Republic v Kenga & 41 others; Kenya National Commission on Human Rights (KNCHR) (Interested Party) (Miscellaneous Criminal Application E153 & E156 of 2023 (Consolidated)) [2023] KEMC 57 (KLR) (1 December 2023) (Ruling)

Neutral citation: [2023] KEMC 57 (KLR)

REPUBLIC OF KENYA

IN THE SHANZU LAW COURTS

MISCELLANEOUS CRIMINAL APPLICATION E153 & E156 OF 2023 (CONSOLIDATED)

JM OMIDO, SPM

DECEMBER 1, 2023

BETWEEN

REPUBLIC ..... PROSECUTION

AND

AMANI SAMUEL KENGA & 40 OTHERS ..... RESPONDENT

AS CONSOLIDATED WITH

MISCELLANEOUS CRIMINAL APPLICATION E156 OF 2023

BETWEEN

REPUBLIC ..... PROSECUTION

AND

MILCAH NASIMIYU MUDAMBWA ALIAS MIRIAM NEKESE ONENTIA & 24 OTHERS ..... RESPONDENT

AND

THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR) ..... INTERESTED PARTY

RULING

A. Introduction.

1. The application before me is one by way of Notice of Motion dated October 18, 2023, presented by the Kenya National Commission on Human Rights (hereinafter referred to as "the Commission"), an

independent Constitutional Commission established under Article 59 of *the Constitution of Kenya, 2010*, and is expressed to be brought under Articles 3, 21(1) and (3), 22(1) and (2), Articles 48, 49 and 50(7) and Article 59(2)(e) of *the Constitution of Kenya 2010* and all other enabling provisions of the law.

2. The Commission's motion seeks the following orders:

    a. That the Applicant/Intended Interested Party be enjoined in Misc. Criminal Application No. 152 of 2023 (as consolidated with Misc. Criminal Application No. 156 of 2023) as an Interested Party.

    b. That upon the grant of Order (a) herein, this Honourable Court do issue directions as to filing of pleadings, any information and/or evidence it may deem important and relevant to facilitate the just disposition of this matter.

    c. That there be no order as to costs.

3. The grounds upon which the motion is premised are set out on its face and are 20 in number and are in precis as follows:

    i. The Commission has the core constitutional mandate of ensuring the protection and promotion of human rights in the Republic of Kenya as set out under Article 59 of *the Constitution* and Section 8 of the *Kenya National Commission on Human Rights Act*, No. 14 of 2011, (hereinafter "the Act") which includes promoting respect for human rights and developing a culture of human rights within the Republic; on its own initiative or on the basis of complaints, to monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs; to investigate or research a matter in respect of human rights, and make recommendations to improve the functioning of state organs; and to act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights.

    ii. The Commission is also charged with the duty of taking steps to obtain redress for human rights violations when the same are determined to have occurred.

    iii. The Commission has been working with other state agencies in monitoring and ensuring that operations conducted or undertaken by the agencies in relation to what is now commonly referred to as the Shakahola Massacre are in line with human rights standards best practices and principles, and has participated in various connected court processes in the discharge of its mandate.

    iv. The Respondents herein were previously treated as victims and held at a rescue centre pursuant to inter alia an advisory made to the court by the Commission. The Respondents were subsequently recharacterized as suspects on the basis that they may have committed criminal offences under various statutes following which they were placed in detention on the strength of court orders issued herein, pending conclusion of investigations and/or charge.

    v. Whereas the State, through the Office of the Director of Public Prosecutions (hereinafter referred to as "the ODPP") has vide an application by Notice on Motion dated October 9, 2023 sought to have the pre-trial detention for all the Respondents increased by a further 180 days pending the conclusion of active investigations, the Commission is concerned about the request for the continued detention of the Respondents without charge and its ramifications on their individual fundamental rights and freedoms, which the Commission is mandated to

protect and promote, hence the Commission's desire to participate in the instant proceedings and respond to the State's application for extension of the detention period.

vi. The Commission seeks to advance the interests of constitutionalism, *the constitution* and the rule of law and can only do so if allowed to participate in the instant proceedings as an interested party.

