



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, KIAGE & MURGOR, JJA)

CIVIL APPEAL (APPLICATION) NO. 536 OF 2019

BETWEEN

EG.....APPELLANT

AND

THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT

DAVID KURIA MBOTE.....1ST INTERESTED PARTY

ANTHONY OLUOCH..... 2ND INTERESTED PARTY

IMMAH REID.....3RD INTERESTED PARTY

GEORGE NJERI.....4TH INTERESTED PARTY

Y. HUSSEIN5TH INTERESTED PARTY

JAY TIROP..... 6TH INTERESTED PARTY

KENYA CHRISTIANS PROFESSIONAL FORUM.....7TH INTERESTED PARTY

KELIN..... 8TH INTERESTED PARTY

SENATOR IRUNGU KANGÁTA..... 9TH INTERESTED PARTY

REGISTERED TRUSTEES UMMAH FOUNDATION..10TH INTERESTED PARTY

NATIONAL GAY & LESBIAN

HUMAN RIGHTS COMMISSION.....PROPOSED 11TH INTERESTED PARTY

(An application for joinder of the National Gay & Lesbian Human Rights Commission in the appeal from the judgment of the High Court of Kenya at Nairobi (Aburili, Mwita & Mativo, JJ.) dated 24th May, 2019

in

Constitutional Petition No. 150 of 2016

as consolidated with

Constitutional Petition No. 234 of 2016)

RULING OF THE COURT

[1] The core of the court's power to join a party to any proceedings including at the appellate stage, as aptly discussed in **Hamisi Yawa & 36,000 others vs. Tsangwa Ngala Chome & 19 others** [2018] eKLR, is to bring on board a necessary party for purposes of determining the real issue(s) in dispute. Also, a joinder of a party is not an automatic right, but one which is granted upon exercise of the discretion of the court concerned. Nonetheless, the court exercises such discretion under defined parameters, that is, it must be satisfied that: -

a) The intended party has a personal interest or stake in the matter in question; and that interest is clearly identifiable and proximate enough and not merely peripheral.

b) The intended party's presence would enable court to resolve all the matters in the dispute.

c) The intended party would suffer prejudice in case of non-joinder.

d) The joinder of the intended party will not vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings.

See **Kensalt Limited vs. Water Resources Management Authority** [2018] eKLR.

[2] A brief background of this matter is that, the proposed 11th interested party (the applicant) has called upon us to exercise the above jurisdiction by its motion dated 7th August, 2020. In particular, the applicant has sought to be enjoined in the appeal pending before the Supreme Court as the 11th interested party and upon issuing the said order of joinder, to give directions concerning filing of its written submissions.

[3] The appeal relates to two constitutional petitions, that is, **Petition Nos. 150 of 2016 and 234 of 2016**, filed at the High Court. In a nutshell, both petitions, which were later consolidated, challenged the constitutionality of **Sections 162(a) & (c) and 165** of the Penal Code which criminalises same sex relations. By a judgment dated 24th May, 2019 a three Judge bench of the High Court dismissed both petitions which order instigated the appeal.

[4] The applicant argued that it has a direct and substantial interest in the appeal, in that, it was established for purposes of protecting and promoting the inherent dignity, basic rights and fundamental freedoms of Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (**LGBTIQ**) persons in Kenya hence, the issue in controversy falls squarely within its mandate; that it not only conceptualised but also spearheaded the institution of **Petition No. 150 of 2016**, the subject of the appeal, through the appellant who was once its Executive Director and that its members will be affected by the outcome of the appeal.

[5] According to the applicant, its joinder was also necessary because firstly, the appellant, who was no longer working with the organisation, had failed to serve it with the notice of appeal as required under **Rule 77 (1)** of this Court's Rules or inform it of the existence of the appeal and the applicant only learnt of the appeal on 28th July, 2020. Secondly, the interests of its members would remain unarticulated unless it was joined to the appeal and the issues in controversy substantially determined with its participation as a major stakeholder. Thirdly, that no prejudice would be occasioned to the other parties and its joinder would not derail the expeditious determination of the appeal.

[6] The applicant further urged that it would not only challenge the impugned decision on merit but also demonstrate that, the respondents, both in the petition and the appeal, have disingenuously raised irrelevant diversionary issues to transmute the character of the proceedings from seeking to decriminalise the disputed provisions of the Penal Code to legalising same sex marriages in Kenya. And that the issues arising from the appeal extend beyond the appellant and members of the LGBTIQ community.

