



**Pati Limited v Funzi Island Development Limited & 4 others; Mwamzandi
(Proposed Interested Party); Law Society of Kenya (Intended Amicus Curiae)
(Civil Application 4 of 2015) [2019] KESC 33 (KLR) (4 March 2019) (Ruling)**

*Pati Limited v Funzi Island Development Limited & 4 others; Kassim Bakari Mwamzandi
(Proposed Interested Parties); Law Society of Kenya (Proposed Amicus Curiae) [2019] eKLR*

Neutral citation: [2019] KESC 33 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CIVIL APPLICATION 4 OF 2015
MK IBRAHIM, JB OJWANG, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ
MARCH 4, 2019**

BETWEEN

PATI LIMITED APPLICANT

AND

FUNZI ISLAND DEVELOPMENT LIMITED 1ST RESPONDENT

JB HAVELOCK 2ND RESPONDENT

ME HAVELOCK 3RD RESPONDENT

THE COUNTY COUNCIL OF KWALE 4TH RESPONDENT

COMMISSIONER OF LANDS 5TH RESPONDENT

AND

MWAMZANDI PROPOSED INTERESTED PARTY

AND

LAW SOCIETY OF KENYA INTENDED AMICUS CURIAE

*(Being an application for review of the decision of the Court of Appeal in Civil
Application No. 10 of 2014 declining leave to appeal to the Supreme Court)*

**Applications for joinder as an interested party and amicus curiae made before certification that an
intended Supreme Court appeal raised matters of general public importance are premature
The applicant sought leave (certification) at the Court of Appeal in order to appeal to the Supreme Court. The
Court of Appeal declined to grant leave. The applicant then applied to the Supreme Court for a review on the**



decision relating to leave to appeal. While the application relating to leave was pending an application for joinder as an interested party and to be admitted as amicus curiae were filed. The court held that applications for joinder as an interested party and amicus curiae made before certification that an intended Supreme Court appeal raised matters of general public importance are premature.

Reported by Beryl A Ikamari

Civil Practice and Procedure - joinder of parties - application for joinder of parties as an interested party and an amicus curiae - legal threshold to be met in the applications for joinder - correct timing applicable to the making of the applications for joinder in the Supreme Court - whether such applications for joinder could be made before certification that an intended Supreme Court appeal raised matters of general public importance.

Brief facts

At the High Court, in Judicial Review Miscellaneous Application No. 272 of 1994, the 1st, 2nd and 3rd respondents, sought orders of *certiorari* to quash a decision to allocate the suit land to Hon. Mwamzandi and later to Pati Limited as well as the letter of allotment dated July 27, 1994 and the Grant No. 106 relating to L.R 20247. They were unsuccessful in obtaining such orders at the High Court but on appeal at the Court of Appeal, the orders of *certiorari* were granted.

The applicant sought leave (certification) at the Court of Appeal in order to appeal to the Supreme Court against the decision. In a ruling dated March 20, 2015 the Court of Appeal declined to grant leave. The applicant then applied to the Supreme Court for a review on the decision relating to leave to appeal. An additional application for a stay of execution of the judgment of the Court of Appeal in Mombasa, C. A No. 252 of 2005, was granted.

While the application relating to leave was pending, Mr. Kassam Bakari Mwamzandi filed a notice of motion application seeking to be enjoined to the proceedings as an Interested Party and the Law Society of Kenya filed an application to be admitted as *amicus curiae*. The basis of the application by the Law Society of Kenya was that the Court of Appeal decision to revoke a title through judicial review proceedings raised issues of public importance and it contradicted several other Court of Appeal decisions. In response, the 1st, 2nd and 3rd respondents filed two notices of preliminary objection, one for each application. The basis of the preliminary objections was that there were no proceedings before the court, except for an application for review of the Court of Appeal decision on certification. Therefore, those respondents stated that the applications were premature.

Issues

- i. Whether applications for joinder as an interested party and *amicus curiae* could be made before certification that an intended Supreme Court appeal raised matters of general public importance.

