



**Choge & another v Choge & another; Choge & 4 others (Proforma Respondent); Bor & another (Suing as the Representatives and on Behalf of Terik Community) (Intended Interested Party) (Civil Appeal E014 of 2023) [2024] KEHC 237 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 237 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CIVIL APPEAL E014 OF 2023  
AC MRIMA, J  
JANUARY 24, 2024**

**BETWEEN**

**JOSEPH ANGANGA CHOGE & ANOTHER ..... APPELLANT**

**AND**

**ESTHER JEPKEMBOI CHOGE & ANOTHER ..... RESPONDENT**

**AND**

**DANIEL KIPTUM CHOGE & 4 OTHERS ..... PROFORMA RESPONDENT**

**AND**

**JOHN C. BOR & JOHN CHESEBA (SUING AS THE REPRESENTATIVES AND ON BEHALF OF TERIK COMMUNITY) ..... INTENDED INTERESTED PARTY**

**RULING**

1. The application under consideration in this ruling is the Notice of Motion dated 9<sup>th</sup> May, 2023. It was taken out by John C. Bor and John Cheseba on behalf of the Terik community through the Terik Council of Elders as the Applicants.
2. The application was supported by two Affidavits sworn by John C. Bor on 9<sup>th</sup> May, 2023 and 19<sup>th</sup> June 2023 respectively. It was also supported by the Applicants' written submissions dated and filed on 22<sup>nd</sup> June, 2023.
3. The application was opposed by the two Respondents as well as the 4<sup>th</sup> and 5<sup>th</sup> Proforma Respondents herein. The rest of the parties seemed not to have any issue with the application.
4. The Respondents filed a Replying Affidavit sworn by Beatrice Musimbi Chegugu, the 2<sup>nd</sup> Respondent, on 15<sup>th</sup> May, 2023. They also filed written submissions dated 10<sup>th</sup> July 2023.



5. In opposing the application, the 4<sup>th</sup> and 5<sup>th</sup> Proforma Respondents filed Grounds of Objection dated 15<sup>th</sup> May, 2023. However, they did not file any written submissions.
6. The gist of the application is mainly that the impugned judgment made adverse findings about the customs and traditions of the Terik Community without according them a hearing since the said community was not even a party in the suit. The Applicant made elaborate submissions and referred to several decisions in support of the application.
7. The gravamen of the opposition to the application was that there can be no joinder of a party in an appeal which party did not participate in the primary suit, the Terik community did not demonstrate any interest in the matter, that there was a possibility of introduction of new issues by the Applicant and that the Applicant was not a competent party to be enjoined.
8. The Respondents filed extensive submissions in opposition to the application. Various decisions were also referred to.
9. It is on the basis of the foregoing background that this Court is now called upon to determine the application.
10. This Court has carefully considered the application, the responses and the submissions by the parties. The Court is grateful to Counsel for their exhaustive and pointed research on the subject at hand.
11. Given the nature of the instant application, a look at the law guiding the joinder of parties is paramount.
12. This Court dealt with the issue of joinder of interested parties in Nairobi High Court Constitutional Petition No E371 of 2021 *Esther Awuor Adero Ang'awa v Cabinet Secretary responsible for matters relating to Basic Education & others*. This is what I rendered: -
  12. The starting point is the *Constitution*. Rule 2 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (hereinafter referred to as 'the Mutunga Rules') define an 'interested party' 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;
  13. The Supreme Court in *Trusted Society of Human Rights v Mumo Matemu & 5 others* [2014] eKLR observed as follows: -
 

... 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.
  14. Later, the Supreme Court further delimited the legal principles applicable in joinder applications. That was in Petition No 1 of 2017 *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others & Michael Wainaina Mwaura (as Amicus Curiae)* [2017] eKLR and in Petition No 15 as consolidated with Petition No 16 of 2013 *Francis Kariuki Muruatetu & Another v Republic & 5 others* [2016] eKLR.



