

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 37 OF 2017

In the matter of Alleged threat of contravention of Articles

1, 10, and 118 of the constitutional of Kenya 2010

and

In the matter of University Education (Amendment) act

and

In the matter of Medical Laboratory Technicians and Technologies Act, Cap 253A

and

In the matter of Medical Practitioners and Dentists Board Act, Cap 253

and

In the matter of Pharmacy and Poisons Board Act, Cap 244

and

In the matter of the Nursing Council of Kenya Cap 257

and

In the matter of the Kenya Nutritionists and Dieticians Act No. 18 of 2007

BETWEEN

Kenya Medical Laboratory Technicians and Technologists Board.....1stPetitioner

Kenya Medical Practitioners and Dentists Board.....2ndPetitioner

Kenya Pharmacy and Poisons Board.....3rdPetitioner

The Nursing Council of Kenya.....4thPetitioner

Kenya Nutritionists and Dieticians Institute.....5thPetitioner

Public Health Officers and Technicians Council.....6thRespondent

Versus

The Hon. Attorney General.....1st Respondent

and

Commission of University Education.....Intended Interested Party

CONSOLIDATED WITH

PETITION NO. 49 OF 2017

Council of Legal Education.....Petitioner

and

The Honourable Attorney General.....Respondent

Kenya Law Reform Commission.....1stInterested Party

Law Society of Kenya.....2ndRespondent

and

The National Association of Private

Universities in Kenya (NAPUK).....Intended Interested Party

RULING

The National Association of Private Universities in Kenya (NAPUK) (hereinafter referred to as the applicant) seeks an order that it be enjoined in this petition as an interested party. The crux of the application is that the applicant is an umbrella body of private Universities in Kenya and a platform under which private Universities in Kenya can advance matters of common interest and that it has an identifiable stake, legal interest and a duty to help the court effectively and completely adjudicate on all the issues in the proceedings.

In opposition to the application, is a Replying Affidavit filed on 28th February 2017 sworn by the C.E.O of the fifth petitioner stating *inter alia* that that the applicant is neither a regulator within the meaning of the statutes before the court nor a University and that its objects do not include regulation of Universities whose membership is open to private Universities and that it is not clear who are the members of the applicant nor have they annexed minutes supporting the institution of the suit and that the statutes in question do not refer to the proposed interested party either directly or indirectly

Applicants advocates submissions

Counsel for the applicant reiterated the above grounds and added that the applicant has a stake in the matters in question and a duty to help the court to completely and effectually determine the petition, and that half of Universities in Kenya are private institutions, and they offer academic programs which the applicants seek to control, and that the applicant is not a busy body but has an interest in the matter and that the decision sought will affect them. The applicants maintain that they represent private Universities and by enjoining them, the court will avoid multiplicity of suits.

Interested Party's Advocates submissions

Counsel for the interested party in Pet. no. 37 of 2017 supported the application and added that the crux of the dispute is control and regulation of academic programmes whether offered by private Universities of public Universities and also submitted that during the enactment of the contested statutes, the applicant was recognized as a stakeholder and participated in the process.

Petitioners counsels submissions

Counsel for the petitioners adopted the contents of the Replying affidavit referred to above and submitted that the applicant has no direct or remote interest in the matter viewed from the statutes before the court. Counsel submitted that the statutes mention Universities and that the applicant is not a University and that it has no *locus standi* and that the applicant did not demonstrate interest in the matter

Advocates submissions for Petitioner in Petition No. 49 of 2017

Counsel for the petitioner in Pet. No. 49 of 2017 opposed the application and adopted the submissions by the Petitioners counsel in Pet. No. 37 of 2017 and added that the applicant has not demonstrated an identifiable stake in this petition.

Submissions by Counsel for the 1st Respondent in Pet No. 49 of 2017

Counsel for the 1st Respondent in Pet No. 49 of 2017 did not oppose the application.

Does the application raises sufficient grounds

Rule 2 of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013^[1] defines an interested party as follows:-

“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;”

Rule 7 (2) provides that a court may on its own motion join any interested party to the proceedings before it. The broad principles which should govern disposal of an application for enjoinder 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.

Regarding the exercise of the courts discretion on its own motion in applications of this nature, like all discretions, it must be exercised judiciously based on sound principles.^[2] Importantly, the main purpose of joining parties is to enable the court to deal with matter brought before it and to avoid multiplicity of suits. It is a fundamental consideration that before a person can be joined as 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 suit would directly and legally affect the party seeking to be enjoined.^[3]

It must be emphasized that, among others, 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 the parties should be completely and finally determined and all multiplicities of legal proceedings concerning any of the matters be avoided. In this regard, it would be appropriate and in the interest of justice that all matters touching and concerning the subject matter of the suit in the case at hand be determined finally and completely to avoid litigating over the same matters again; which dictates that the Applicant be joined as a party to the suit. The crux of the dispute is control and regulation of academic programs and whether or not is the statute applies to programs offered by private Universities or public Universities is to me an issue that will be determined at the hearing. On this ground alone, the court would be inclined to exercise its discretion and enjoin the applicant on its own motion.