[7] Citing the Supreme Court decision in **Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 others** [2014] eKLR, the applicant was adamant that it had met the pre-requisites of being joined into the appeal as an interested party.

[8] The motion was vehemently opposed by the appellant (E.G) by terming it as frivolous, an abuse of the court process and intended to delay the disposal of the appeal.

Making reference to **Andrew Inyolo Abwanza vs. Board of Trustees of Pentecostal Assemblies of God- Kenya & 3 others** [2009] eKLR, the appellant contended that the applicant does not exist in law as it was yet to be registered under the **Non-Governmental Organizations Co-ordination Act, 1990**, which issue is pending before the Supreme Court; and that it therefore lacked the capacity to sue or be sued or at the very least issue instructions to the counsel on record or **Njeri Gateru**, its Executive Director, to file the motion. In the appellant's opinion, the applicant had misled this Court; that contrary to the allegations the applicant had participated in the proceedings at the High Court and was kept abreast of the progress of the dispute right from the High Court up to the appeal as evidenced in its briefings on

social media and its website; and that there was no reason as to why the applicant hadn't sought to join the proceedings earlier.

[9] The appellant further argued that he had filed the Petition on his own behalf as well as on behalf of the LGBTIQ community; that the applicant was not bringing anything new to the table; that what it sought to raise had already been advanced by the other parties and that the applicant had not demonstrated the prejudice it would suffer if it was not joined to the appeal.

[10] In further opposition to the motion, the 16th respondent argued that the motion was devoid of merit on account of the applicant's standing or lack of capacity; and that the request for joinder had been made too late in the day, that is, after directions had been issued on disposal of the appeal.

[11] Upon service of the hearing notice and directions on all parties, only the applicant, the appellant and 16th respondent participated in the virtual hearing of the application. In line with this Court's Covid -19 Practice directions the matter was heard vide GO TO MEETING virtual Platform. In attendance was **Mr. Muthomi** for the applicant, **Mrs. Ligunya** for the appellant and **Mr. Simiyu** holding brief for **Mr. Kanjama** for the 16th respondent. Counsel relied on the written submissions and made some oral highlights, a summary of which we have captured as herein above.

[12] Beginning with the issue of whether the applicant had capacity or *locus standi* to file the current motion, it is clear that the cause of action in regard to the two petitions was anchored on whether the provisions of the Penal Code in question contravened the Constitution and/or the rights protected thereunder. It is equally settled that the 2010 Constitution expanded the scope of *locus standi* or the right to institute a suit or be heard, on any violation or threatened violation of the Constitution.

[13] In this case it is not in dispute that the applicant has not been registered *under the Non-Governmental Organizations Co-ordination Act*. Nonetheless, *under Article 260* of the Constitution a person is defined to include an association, body corporate or an unincorporated body. It follows therefore, that despite being unregistered the applicant

had the necessary capacity to file the current motion as well as seek its joinder to the

appeal. See **Law Society of Kenya Nairobi Branch vs. Malindi Law Society & 6 others [2017] eKLR.**

[14] Further, bearing in mind the objective and composition of the applicant coupled with the crux of the appeal, we find that the outcome of the appeal, whatever it will be, will definitely affect the applicant and its members as contemplated under ***Rule 77(1)*** of this Court's Rules. As such, we have to pay regard to the rules of natural justice and in particular, giving a person who is likely to be affected by a decision, the right to be heard before the decision is made. See **Mbaki & Others vs. Macharia & Another [2005] 2 EA 206.**

[15] While it is not lost to us that the appellant is a member of the LGBTIQ community, we are persuaded that the inclusion of the applicant in the appeal will not in any way prejudice the proceedings or the parties. In our view, the applicant's inclusion will afford the Court an opportunity to hear the various perspectives of the concerned parties which will in turn enable it to conclusively determine the matter.

[16] Accordingly, we find that the motion has merit and is hereby allowed. For clarity, we grant the applicant leave to be enjoined in the appeal as the 11th interested party and direct that it files its written submissions within seven (7) days of this ruling. The other parties shall have seven (7) days after service of the said submissions to file their submissions in response to the same. Considering that the matter is of public interest we

make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.

M. K. KOOME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

(signed)

DEPUTY REGISTRAR