15. In *Francis Kariuki Muruatetu & another v Republic & 5 others* Petition 15 as consolidated with 16 of 2013 [2016] eKLR the Supreme Court identified the following applicable conditions, and, stated as follows: -
- 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.
16. Apart from the three principles developed by the Supreme Court, Rule 2 of the Mutunga Rules clarifies that a party seeking to be enjoined as an interested party ought to demonstrate that he/she/it has an identifiable stake or legal interest or duty in the proceedings before the Court.
13. Deriving from the foregoing, the following conditions are relevant in the consideration of joinder applications: -
- i. The party intending to be enjoined has an identifiable stake which is proximate enough and not merely peripheral.
  - (ii) The party has a clear legal interest in the matter.
  - (iii) The party has a defined duty in the proceedings.
  - (iv) The party is not directly involved in the litigation. In other words, the party is not one of the main parties in the proceedings that is either as a Petitioner or a Respondent.
  - (v) The party will be affected by the decision of the Court when it is made, either way.
  - (vi) The party demonstrates that his or her or its interest will not be well articulated unless he himself or she herself or itself appears in the proceedings, and champions the cause. Differently put, the party must demonstrate that it stands to be prejudiced if it does not take part in the proceedings.
  - (vii) The party should not expand the prevailing cause of action or introduce a new cause of action.
14. The Court will now apply the foregoing conditions to the application at hand.
15. The first consideration must be the issue as to whether the Applicant is a competent party for joinder. The Applicant has availed a copy of its Certificate of Registration before Court. It was issued by



the Registrar of Societies to Terik Council of Elders on 29<sup>th</sup> October 2018. It bears No R.51156 SOC/77156.

16. Article 260 of the Constitution defines a “person” to include a company, association or other body of persons whether incorporated or unincorporated. Therefore, the Applicant is a legal person under the Constitution.
17. The second consideration is whether a party which did not take part in a primary suit can be enjoined on appeal.
18. This issue was considered by the Court of Appeal in EG v Attorney General; David Kuria Mbote & 10 others (Interested Parties) [2021] eKLR where the Court had the following to say: -
  - (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 v 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 v Macharia & another [2005] 2 EA 206.
19. The Court of Appeal eventually allowed the application for joinder on appeal. It is, therefore, this Court’s finding that a party can still be enjoined in an appeal even where that party did not participate in the primary suit. The utmost consideration should always be whether the party satisfies the conditions for joinder discussed above.
20. Having said as much, I will now turn to the case at hand. There is no doubt that the impugned judgment made findings relating to the customs and traditions of the Terik community. The findings impeached the said customs and traditions.
21. The Applicant was aggrieved by those findings. It now seeks to be enjoined so that it can have a say in the matter as this Court considers the appeal.
22. The Court is alive to the Respondents’ fear that the Applicant is likely to introduce new issues on appeal and may unfairly expand the borders of the case. Outwardly, the fear may seem not to be far-fetched. However, this matter is now on appeal. Issues of adducing new evidence on appeal are strictly guided by settled legal principles and the law. It is not automatic for a party to do so. The fear should, hence, not easily settle in the Respondents’ hearts.
23. Apart from the issue of evidence and expanding the appeal, this Court must also emphasize that an appeal is primarily grounded and argued within the confines of the grounds as raised in a Memorandum of Appeal. Therefore, the much the Applicant can do is to tender its submissions on the areas where it feels the trial Court erred more so in respect to the customs and traditions of the Terik community.
24. The Applicant has an identifiable stake in the appeal. It was offended by the impugned decision by the trial Court. A look at the Amended Memorandum of Appeal confirms a challenge to what the trial Court found in respect to the Terik community. This Court, sitting as the first appellate Court,



will, hence, decide on these grounds of appeal. Therefore, allowing the Applicant to participate in this appeal will enrich the arguments and the decision of this Court.

25. There is also the issue of prejudice. This Court does not see how the rest of the parties will be prejudiced by the joinder of the Applicant. Simply put, no party will stand prejudiced by the joinder.
26. Having said as much, it is, therefore, this Court's finding that the application is merited.
27. In the end, the following final orders do hereby issue: -
  - a. The Notice of Motion dated 9<sup>th</sup> May, 2023 by the intended interested party is hereby allowed.
  - b. The Terik Council of Elders shall henceforth appear in this appeal as the 1<sup>st</sup> Interested Party.
  - c. Costs of the application shall be in the appeal.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 24<sup>TH</sup> DAY OF JANUARY, 2024.**

**A. C. MRIMA**

**JUDGE**

Ruling No 1 delivered virtually in the presence of:

Mr. T. K. Rutto, Learned Counsel for the Applicant/Interested Party.

Mr. Kibet for Mr. Busiaga, Learned Counsel for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents.

Mr. Murgor, Learned Counsel for the 1<sup>st</sup> & 2<sup>nd</sup> Proforma Respondents.

Miss Waweru for Mr. Katwa, Learned Counsel the 4<sup>th</sup> & 5<sup>th</sup> Proforma Respondents.

Chemosop/ Duke – Court Assistants