vii. The Commission has participated in courts at all levels in the country (from the Magistracy to the Apex or Supreme Court) to enrich the proceedings with the unique expertise and human rights perspectives that have been born out of its experience and long track record in upholding constitutionalism in discharging its mandate which have been appreciated by the respective courts.

viii. The Commission has supported the ODPP and is even named as a Respondent alongside the ODPP in an ongoing petition before the High Court in Nairobi.

ix. The application subject to this ruling has been made without any unreasonable or inordinate delay.

x. It is in the interest of constitutionalism equity and justice that the application be allowed and that in any event, no party will be visited with prejudice if the application is allowed.

4. The application is supported by the affidavit of Annemarie Okutoyi sworn on October 18, 2023. The Deponent to the said supporting affidavit describes herself as the Director of the Research Advocacy and Outreach Directorate of the Commission. The Deponent in her affidavit, which I have had the occasion of perusing, has essentially restated and expounded on the grounds listed above.

5. The State opposes the Commission's application and to that end filed a statement of grounds of opposition dated October 25, 2023 presented by Victor Juma Owiti, HSC, Principal Prosecution Counsel, in which the State urges as follows, against the Commission's application:

i. That the Intended Interested Party has in fact sought to be barred from participating in the substantive application.

ii. That without prejudice to the foregoing, the Intended Interested Party has not met the threshold for joinder as a party as settled in the Supreme Court case in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* 2015 [eKLR].

iii. That the Intended Interested Party has not particularized any prejudice that it would suffer if the intervention sought by dint of the instant application is denied.

iv. That the intended interested Party has neither alleged nor provided reasons for, the belief that the submissions it intends to make would be different from those of the primary parties being the Applicant (the State) and/or the Respondents.

v. That the instant application (if allowed) would unnecessarily cloud the issues for determination in the substantive application.

6. When this matter was placed before me on October 23, 2023 for directions on the application that is the subject of the instant ruling, the court, with the concurrence of the parties, sanctioned that the application would proceed by way of written submissions and timelines for filing of the submissions, lists of authorities and copies thereof were set.

7. When the matter was subsequently in court on 9th November, 2023, Ms. Kirui and Ms. Musa appeared for the Commission while Mr. Jami, Assistant DPP represented the State. Both the Commission's and

the State's counsel informed the court that the directions of 23rd October, 2023 had been complied with and that the respective documents had been filed. The 66 Respondents herein, through their Counsel Mr. Mutegi (instructed by the Nation al Legal Aid Service (hereinafter "NLAS") told the court that they had no opposition to the Commission's application and would therefore not file any documents on the motion. The court scheduled the ruling for November 15, 2023.

8. On retiring to prepare the ruling, it came to light, upon perusal of the record that some of the pertinent documents on the application had not been filed by both the Commission and the State, which, unfortunately, had the result of delaying the delivery of the ruling beyond the date that had been given to the parties. Be it as it may, the two parties were informed of the position and submitted the documents.

B. The Commission's Submissions

9. In its submissions filed herein dated October 31, 2023, the Commission largely reiterates the grounds of the application listed under paragraph 3 (i) to (x) as reproduced in this ruling (above) and the contents of the supporting affidavit, which, as I have stated above, restates and expounds on the grounds of the motion.

10. What perhaps is noteworthy from the submissions by the Commission is that it has pointed out two cases that the Commission has participated in as an Interested Party; Kisumu Chief Magistrate's Court Inquest No. 6 of 2017; In the matter of Baby Samantha Pendo (Deceased) and Isiolo Chief Magistrate's Court Inquest No. 3 of 2017; Saida Hussein v Republic. However, this court is not privy to the circumstances under which the Commission was allowed to participate as an Interested Party in the two matters as the decisions granting such admission to the cases were not provided to the court.

11. The Commission states that the continued detention of the Respondents without a charge and the State's application for the detention to be extended for a further 180 days and the Commission's observation that the State "has adopted laxity" in this matter prompted it to apply to this court to participate as an Interested Party in these proceedings, "to offer the required legal support and representation that will see justice being administered expeditiously".