This court is acutely aware of the position that a plaintiff is *dominus litis*, and can sue whomever he or she thinks will obtain relief from; and that a plaintiff cannot be forced to sue somebody whom he or she has not chosen to sue. Further, where a plaintiff sues a wrong party he or she has to shoulder the blame.

In the instant application, however, the adding of the Applicant as an interested party by an order

of this court exercising its discretion within the provisions of the law, would not amount to “forcing” petitioners to sue someone they do not have a claim against, or suing “a wrong party.” My view is fortified by the definition of interested party in the rules.

The elements to be satisfied where a party seeks to be enjoined in proceedings as an interested party are that:-

- a. the intended interested party must have "an identifiable stake"
- b. or legal interest
- c. or duty in the proceedings

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.

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.[4] 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.[5] It is 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. From my analysis above, the applicant has demonstrated a legal and identifiable interest and also a duty to participate in the proceedings. 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.

The Black's Law Dictionary[6] 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.*"

An interested party is someone who is identified as being directly affected by the case (in particular, the relief that may or may not be granted by the court depending on whether it finds for or against the claimant).[7]

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*[8]

In the case of ***Judicial Service Commission – vs – Speaker of the National Assembly & Another***[9] 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.”

In *Mumo Matemu vs. Trusted Society of Human Rights Alliance and 5 Others*^[10] 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.”

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. 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.

The global experience

In other common law jurisdictions, such as the United States, Canada and South Africa, interested party's interventions before the courts have long been the norm. Consistent comparative practice across Supreme and Constitutional courts globally support the contribution made by third parties in important cases with a constitutional impact or on any wider public interest.^[11]

Public Interest intervention

Finally, it is important to distinguish between two kinds of interested party interventions, those where the intervener is seeking to represent the public interest, or merely his or her own private interest. Generally speaking, a case may be appropriate for an intervention if it: (i) raises one or more issues of public importance; and (ii) there is a risk that this public interest may not be sufficiently well-addressed by the submissions of the parties alone. In short, any would-be public interest intervener must ask how they might assist the court in this case; or how they might ‘add value’ to the court’s consideration of the issues before it.

It is not disputed that the statutes in question seek to control academic programs. It is not disputed that the applicant is an umbrella body of private Universities offering academic programs.

I am satisfied that the applicant have demonstrated a “legitimate interest” in these proceedings within the Rules. I am satisfied that the applicant has demonstrate sufficient grounds to be enjoined in these proceedings. I also find that the petitioners will not in any manner be prejudiced by the orders sought. The presence and participation of the applicant in these proceedings is necessary to avoid multiplicity of suits. I find that this is a proper case for the court to exercise its discretion in favour of the applicant.

Accordingly, guided by the above authorities and considering the relevant law and the facts of this case, I allow the application and order as follows:-

- a. ***That*** the National Association of Private Universities in Kenya (NAPUK) be and is hereby enjoined in these proceedings as the second interested party.
- b. ***That*** the second Interested party be and is hereby granted ***fourteen (14) days*** from the date of this order to file its Response (if any) to the petition.
- c. ***That*** the Petitioners in the two consolidated petitions be and are hereby granted ***fourteen (14)***

days from the date of service by the second Interested Party to file their Responses if any.

d. No orders as to costs.

Orders accordingly

Signed, Delivered, Dated at Nairobi this **12th** day of **May** 2017

John M. Mativo

Judge

[1] Supra

[2] **See:** *Yahaya Kariisa v. Attorney General & A'nor*, S.C.C.A. No.7 of 1994 [1997] HCB 29

[3] **These considerations have been amplified by the Supreme Court of Uganda in the case of the Departed Asians Property Custodian Board v. Jaffer Brothers Ltd** [1999] I.E.A 55

[4] This is the test which has been applied in *Amon v. Raphael Tuck and Sons Ltd.*, 1956 - 1 All ER 273

[5] See *Dollfus Mieg et Compagnie S.A.V. Bank of England*, 1950-2 All ER 605 at p. 611. **See also:** *Gokaldas Laximidas Tanna v. Store Rose Muyinza*, H.C.C.S No. 7076 of 1987 [1990 – 1991] KALR 21.

[6] 9th Edition, page 1232

[7] See CPR Part 54.1(2)(f), defining an 'interested party' as "any person (other than the claimant and defendant) who is directly affected by [a]claim" (Part 54.1(2)(f)) [emphasis added]. An interested party can be named as such by either the claimant (in the claim form) or the defendant (in the acknowledgment of service). In *R v Rent Officer and another ex parte Muldoon* [1996] 1 WLR 1103, the House of Lords held "that a person is directly affected by something connotes that he is affected without the intervention of any immediate agency" (per Lord Keith).

[8] Lee, Evan; Mason Ellis, Josephine (December 3, 2012). " The Standing Doctrine's Dirty Little Secret." *Northwestern Law Review*. 107, 169

[9] {2013} eKLR,

[10] {2013} eKLR

[11] *R v Home Secretary ex parte T & V* [1997] 3 WLR 23. JUSTICE's written submission provided a detailed analysis of the UK's relevant obligations under international law, including the UN Convention on the Rights of the child