

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
PETITION E048 OF 2023

JOHN MATHENGE.....1ST PETITIONER
CENTER FOR MINORITY RIGHTS & STRATEGIC
LITIGATION.....2ND PETITIONER

-VERSUS-

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT
SALIM SAID.....2ND RESPONDENT
ATHMAN AHMED.....3RD RESPONDENT
ANTI-LGBTQ MOVEMENT.....4TH RESPONDENT
ALI MOHAMMED.....5TH RESPONDENT
KENYA NATIONAL COMMISSION

ON HUMAN RIGHTS.....1ST INTERESTED PARTY
AMNESTY INTERNATIONAL-KENYA.....2ND INTERESTED PARTY
KENYA HUMNAN RIGHTS COMMISSION...3RD INTERESTED PARTY
NATIONAL COHESION & INTERGRATION
COMMISSION.....4TH INTERESTED PARTY

RULING

1. The application before court is a motion for joinder dated 16 September 2024 and is expressed to be filed under Rule 5 (d)(ii) and (e) and 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules).
2. The application is by the petitioner who seeks to include three other parties to the petition as a co-petitioner and interested parties respectively. To be precise, the prayers sought in this regard have been framed as follows:

“a) That this Hounourable Court be pleased to add Generation of Holistic Partners Network (GHPN) to these proceedings as a 3rd co-Petitioner.

b) That this Honourable Court be pleased to add Gay and Lesbian Coalition of Kenya to these proceedings as an Interested Party.

c) That this Honourable Court be pleased to add the Kenya legal And Ethical Issues Network on Hiv and Aids (Kelin) to these proceedings as an Interested Party.”

3. If those prayers are allowed, the petitioner has sought to have the petition amended to reflect these changes. Intriguingly, the application is supported by the affidavit sworn, not the petitioner, but by one Ishmael Omumbwa Ondunyi who has introduced himself as follows:

“I am an adult person of sound mind and the current co-Chairman of the Proposed 3rd Petitioner. I am also the Executive Director of PEMA Kenya a constituent member of the proposed 4th Interested Party.”

4. Ondunyi has described the proposed 3rd petitioner as “a Gay, Bisexual and other Men who have sex with Men (GBMSM) HIV prevention network formed in 2014 and comprises of 14 organizations across Kenya whose main objective is to reduce incidence and impacts of HIV”. The organisation is said to have been registered in 2023.

5. Ondunyi has also sworn that one of the objectives of the proposed 3rd petitioner is to monitor, reduce and combat stigma and discrimination associated with its members, the effect of which has impeded the ability

of its membership to access health care related services, such as access to anti-retroviral drugs, HIV/AIDS counselling and other HIV/AIDS related services.

6. The proposed 4th interested party has been described as *“an umbrella organization made up of LGBTIQ+ led and serving organisations in the country and advocating for the rights, safety and wellbeing of the LGBTQI+ people in Kenya.”*
7. The proposed 5th interested party, on the other hand, is said to be a *“non-partisan, non-profit and non-governmental organisation duly registered under the Non- Governmental Organisations Act, working to protect and promote health-related human rights in Kenya”* and that *“it has a particular focus on ensuring that persons living with HIV have the right to the highest attainable standard of health”*.
8. Ondunyi has sworn further that he is aware that since March, 2023, the 2nd to the 5th Respondents have held what they have called *“Anti-LGBTIQ+ demonstrations”* countrywide, inciting violence against members of the LGBTIQ+ community, LGBTIQ+ led organisations and allies with the result that the organisations represented by the applicant have had to close down. For instance, the 2nd to 5th respondents are said to have raided Mvita clinic and HAPA Kenya clinics in Mombasa and Voi and forcibly closed them. Consequently, members of the proposed 4th and 5th interested parties were unable to access health related services such as

anti-retroviral drugs, HIV/AIDS counselling and other HIV/AIDS related services.

9. Against the foregoing background, Ondunyi has sworn that proposed 4th interested party would demonstrate to court how these anti-LGBTIQ+ actions directly impact the daily lives, dignity, and fundamental rights of marginalized community members providing valuable evidence on how anti-LGBTIQ+ actions exacerbate health risks, mental health challenges, and broader social exclusion for LGBTIQ+ persons.

10. As for the proposed 5th interested party, it is sworn in support of its inclusion to the petition that it *“has extensive experience advocating for the health rights of vulnerable and marginalized communities, particularly persons living with HIV and TB”* and therefore, *“KELIN is uniquely positioned to offer insights into the adverse effects of discrimination and stigma on healthcare access and public health and the impact of anti-LGBTIQ+ actions on the right to health providing the court with a deeper understanding of the broader health implications”*.

11. The 1st respondent did not respond to the application and Mr. Penda, the learned counsel for the 1st respondent, informed the court that he was not taking any position in the application.