12. It is the further submission by the Commission that it has in the past participated in and "has been part and parcel of the exercise being conducted at Shakahola Forest and its role cannot be ignored". It is urged that the Commission "has been part and parcel of the Shakahola tragedy in different capacities such as monitoring the exhumation, post mortems and taking part in Shanzu Miscellaneous Criminal Application Number E500 of 2023; Republic v Kennedy Were & 64 others" (in which matter the Respondents herein had been characterized as victims).

13. It is stated in the submissions by the Commission that as a result of having participated in the various processes in the Shakahola affairs, it ought to be allowed to participate in the instant proceedings as an Interested Party and upon such approval, the court do give directions on how the evidence should be submitted and the Respondents put through a fair and just trial process that "falls within the four corners of *the constitution*".

14. It is to be noted that the Commission raises a concern that the State has proceeded to file an application for the continued detention of the Respondents for a further period of 180 days yet no account has been rendered for the period initially ordered of 30 days detention of the Respondents. That effectively, the continued detention, if allowed, is tantamount to detention without trial.

15. Further, as no clear indication as to when a formal charge will be brought against the Respondents herein, the participation by the Commission will be a "first step" towards a justifiable and expeditious dealing with the Respondent's "volatile constitutional situation".

16. The Commission states further that the application is aimed at ensuring that all relevant evidence is submitted to this court, a process which will not be achieved if the Commission is not admitted to the instant proceedings.

17. The Commission in urging the application relied on Rule 2 of the Mutunga Rules (*Constitution of Kenya Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*) 2013 where an "Interested Party" is defined as:

> " 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".

18. From the above definition, the Commission asks the court to reach a finding that it has an identifiable stake and legal interests in as far as protection of fundamental human rights of the Respondents is concerned hence the necessity to allow the Commission to participate in the proceedings before this court.

19. The Commission sought to rely on the definition ascribed to the term "Interested Party" by the Supreme Court in the case of *Francis Karioko Muruatetu & another v Republic* [2016] eKLR, where the apex court adopted the definition in the *Black's Law Dictionary*, 9th Edition where the term is defined thus:

> " A party who has a recognizable stake (and therefore standing) in the matter".

20. In *Muruatetu* (supra) the Supreme Court placed reliance on its decision in the case of *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* [2014] eKLR where the court observed as follows:

> " Suffice is to say that while an interested party has a 'stake/interest' directly in the case, an amicus's interest is its 'fidelity' to the law: that an informed decision is reached by the Court, having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.
>
> Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. On the other hand, an amicus is only interested in the Court making a decision of professional integrity. An amicus has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a 'friend' of the Court, his [or her] cause is to ensure that a legal and legitimate decision is achieved."

21. It is thus the position of the Commission that having participated in the Application in which the Respondents were characterized as victims, the Commission has a stake to defend, namely the potential violation of the fundamental rights of the Respondents.

22. The Commission relied further on the authority of the Supreme Court in the case of *Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others* [2014] eKLR in which the court cited its decision in *Mumo Matemu* (supra) and stated as follows:

> "In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court's Ruling in the *Mumo Matemu case* where the Court (at paragraphs 14 and 18) held:
>
> > "[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause..."

23. Further reliance was placed by the Commission on the High Court authority of *Meme v. Republic*, [2004] 1 EA 124, where the court observed that a party could be enjoined in a matter for the reasons that:

> "(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
>
> (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
>
> (iii) Joinder to prevent a likely course of proliferated litigation."

24. In winding, the Commission submitted that without its participation in this matter, there is a possibility that the fundamental rights of the Respondents may be under threat of violation.

