 3<sup>rd</sup> interested party has an interest in the estate; and, that he contests the claim by the petitioner that he is a *son* of the deceased. But at this stage, I cannot state with certainty that the criminal charges have been brought to pile up pressure upon the petitioner in the probate and administration causes. Again, it is a matter for the judge at the hearing of the main petition.

27. The matters raised by the petitioner are no doubt *weighty*. He is deemed *innocent* until proved otherwise. He is entitled to equal protection of the law. The petitioner seems to have a robust defence to the criminal action. But I would be overreaching by interrogating the *adequacy* of the police investigations or charge; or, whether the petitioner should take plea. The questions whether or not the petitioner has a sound defence; or, whether or not the centre of the charge will hold will be the true province of the *Eldoret Chief Magistrates Criminal Court* upon tested evidence. That is the forum where the applicant will be entitled to a full hearing and a fair trial.

28. I am fortified by Makau J in *John Paul Odhiambo v DPP & another*, Siaya, High Court Petition 1 of 2016 [2016] eKLR. The learned judge, faced by similar circumstances, held-

“*It is in the public interest and public policy that a person reasonably suspected of having committed a crime should be tried in an independent court and if proved guilty, convicted and punished. The justice system does not guarantee an accused that trial courts would be infallible but only guarantees an accused that his constitutional rights including presumption of innocence and fair trial as enshrined under Article 50 of the Constitution would be enforced, thus he would get justice. Justice includes the public interest in getting the truths of the charges as well as interest in both the society and the accused in a fair process*”.

29. I have not heard the petitioner to say that he has *no* faith in the Eldoret Chief Magistrates Criminal Court; or, that the court has *no* jurisdiction to try the petitioner for *attempted murder*; or, that the presiding magistrate has breached the rules of natural justice. The amended notice of motion thus falls on its face. See *Meixner & another v Attorney General* [2005] 2 KLR 189, *Joram Mwenda Guantai v The Chief Magistrate* [2007] 2 EA 170, *John Paul Odhiambo v DPP & another*, Siaya, High Court Petition 1 of 2016 [2016] eKLR.

30. Furthermore, the Criminal Procedure Code has sufficient safeguards to ring-fence the petitioner. In *William Ruto & another v Attorney General* Nairobi, High Court Civil Suit 1192 of 2005 [2010] eKLR, the court had this to say-

“*The petitioners have questioned the competence of the charges that they face. In our view, it is not for this court to determine whether or not the charges as framed disclose an offence. There are adequate provisions in the Criminal Procedure Code (CPC) for instance Section 89 (5) CPC which can be used to address the issue. That section states as follows -*

“*89(5) where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order.*”

31. I am unable to hold on the materials before me that the 1<sup>st</sup>, 2<sup>nd</sup> or 4<sup>th</sup> respondents are acting outside the law or in excess of their jurisdiction in investigating the matter; or, deciding to charge the petitioner for attempted murder. I am not persuaded at this stage, as urged by learned counsel for the petitioner, that the respondents are trying to achieve a *collateral purpose*. See *Republic v Inspector General of Police Ex-parte Patrick Nderitu* Nairobi, High Court Judicial Review 130 of 2013 [2015] eKLR. If it turns out at the hearing of the petition that the respondents acted with malice or without any sound evidence, the petitioner still has remedies in a civil action for damages.

32. The investigations may not be up to scratch. The police may have recommended the prosecution of the petitioner without a *water-tight* case: but it is beyond my jurisdiction to interrogate the evidence; or, to supplant the criminal court. It is also *not* my true docket at this stage to *micromanage* the conduct of police investigations; or, to dictate the procedures of taking statements from witnesses or suspects.

33. I agree with the proposition that the police only need to establish some *reasonable suspicion* before preferring charges. *Republic v*

Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR. The burden and standard of proof must surely be left to the *criminal court*. Allegations of *attempted murder* are serious. But they remain mere *allegations* at the moment. It may well turn out, as the petitioner says, that he was not culpable; that he is a victim of the undercurrents of the tussle over the properties of the late Ezekiel Barngetuny. It is not for me to say at this stage in the matter.

34. In the end, I am not satisfied that the petitioner has made out a *prima facie* case for grant of any conservatory order. See Flemish Investments Limited v Town Council of Mariakani, Mombasa High Court Case 459 of 2010 (unreported), Suleiman v Amboseli Resort Limited [2004] 2 KLR 589, Giella v Cassman Brown and Company Limited [1973] E.A 358.

35. The upshot is that the *amended* notice of motion dated 12<sup>th</sup> August 2016 is *dismissed*. Costs shall abide the outcome of the main petition.

36. I will now turn to the second motion dated 22<sup>nd</sup> November 2016. It is taken out on behalf of *Erick Barngetuny*, the 3<sup>rd</sup> interested party. He prays that he be *removed* from these proceedings. It is the petitioner's case that Erick is the hidden hand in the criminal proceedings. From the depositions that I set out at length, it is obvious that Erick is *connected* with the estate of the late *Ezekiel Barngetuny*. It is also evident that there is a simmering dispute between the petitioner, Erick and the family of the deceased in Succession Cause No.2329 of 2011, *In the matter of Benjamin Barngetuny Bwaber (Deceased)* and Succession Cause No. 229 of 2014, *In the matter of the Estate of the late Ezekiel Barngetuny(Deceased)*. But at this stage, I cannot state with certainty that the criminal charges have been brought to pile up pressure upon the petitioner. Again, it is a matter for the judge at the hearing of the main petition.

37. True, Police Constable Samson Kokaro avers that Eric Barngetuny is *not* a complainant or witness in the criminal case. But he is so closely *intertwined* with the claims in the petition that to remove him would be to leave a mere *skeleton* of a petition. The court has inherent power to add or strike out the name of a party. The rationale is to prevent the *ends of justice* from being *defeated*; and, to allow the effectual and final determination of the petition. See Werrot & Company Ltd and others v Andrew Gregory & others [1998] LLR 2848 (CCK), Amon v Raphael Tuck & Sons [1956] 1 All ER 273. It is a *discretionary* power.

38. I find that the 3<sup>rd</sup> interested party is a *necessary* party for the *effectual* determination of the main petition. It follows as a corollary that the application by the 3<sup>rd</sup> interested party dated 22<sup>nd</sup> November 2016 is devoid of merit. It is also *dismissed*. Costs shall abide the outcome of the main petition.

It is so ordered.

**DATED, SIGNED and DELIVERED at ELDORET this 14<sup>th</sup> day of February 2017.**

**KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of-**

Ms. Kiget for the petitioner.

Mr. Mulati for the 1<sup>st</sup>, 2<sup>nd</sup> & 4<sup>th</sup> respondents.

Mr. Kuria for the 3<sup>rd</sup> and 5<sup>th</sup> respondents.

Mr. Lang'at for the 1<sup>st</sup> & 2<sup>nd</sup> interested parties.

Mr. Kibii for the 3<sup>rd</sup> interested party.

Mr. J. Kemboi, Court Clerk.