Held

1. In an application to be enjoined to proceedings as an interested party, one had to demonstrate that he or she had a personal interest in the subject matter before the court. On the other hand, an intended *amicus curiae* had to demonstrate his or her expertise in the subject matter before the court and how he or she would enrich and help the court reach a just determination.
2. In the determination of an application seeking joinder as either an interested party or *amicus curiae*, the important thing was the subject matter before court. There had to be a substantive question of law or point of controversy before the court. The application for joinder could not be made in a vacuum or in an anticipatory context. There had to be live cognizable issues and questions for determination before the Court.
3. The application for leave, entailing certification that the intended appeal involved matters of general public importance, was not an appeal. Such an application did not constitute a live or substantive question of law for determination. The issues framed by parties in an application for certification were prepositions. It was only after evaluation and affirmation by the court that those framed issues involved matters of general public importance and the filing of a substantive appeal, would the framed issues transmute into cardinal points of law or of jurisprudential moment before the court for determination.



4. Before the grant of leave or certification and the filing of a substantive appeal, an application to be enjoined as an interested party or *amicus curiae* would be abstract and anticipatory and therefore bad in law. The two applications for joinder were premature. However, those applications were not vexatious or frivolous and therefore there would be no orders as to costs.

Applications dismissed.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

1. The substantive application before the Court is an Originating Motion dated 2nd April 2015 seeking orders for stay of execution of the Judgement of the Court of Appeal delivered on 27th February 2014 in *Funzi Island Development Ltd & 2 Others v Pati Ltd & 2 Others*, Mombasa C.A No. 252 of 2005; and the review of the decision of the Court of Appeal dated 20th March 2015 in *Pati Ltd v Funzi Island Development Ltd and 4 Others*, Malindi Civil Application No. 10 of 2014 that declined to grant leave to the Applicant to file its appeal before this Supreme Court.
2. The subject of this Ruling are two Notices of Motion Applications seeking orders of joinder as Interested Party and Amicus Curiae filed by one Kassim Bakari Mwamzandi and Law Society of Kenya respectively.
3. The applications are premised on the following factual and litigation background:
 - a) By way of Judicial Review Miscellaneous Application No. 272 of 1994, the 1st, 2nd and 3rd Respondents moved the High Court seeking several orders inter alia: that the Gazette Notice No. 3831 dated 24.6.1994 setting apart Land on Funzi Island and letter dated 27.7.1994 addressed to interested party Pati Limited relating to the allotment of un-surveyed Plot 0.1. ha for the purpose of boat landing base issued by the Commissioner of Lands be quashed and or set aside being null and void; that the grant issued CR106 under Registration of Titles Act to the Pati Limited by respondents be quashed and or set aside as being null and void; and that Pati Limited, its employees, servants and agents be prohibited from having any dealings whatsoever, or carry out any development, or occupation entry upon or any access or otherwise on the said land on Funzi Island.
 - b) In a judgement delivered on 14th October, 2004, the High Court, Khaminwa, J declined to issue the orders sought and dismissed the application with costs.
 - c) Aggrieved, the Respondents appealed to the Court of Appeal. In a judgement delivered on 27th February 2014, the Court of Appeal allowed the appeal and granted an order quashing the allocation of the suit land to Hon. Mwamzandi and later to Pati Limited as well as the letter of allotment dated 27th July 1994 and the Grant No. 106 relating to L.R 20247.
 - d) The Applicant, herein, was aggrieved by the Court of Appeal decision and sought to appeal to the Supreme. First, it filed an Application No. 28 of 2014, seeking leave of this Court for extension of time within which to file and serve a Notice of Appeal out of time. In a ruling



delivered on 4th November 2014, the Court (Ibrahim & Njoki SCJJ) granted the application as prayed.