C. Submissions by the State.

25. In its submissions dated November 7, 2023, the State took the introductory view that the intention the Commission has is to be admitted into the instant proceedings so that it would then oppose the State's application that seeks the extension of the custodial orders pending the conclusion of investigations

26. While pointing out to the court that the order sought by the Commission in its application is to be enjoined rather than to be joined in the proceedings herein, the State invited the court to refer to the High Court authority of *Re Estate of Barasa Kanenje Manya (Deceased)* [2020] eKLR in which the court (Musyoka, J.) in making the distinction between the words joinder and enjoinder stated thus:

> "2. Before I get into the substance of the application, let me straighten out the record, with the regard to the use of the words "join" and "enjoin," for the applicants herein seek to be "enjoined" to the cause as parties. I have come across many applications where parties use the two words interchangeably. I have also come across cases where parties talk about "joinder" and "enjoinder" interchangeably. "Join" and "enjoin" exist in the English lexicon, but they do not mean the same thing. To "join" a party to a suit means to add that person to the suit. To "enjoin," in law, means to injunct, or to bar a party from doing something. "Enjoinder" means a prohibition ordered by injunction.
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> 3. *Black's Law Dictionary*, Tenth Edition, Thomson Reuters, St. Paul, 2004, does not define the word "join." What it does is to define the noun derived from it,

that is to say "joinder," as "the uniting of parties or claims in a single lawsuit." It does not define "enjoinder," but identifies it as the noun drawn from the verb "enjoin," which it defines as "to legally prohibit or restrain by injunction" or "to prescribe, mandate, or strongly encourage." The *Concise Oxford English Dictionary*, Twelfth Edition, Oxford University Press, New York, 2011, defines "join" as "to link or become linked or connected to," and "joinder" as, in law, "the action of bringing parties together." The same text defines "enjoin," as used in everyday conversation, as to "instruct or urge to do something," and, in law, as to "prohibit someone from performing (an action) by issuing an injunction."

4. I raise this because the applicants herein have asked to be "enjoined" to the cause as parties. That literally means that they be injuncted or barred or prohibited from the cause. The prayers as framed are completely nonsensical, when looked at against the averments made in the affidavit, sworn in support of the application. In the said affidavit, the applicants still talk about being "enjoined" in the proceedings as parties, so that the court can fully and effectually determine the issues in the succession cause. They are not asking for injunctions, and, therefore, the use of the word "enjoined," in the application and the affidavit, is unfortunate, for the applicants appear to have intended to use the word or words "join" or "joined" instead. Clearly, the prayers as framed would make no sense at all if granted as prayed."

27. The court in *Re Estate of Barasa Kanenje Manya* (supra) concluded on the distinction between joinder and enjoinder as follows:

> " 5. I am minded to dismiss the application, for the reason of what I have stated in the foregoing paragraph of this ruling. However, I note that the parties hereto are acting in person, and, as lay persons, they may not be familiar with legalese, and, therefore, the meanings attached, in law, to the words "join," "enjoin," "joinder" and "enjoinder." Consequently, I am inclined to stretch the application of article 159 of *the Constitution* and rule 73 of the Probate and Administration Rules, to presume that the applicants intended to apply for "joinder" as opposed to "enjoinder," and to proceed to determine the application on its merits based on that presumption."

28. The position taken by the State then is that as the Commission seeks, through the application dated October 18, 2023 to be enjoined (rather than joined) to the proceedings herein, and as the application was drawn and presented by a qualified Counsel (unlike in the case of *Re Estate of Barasa Kanenje Manya* where the parties were lay persons acting for themselves), this court ought to apply the distinction between join and enjoin as set out in the above authority and proceed to dismiss the application and proceed to grant the Commission the prayer sought for enjoinder and effectively bar the Commission from participating in the present proceedings.

29. Without prejudice to its position taken above regarding joinder versus enjoinder, the State submitted that the Commission had not presented a case that meets the threshold for joinder of parties to proceedings as was settled in the Supreme Court case of *Mumo Matemu* (supra). More particularly the State argued that the Commission has failed to particularize the nature of prejudice it would suffer if the application is declined. That further, the State has not provided reasons for the belief that the primary

parties in the proceedings before this court (the State and the Respondents) would not address all pertinent issues that may arise in the matter, including the intended submissions by the Commission.

30. It was the State's further submission that as admitted by the Commission, applications for custodial orders have been entertained before in this matter and substantive rulings rendered on the merits of the presentations made to the court, yet the Commission did not claim or allege that the court had arrived at erroneous positions and that none of the determinations by the court were being impugned by the Commission (or even the Respondents).