12. The 2nd and 3rd respondents opposed the application and swore a joint replying affidavit to this effect. According to them, there is no proof that

the deponent of the affidavit filed in support of the application is duly authorised to sign the affidavit on behalf of the proposed 3rd petitioner.

13. It is also sworn that the affidavit, has not established any nexus between the allegations and complaints contained in the petition and those made by the proposed petitioner and interested parties.

14. According to the 2nd and 3rd respondents, the demonstrations to which the applicant has referred were stopped even before the issuance of a court order and, in any event, the said demonstrations had no adverse actions nor results. The demonstrations are said to have been peaceful with no incitement of violence of any sort and that the protesters were merely exercising their constitutionally protected right, lawfully.

15. The allegations by the applicant, it is sworn, are mere generalised allegations, not specifically defined or explained and are not supported by any form of proof. For instance, although the applicant claims to be a core member of the LGBTQ+ community, there is no proof to that effect.

16. The 2nd and 3rd respondents have also sworn that it has not been demonstrated that the interests of the applicants will not be well articulated if they are not made parties to the petition.

17. It is not in dispute that a person may be joined or added to a constitutional petition as a petitioner, respondent or an interested party. The addition of a party to a petition in any of these capacities is provided for under rules 5 and 7 of the Constitution of Kenya (Protection of Rights and

Fundamental Freedoms) Practice and Procedure Rules, 2013(Mutunga Rules). Rule 5 reads as follows:

5.The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—

(a) Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties.

(b) A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.

(c) Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.

(d) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

(i) order that the name of any party improperly joined, be struck out; and

(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

(e) Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents.

18. Rule 7 is specific to joinder of parties as interested parties. It reads as follows:

7. (1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.

(2) A court may on its own motion join any interested party to the proceedings before it.

19. An interested party is defined in rule 2 of the Rules to mean “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.”

20. Read together with Rule 2, Rule 7 (1) is to the effect that it is “*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*” that may make an application, either oral or written, to be joined to a petition as an interested party.

21. Rule 5 (c) and (d) of the Rules, provide two instances when a petitioner may move the court to add another person or entity to a petition as a co-petitioner and as an additional respondent. As far as rule 5 (c) is concerned, this window is only open “*where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner*”. To that end, the Court will, “*if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit*”.

22. Rule 5 (d) (ii) opens the window to both a petitioner and a respondent in any petition to seek to add any other person or entity to the petition. For emphasis, the rule reads:

(d) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

(i) ...

(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

23. It would be odd for a respondent to apply for a person to be made a petitioner in any particular petition; thus, the logical inference that can be drawn from the reading of rule 5(d) (ii) is that this window is open to both the petitioner and the respondent to seek to join any other person or entity either as an additional respondent or as an interested party. In any event, as has been noted before, Rule 5(c) singles out a petitioner as the only party that may seek to join an additional petitioner to the proceedings. It also provides the circumstances under which an application to that end may be made.

24. Although rule 7 provides that it is the interested party who may apply to be joined to a petition in that capacity, the wording of rule 5 (e) suggests that the application under rule 5 (d) is not restricted to the addition of a respondent only; under that same rule, it is open to the court, on an application, to add a party to a petition as an interested party. For emphasis the rule reads as follows:

(e) Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents. (Emphasis added).

25. Thus, it is not just a respondent who may be added because, the phrasing that “*where a respondent is added*” leaves open the possibility that besides a respondent, a party may be added in any other capacity subject, of course, to the alternative to which a respondent, already party to the petition, is restricted which is that he can only apply to add a person or entity to a petition either as a respondent or an interested party. Unlike a petitioner who may apply to add a person to a petition as a petitioner, the respondent has no such leeway.

26. Turning back to the application before court, it is purportedly made by the petitioner. It is a purported application because the affidavit sworn in support of the application has been sworn, not by the petitioner, but by a person who, for all intents and purposes, is a stranger to the suit before court. Without the petitioner’s affidavit no application or proper application can be said to be before court.

27. While it is only the petitioner who could possibly apply for an order to introduce another person or entity into the proceedings as a petitioner, it was always open to the proposed interested parties to file their own

application to be joined to the suit as interested parties. As much as the petitioner could apply to introduce them into the proceedings, nothing stopped them from taking the initiative and moving the court appropriately.

28. For the sake of determination of this application, none of the representatives of the parties sought to be introduced as the petitioner or interested parties could purport to swear an affidavit in support of an application filed by the petitioner. To the extent they did so, the application is incompetent and fatally defective. For this reason, the application is hereby struck out with costs to the respondents. It is so ordered.

Signed, dated and circulated on the CTS on 20 February 2026

Ngaah Jairus
JUDGE