- (e) The Applicant then made an application to the Court of Appeal for certification seeking leave to appeal to the Supreme Court. In a ruling delivered on 20th March, 2015, the Court of Appeal declined to grant certification and dismissed the application.
 - (f) Dissatisfied with that decision, the Applicant now approached this Court for a review of the Court of Appeal's decision by filing the Originating Motion dated 2nd April, 2015.
4. The substantive application was placed before the Court, Ibrahim, SCJ, on 10th April, 2015 who ordered interalia that: there be a stay of execution of the Judgement of the Court of Appeal delivered on 27th February 2014 in Mombasa C. A No. 252 of 2005 pending the inter parties hearing and determination of prayer No. 1 of the Application No. 4 of 2015.
 5. During the pendency of that substantive application, two applications, subject matter of this ruling, were filed. First, on the 18th January 2015, one Mr. Kassam Bakari Mwamzandi filed a Notice of Motion application dated 14th January 2015 seeking to be enjoined to the proceedings as an Interested Party.
 6. Secondly, on 19th January 2016, the Law Society of Kenya filed a Notice of Motion application seeking to be admitted as amicus curiae on the ground that the decision of the Court of Appeal, to revoke a title through Judicial Review proceedings raises issues of public importance and that the decision contradicts several other Court of Appeal decisions.
 7. On 28th January 2018, in response to the two applications seeking joinder, the 1st 2nd and 3rd Respondents filed two Notices of Preliminary Objections, one for each application. The gist of the Preliminary Objections is that there are no proceedings before this Court, save for an application for review of the Court of Appeal decision declining certification; and that the applications are premature.
 8. We have perused the application by Mr. Kassim Bakari Mwamzandi together with his Supporting Affidavit sworn on 14th January 2016 and appraised his Written submissions dated 15th January 2018. The crux of his motion is that the impugned Court of Appeal decision made adverse findings against him, seriously imputing his reputation and integrity without giving him a chance to be heard.
 9. We have also perused the application by the Law Society of Kenya together with the Supporting Affidavit sworn by Tom Maina Macharia, an advocate of the High Court duly instructed by the Society, sworn on 15th January 2016. We also note its Submissions filed on 25th January 2016 in which it is urged that the Law Society of Kenya has a mandate to interalia, protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law.
 10. The law as regards the admission of Interested Parties and Amici Curiae was settled by this Court in the cases of Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others, Supreme Court Petition No. 12 of 2013, [2015] eKLR and Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR. The fundamental principles as enunciated in these decisions is that for an Interested Party application, one has to demonstrate that he/she has a personal interest in the subject matter before Court, while for an amicus curiae, a one has to demonstrate his/her expertise in the subject matter before Court and how he/she will enrich and help the Court reach a just determination.
 11. Consequently, it is imperative to note that in the determination of an application seeking joinder as either Interested Party or amicus curiae, at the core is the subject matter before Court. There must be a substantive question of law or point of controversy before the Court to which the application is made to. Such joinder motion cannot be made in a vacuum or in an anticipatory context. There must be live cognizable issues and/or questions for determination before the Court.



12. Before the Court, the substantive motion is an application seeking leave to appeal to this Court upon certification that the Applicant's intended appeal involves matters of general public importance. Such an application seeking leave to appeal to the Supreme Court is not an appeal. Before the Court, in such an application, is no live and/or substantive question of law for determination. Drawing from the filtering jurisprudence enunciated by this Court in *Peter Oduor Ngoge V Francis Ole Kaparo & 5 others* [2012] eKLR, in such an application, there are as of yet no cardinal issues of law or of jurisprudential moment which either the Court of Appeal and/or Supreme Court has certified and granted leave to be appealed to the Supreme Court. The issues framed by parties in such an application for leave to appeal are 'propositions'. It is only upon evaluation by the Court and affirmation that they involve matters of general public importance, and an appeal subsequently filed, that they transmute into cardinal points of law or of jurisprudential moment before the Court for determination.
13. Hence it is only upon the completion of that forensic evaluation by the Court faced with an application for leave, and upon grant of such leave and the subsequent filing of an appeal that a party can legitimately lodge an application to be enjoined as either an Interested Party and/or Amicus Curiae. For it is at that juncture that a party would have legitimately appreciated the issues before Court and determined what position to take. Before such leave and certification is granted, an application to be enjoined as an Interested Party and/or amicus is made in abstract and in anticipation, which is bad in law.
14. Consequently, we find that as the substantive motion before the Court is an application for review of denial of certification and leave to appeal to the Supreme Court by the Court of Appeal, the two applications seeking joinder are pre-mature and are for dismissal which we hereby do. However, as the two applications were not adjudged to be vexatious and/or frivolous, we make no orders as to costs.
15. We make the following orders:
 - (i) The Notice of Motion application dated 14th January 2016, by Kassim Bakari Mwamzandi, seeking to be enjoined as an Interested Party is hereby dismissed.
 - (ii) The Notice of Motion application dated 15th January 2016, by the Law Society of Kenya, seeking to be enjoined as Amicus Curiae is hereby dismissed.
 - (iii) Each party shall bear its costs.
 - (iv) As the parties in the substantive application have complied with the Court's directions, the Court shall proceed to determine that application.

Orders accordingly

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2019

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

J. B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA



JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

