



**Attorney General v David Ndi & 73 others (Petition 12
(EO16) of 2020) [2021] KESC 17 (KLR) (9 November 2021) (Ruling)**

Neutral citation: [2021] KESC 17 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 12 (EO16) OF 2020
PM MWILU, DCJ & VP, MK IBRAHIM, N NDUNGU, I LENAOLA & W OUKO, SCJJ
NOVEMBER 9, 2021**

BETWEEN

ATTORNEY GENERAL PETITIONER

AND

DAVID NDII & 73 OTHERS & 73 OTHERS RESPONDENT

(Being an application by Party of National Unity (PNU) to be enjoined as an Interested Party)

Principles that guide the Supreme Court in determining an application to be joined as an interested party

The Supreme Court held that an applicant seeking to be joined as an interested party to a suit had to establish that there were sufficient grounds for the grant of the application. The applicant would have to show the personal interest or stake it had in the matter, the prejudice that would be suffered if they were not joined as an interested party in the matter and the submissions that the applicant would make. The submissions should not be a mere replication of what the other parties were making.

Reported by John Ribia

***Civil Practice and Procedure** – suit - parties to a suit – application to be joined as an interested party - what were the principles that guided the Supreme Court in determining an application to be joined as an interested party - Supreme Court Rules, 2020, rule 24.*

Brief facts

The applicant sought to be joined as an interested party to the suit on grounds that it brought a fresh perspective to the appeal adopting a different view from the Court of Appeal’s finding on the basic structure. The applicant submitted that the alterations to the Constitution’s basic structure had to be subjected to a two-step inquiry that incorporated tiers of the constitutional scrutiny. The 7th, 8th, 9th; 13th and 18th respondents’ opposed the application, urging the court to dismiss it on the grounds, *inter alia*, that the applicant had no identifiable interest, separate and distinct from those already advanced by the parties on record, and that the application fell short of the elements required for joinder of an interested party.



Issues

What were the principles that guided the Supreme Court in determining an application to be joined as an interested party?

Relevant provisions of the Law

Supreme Court Rules, 2020

Rule 24 - Interested parties

(1) *A person may, within seven days of filing a response in any proceedings, apply for leave to be joined as an interested party.*

(2) *An application under sub-rule (1) shall include—*

(a) *a description of the interested party;*

(b) *a depiction of such prejudice as the interested party would suffer if the intervention was denied; and*

(c) *the grounds or submissions to be advanced by the interested party, their relevance to the proceedings, and their departures from the standpoint of the parties.*

(3) *An application under this rule shall be determined on the basis of written submissions.*

Held

1. An applicant for joinder as interested party had to satisfy the Supreme Court that they had satisfied the legal requirements for joinder under rule 24 of the Supreme Court Rules, 2020.
2. The guiding principles applicable in determining an application to be joined as an interested party in were:
 1. One had to move the court by way of a formal application. Joinder of a party was not as of right, but was at the discretion of the court; hence, sufficient grounds had to be laid before the court, on the basis of the following elements:
 - i. The personal interest or stake that the party had in the matter had to be set out in the application. The interest had to be clearly identifiable and had to be proximate enough, to stand apart from anything that was merely peripheral.
 - ii. The prejudice to be suffered by the intended interested party in case of non-joinder, had to also be demonstrated to the satisfaction of the court. It had to also be clearly outlined and not something remote.
 - iii. A party's application had to set out the case and/or submissions it intended to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that those submissions were not merely a replication of what the other parties would be making before the court.
3. The applicant had not met the threshold for admission as an interested party as it had failed to establish a personal interest or stake that was proximate enough to occasion any prejudice to it, if not joined in the proceedings.

Application dismissed.

Orders

No order as to costs.

Citations

Cases

1. Francis Kariuki Muruatetu & Another v Republic & 5 others (Petition No. 15 as consolidated with Petition No. 16 of 2015, [2016] eKLR) — Explained

Advocates

None mentioned



RULING

1. Upon perusing the notice of motion application dated 12th October 2021 by the Applicant, Party of National Unity (PNU), and the supporting affidavit sworn and filed on even date, by David Nganga Kamau, seeking to be enjoined in these proceedings as an Interested Party; and
2. Noting that the applicant's filed submissions pleading that it brings a fresh perspective to the appeal adopting a different view from the Court of Appeal's finding, that the basic structure can only be amended through the primary constituent power which must include four sequential processes namely civic education; public participation; collation of views; constituent assembly debate; and a referendum. In this regard, the applicant submits that the alterations to the Constitution's basic structure must be subjected to a "two-step inquiry" that incorporates tiers of the constitutional scrutiny; and that under this test, the court should first ask whether the proposed amendment implicates the basic structure or whether a proposed amendment deepens or derogates from constitution's substantive core; and
3. Noting that the 7th, 8th & 9th; 13th and 18th respondents' oppose this application, urging the court to dismiss it on the grounds, *inter alia*, that the applicant has no identifiable interest, separate and distinct from those already advanced by the parties on record, and that the application falls short of the elements required for joinder of an interested party as set out in the case of *Francis Kariuki Muruatetu & another v Republic & 5 others, Sup Ct Petition No 15 as consolidated with Petition No 16 of 2015, [2016] eKLR.*
4. Considering the above context and all arguments set therein, we find as follows:
 - i. An Applicant to be enjoined as an Interested Party has to satisfy this Court that it has met the legal requirements for joinder. The relevant law in that regard is rule 24(1) of the Supreme Court Rules, 2020. The said Rule provides as follows:

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 - (1) A person may, within seven days of filing a response in any proceedings, apply for leave to be joined as an interested party.
 - (2) An application under sub-rule (1) shall include—
 - (a) A description of the interested party;
 - (b) A depiction of such prejudice as the interested party would suffer if the intervention was denied;

And;

 - (c) The grounds or submissions to be advanced by the interested party, their relevance to the proceedings, and their departures from the standpoint of the parties.”



ii. This court has laid down the guiding principles applicable in determining an application to be enjoined as an interested party in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others* SC Petition (Application) No 12 of 2013. The principles were affirmed in the case of *Francis Kariuki Muruatetu & another v Republic & 5 others (supra)* where the court stated:

“... 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:

- (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.
- (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.
- (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”

5. Applying the principles enumerated herein above, we find that the applicant has not met the threshold for admission as an interested party as it has failed to establish a personal interest or stake that is proximate enough to occasion any prejudice to it, if not enjoined in these proceedings. We therefore find no merit in the application and we accordingly dismiss it.

6. There shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF NOVEMBER 2021

P. M. MWILU

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**DEPUTY CHIEF JUSTICE &
VICE PRESIDENT OF THE SUPREME COURT**

M. K. IBRAHIM

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**JUSTICE OF THE SUPREME COURT
NJOKI NDUNGU**

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JUSTICE OF THE SUPREME COURT



I. LENAOLA

.....

JUSTICE OF THE SUPREME COURT

W. OUKO

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JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