31. With regard to the application for extension of custodial orders, the State took the position that this court does not require the assistance or interpretation by the Commission outside the competence of the material to be provided by the primary parties and that in any event, Section 33 of the *Prevention of Terrorism Act*, No. 30 of 2012 provides for such applications and orders and that before granting the same, the court is under a duty to consider any objection that the Respondents (suspects) may have in relation to the application and may under Section 33(4) of the Act;

    a. Release the suspect unconditionally.

    b. Release the suspect subject to such conditions as the court may impose to ensure that the suspect;Does not, while on release, commit an offence, interfere with witnesses or the investigations in relation to the offence for which the suspect has been arrested;Avails himself for the purpose of facilitating the conduct of investigations and the preparation of any report to be submitted to the Court dealing which the matter in respect of which the suspect stands accused; andAppears at such a time and place as the Court may specify for the purpose of conducting preliminary proceedings or the trial or for the purpose of assisting the police with their inquiries; or

    c. Having regard to the circumstances specified under subsection (5), make an order for the remand of the suspect in custody.

32. Such that then, urged the State, there are parameters under the statute that are provided that the court considers in granting or extending custodial orders and that there is no requirement in law that for custodial orders to be granted or extended, there first must be charges preferred against a suspect. Moreover, the issuance or extension of such orders is not automatic as the applying party must meet the parameters and threshold set out in the Act.

33. In concluding, the State urged that the Commission does not, in the circumstances, intend to make any independent particular position but rather to take the position of the Respondents, who are represented by Counsel, to oppose the State's application. In the State's view, Section 33(4) of the *Prevention of Terrorism Act* contemplates only objections from the suspects (Respondents).

34. The State opines that the Commission, in the premises, offers nothing other than what the parties can already present before the court and that the inclusion of the Commission would in the obtaining situation unnecessarily cloud the issues to be determined in the application for extension of the custodial orders.

D. Issues for Determination.

35. Having considered the Commission's application dated October 18, 2023, the affidavit in support thereof, the Statement of Grounds of Opposition to the application, the able submissions filed by the Learned Counsel for the Commission in support of the motion and those by the Learned Prosecution Counsel in opposition to the application and the record in its entirety, it is clear to me that the issues emerging for resolution in this application are as follows:

a. Considering that the Commission's application seeks that it be enjoined, rather than joined as an Interested Party to the instant proceedings, whether in light of the distinction between the terms joined and enjoined as discoursed in the High Court case of *Re Estate of Barasa Kanenje Manya (Deceased* (supra) the application should stand dismissed, or alternatively, the Commission barred from participating in the instant proceedings.

b. Whether the Commission should be joined to these proceedings as an Interested Party and be allowed to participate in subsequent proceedings herein.

E. Analysis and Findings

36. With respect to issue (a) above, much as I appreciate the decision of the High Court in addressing the meaning of the words join and enjoin (or joinder and enjoinder), I note that in the Supreme Court decisions of *Communications Commission of Kenya* (supra), *Mumo Matemu* (supra) and that of the High Court of *Meme* (supra) the words join (joinder) and enjoin (enjoinder) were used to refer to applications where parties sought to be allowed to participate in the respective matters, as Interested Parties or as amicus curiae.

37. It is instructive from the above decisions that in some instances the words joinder and enjoinder were used interchangeably yet the courts, even in cases where the specific prayer was for enjoinder, did not dismiss the applications for being defective, or prevent the party seeking the orders from participating in the proceedings.

38. Guided by the above decisions two of which are from the Supreme Court, I do not, with respect, agree with the State's submissions that the application by the Commission should be dismissed or that the order that the Commission seeks for is that it be barred from the proceedings herein. Nothing would have been easier than for the Supreme Court to dismiss the applications on the grounds that the word enjoinder was used instead of the word joinder. If anything, it is clear from the application before me and the submissions by the Commission that the desired prayer that the Commission seeks is to be permitted to participate in this matter as an Interested Party. The irregularity of using the term enjoinder instead of joinder is therefore one that does nor render the application fatally defective. The same is curable under Article 159 of *the Constitution*.

39. The second issue for determination is whether the Commission should be joined to these proceedings as an Interested Party and be allowed to participate in subsequent proceedings in this matter.

40. With regard to this issue, I take guidance from the cases referred to by the parties herein – *Communications Commission of Kenya* (supra) *Mumo Matemu* (supra) *Muruatetu* (supra) and *Meme* (supra). The jurisprudence that emerges from the authorities above is that for a party to be joined as an Interested Party in proceedings before the court, the party must satisfy the court that it has a stake and relevance in the proceedings to which it is applying to be joined and that it stands to suffer prejudice if the order for joinder is not made.

41. I then ask myself the following questions:

(a). What is the Commission's stake and relevance in the present proceedings?

(b). What prejudice will the Commission suffer if the court does not make an order for its joinder as an Interested Party?

42. I am guided by the decision of the High Court in *Judicial Service Commission v The Speaker of the National Assembly & 8 others* [2014] eKLR that :

> " 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:
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> 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.
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> 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.
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> 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."

43. The Commission proffered the argument that it is concerned about the request for the continued detention of the Respondents without charge and its ramifications on their individual fundamental rights and freedoms, which the Commission is constitutionally mandated to protect and promote, hence the Commission's desire to be allowed to participate in the instant proceedings and respond to the State's application for extension of the detention period. It is then the position of the Commission that it has an identifiable stake and legal interests in as far as protection of fundamental human rights of the Respondents is concerned hence the necessity to allow the Commission to participate in the proceedings before this court.

44. It is further urged by the Commission that having participated in several processes in the matters relating to the Shakahola affair and having been a party in the Application in which the Respondents were previously characterized as victims, the Commission has a stake to defend, namely "the potential violation of the fundamental rights of the Respondents".

45. It was further presented by the Commission that its application is aimed at ensuring that all relevant evidence is submitted to this court, a process which will not, in its opinion, be achieved if the Commission is not admitted as an Interested Party to the instant proceedings.

46. In resisting the assertions by the Commission that it has a stake and relevance in the present proceedings, the State argued that the nature of the stake or interest that the Commission has in the present matter has not been properly disclosed or described and that the application should fail on that ground alone.

47. The State further urged that the mere fact that the Commission has participated in previous related proceedings and other processes that concern the affairs of the Shakahola incident does not amount to or equate to a stake in the instant proceedings.

48. In further rejoinder to the supplication by the Commission to be allowed to participate in this matter as an Interested Party, the State opined that it was clear from the application that the intention of the Commission was not to make any independent particular position but to take the position of the Respondents to oppose the application by the State for extension of custodial orders, yet under Section

33 of the *Prevention of Terrorism Act*, the law contemplates that only objections from the Respondents can be taken.

49. With regard to the prejudice, if any, that the Commission stands to suffer if the court does not make an order for its joinder as an Interested Party, the Commission's stand was that it will be precluded from executing its mandate and that the Respondent's will be exposed to a situation where their fundamental rights and freedoms may be subject to violation.

50. On its part, the State submitted that the Commission has not particularized any prejudice that would be visited upon it if the application for joinder is declined.

51. In addressing the second issue for determination, I understand the superior courts in the cases cited above to say that a party cannot just walk into a matter as an Interested Party as of right but must first satisfy the court that it has a stake and relevance in the particular proceedings. Such a party must also satisfy the court that it stands to be prejudiced if the court does not make an order for its joinder as an Interested Party.

52. There is no doubt that the Commission is constitutionally mandated to protect and promote fundamental rights and freedoms of individuals. The question that then calls for an answer is whether the mere fact that the Commission has such constitutional mandate amounts to a stake and relevance in the proceedings before me, on the premises that it is concerned that an application has been filed by the State seeking for the continued detention of the Respondents herein without a charge and the ramifications thereof on the individual fundamental rights and freedoms of the Respondents. I will address the question shortly.

53. In the case of *Judicial Service Commission*, (supra) the High Court addressed itself to the applicable threshold in determining whether a party has established that it has a stake and relevance and stands to suffer prejudice in an application to be joined as an Interested Party and observed as follows:

> " We also note that criminal matters occupy a different platform from that of civil proceedings. Criminal proceedings touch on the personal fundamental rights and freedoms 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. In criminal proceedings, the accused should ordinarily be informed beforehand 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."

54. Having stated as much, I will now proceed to answer the question above, which I hereby do in the negative, for the following reasons.

55. Firstly, as seen from the authorities above, it is incumbent upon a party who wishes to be joined as an Interested Party to proceedings to satisfy the two-test rule. The mere fact that the Commission has the constitutional mandate described above does not lessen, in its respect, the need to meet the two-test rule. The Commission must satisfy the rule before being joined.

56. Secondly, the Commission has not stated the reasons or the basis for the concerns that it has over the fundamental rights and freedoms of the Respondents. For instance, it has not stated that the fundamental rights of the Respondents have been violated during the previous proceedings pursuant to which the Respondents were remanded in custody. It has not provided any material to show that the fundamental rights and freedoms of the Respondents will be violated during the hearing of the

State's application. In so far as I am aware, neither the Respondents (nor NLAS) have challenged by way of appeal or any other available legal avenue, the previous custodial orders issued herein.

57. The third reason is that the Respondents are represented by able Counsel under NLAS and any concerns that may arise during the hearing of the State's application for extension of custodial orders can be addressed by the Counsel on record for the Respondents. I say so because the Commission has made it clear, through its submissions, though not expressly, that its intended entry into the matter is for purposes of opposing the application for extension of custodial orders on behalf of the Respondents, who are already represented by competent advocates. In so far as the record informs me, the Respondents or NLAS have not challenged by way of appeal or any other legal avenue the previous custodial orders issued herein.

58. Mr. Mutegi, Counsel for the Respondents instructed by NLAS stated that he was not opposed to the application. What is not clear to me is whether by not objecting to the application meant that he was supporting, or he had no interest or contribution to make in respect thereof, or that he was leaving it to the court to determine it, with whatever outcome that resulted.

59. Be that as it may, I would agree with the State that in the wake of the foregoing, there is nothing that the Commission will bring forth that the Advocates instructed by NLAS to represent the Respondents cannot.

60. Fourthly, the Commission has not demonstrated how it will be impeded from executing its constitutional mandate if it is not made a party to the instant proceedings. The Commission, although not manifestly stated, seems to address the constitutionality of Section 33 of the *Prevention of Terrorism Act* by stating that detention without a charge amounts to detention without trial which is unconstitutional. This court is not clothed with jurisdiction to determine the constitutionality or otherwise of a statutory provision. That is a matter that ought to be placed before the High Court.

61. The Commission stated in its submissions that its application had the intention of ensuring, once joined as an Interested Party, that all relevant evidence that is collected during the investigations is submitted to this court and that if not admitted to the proceedings herein, that would not be achieved. I do not think this is a tenable submission on the issue of the prejudice that the Commission stands to suffer because of the plain reason that at this stage, the trial of the Respondents has not commenced and the court does not anticipate to receive any evidence from the parties.

62. I will now turn to the second point of the two-test rule which is whether the Commission has demonstrated that it will suffer prejudice if the court does not allow its application to be joined as an Interested Party. From the submissions presented herein, the Commission stated that it will stand prejudiced if the application for it to participate in this matter is not allowed. The Commission did not however state the manner or the nature of prejudice that will be occasioned upon it and I will in the premises find that the second point has not been demonstrated.

63. From my analysis above, and guided by the authorities that I have referred to, I am convinced that the current application is not meritorious. Consequently, the result that I reach is that the application by the Commission for admission to the status of Interested Party dated October 18, 2023 must fail as the threshold for such admission has not been met by the Commission. I proceed to dismiss it.

DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 1ST DAY OF DECEMBER, 2023.

OMIDO, J.M.

SENIOR PRINCIPAL MAGISTRATE

Respondents: All present.

For State/Applicant: **Mr. Jami**, Assistant Director of Public Prosecutions.

For Respondents: **Mr. Mutegi**, Advocate & **Mr. Mureti**, Advocate.

Court Assistant: **Ms. Osundwa** & **Ms. Chepkurui.**