



**Kaburi v Matiang'i & 6 others (Constitutional Petition E319 of 2021)
[2023] KEHC 1087 (KLR) (Constitutional and Human Rights) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1087 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E319 OF 2021**

AC MRIMA, J

FEBRUARY 23, 2023

BETWEEN

JOHN KABURI APPLICANT

AND

FRED OKENG'O MATIANG'I 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATION 3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 4TH RESPONDENT

**NATIONAL COHESION AND INTEGRATION COMMISSION 5TH
RESPONDENT**

ETHICS AND ANTI-CORRUPTION COMMISSION 6TH RESPONDENT

ATTORNEY GENERAL 7TH RESPONDENT

RULING

Introduction:

1. This ruling is once again an attempt by a litigant to demarcate the legal parameters within which the Hon Attorney General of the Republic of Kenya can represent parties in a litigation.
2. It is contended that the 1st respondent, Fred Okeng'o Matiang'i, was sued in his personal capacity for making inciteful remarks at a political campaign and as such the Hon Attorney General cannot represent him.



The Application:

3. The application is the notice of motion dated November 4, 2021. It was instituted by the petitioner herein, John Kaburi and is supported by his affidavit deposed to on a similar date.
4. The orders sought are as follows: -
 - i. This honourable court be pleased to order that the Hon Attorney General be and is hereby disqualified from representing the 1st respondent in the matter herein.
 - ii. The costs of this application be provided for.
5. The applicant grounded his case on the fact that the Hon Attorney General came on record for the 1st respondent. He contended that such a move is contrary to the constitutional mandate of the Hon Attorney General as provided for under article 156 of the Constitution.
6. It was the applicant's case that the 1st respondent was sued in his personal capacity and not in his position as the Cabinet Secretary for the Ministry of Interior and Coordination of National Government which he held and as such he ought not be represented by Hon Attorney General or the Government.
7. The applicant recounted that the petition was only calling upon the 1st respondent to account for his conduct in the context of the inciteful remarks he made in public.
8. The applicant, therefore, contended that the Hon Attorney General could not represent the 1st respondent in the circumstances of the case and accordingly sought for the above orders.

The Applicant's Submissions:

9. Through written submissions dated February 2, 2022, the applicant asserted the position that it was improper for the Hon Attorney General to represent the 1st respondent where he was in a personal political campaign.
10. It was submitted that the seriousness of the inciteful remarks were not in public interest and necessitated that the petitioner be held personally accountable as they were meant to unjustly cause tribal chaos.
11. To buttress the exclusion of the 1st respondent's conduct from representation by the Hon Attorney General, reference was made to Isaac Aluoch Polo Aluochier v Uhuru Muigai Kenyatta & another (2014) eKLR where it was observed: -

...all that I am stating is that the respondents are presently part of Government but the actions complained of really turn on their past (principally as officials of political parties and at the same time, ministers of government). I do not see how those actions can be termed actions of national government to attract representation in court by the Hon Attorney General.
12. The applicant urged the court to allow the application as prayed.

The Hon Attorney General's Response:

13. Save for the Hon Attorney General, sued as the 7th respondent, the rest of the respondents did not actively take part in the application. However, the 1st, 2nd, 3rd, 4th & 5th respondents adopted the 7th respondent's position.



14. In opposition to the application, the 7th respondent filed grounds of opposition dated January 9, 2022.
15. It was its case that the 1st respondent was a state officer under section 2(1) of the *National Government Coordination Act* and as such, all legal proceedings against him, except criminal proceedings, the Hon Attorney General ought to represent him.
16. It was pleaded that there was nothing in the pleadings in the form of evidence to indicate that the petitioner sued the 1st respondent in his personal capacity or that the actions complained of against the 1st respondent were acted on his own justifying personal liability.
17. The Hon Attorney General averred that Government is an abstract entity and life is only breathed in it by the various entities/offices that form National Government. It was its case that the Government cannot run its affairs without its office holders in the form of Cabinet Secretaries and Principal Secretaries who perform official government functions.
18. In conclusion, it was posited that under section 12 of *Government Proceedings Act* claims for and against the Government ought to be instituted against the Hon Attorney General.
19. Similarly, it was further posited that under section 22 of *National Government Coordination Act*, nothing done by a public officer in good faith could render such officer personally liable.

The submissions:

20. In its written submissions dated April 28, 2022, the Hon Attorney General reiterated its case that there was no evidence in the petition to back the applicant's assertions on personal liability of the 1st respondent.
21. It was submitted that the 1st respondent was immune from personal liability and to buttress its position it relied on civil appeal No 31 of 2017 *Aharub Ebrabim Khatiri v Nelson Marwa & another* (2019) eKLR where it was observed that the provision under section 22 of the *National Government Coordination Act* do not allow a public officer acting in good faith to be rendered personally liable.
22. The 7th respondent further relied on article 156 of the *Constitution* and section 5 of Hon *Attorney General Act*, Act No 49 of 2012 to buttress propriety of representing the 1st respondent.
23. It urged the court to dismiss the application.

Analysis:

24. This court has carefully addressed its legal mind to both the petition and the application.
25. The gist of the petition is the averment that the 1st respondent uttered some words in public gatherings which words and conduct variously and adversely impacted upon the petitioner and the public in general. The words were allegedly uttered on October 20, 2017 and on 10th and October 11, 2020.
26. As a result, the petitioner sought the following prayers in the petition: -
 - a. A declaration that the 1st respondent's conduct and actions amounted to violation and or infringement of the petitioner's fundamental rights and freedoms under articles 28,35, 41, 47 and 50(1) of the *Constitution*.
 - b. A declaration that the respondents' conduct and actions are in breach of the *Fair Administrative Actions Act*, rules of natural justice and violates the petitioners legitimate expectation.



- c. A declaration that the 1st respondent is a member of an outlawed group hence violated the Constitution and should be charged under section 77(1)(3)(b) (c) (d) (e) and 94 of the Penal Code and declared unfit to hold security docket of the country.
 - d. A declaration that the 2nd, 3rd, 4th, 5th and 6th and 7th respondents abdicated their mandate by failing to check and or control the actions of the 1st respondent and are ordered to investigate and take action against the 1st respondent.
 - e. A declaration that the 1st respondent through his remarks has confirmed that he a member of outlawed criminal gang and can use the security officers to violate the fundamental rights and freedoms of other Kenyans.
 - f. A declaration that the 1st respondent's remarks amounted to an incitement of the public to violence and demeans the office he holds.
 - g. Any other relief that this court may deem fit to grant.
 - h. Costs of the petition
27. There is no doubt that the 1st respondent was the Cabinet Secretary for the Ministry of Interior and Coordination of National Government during the time in issue. The impugned words were instead captured in paragraph 2 of the petitioner's submissions.
28. From the translation of the words tendered by the petitioner, it appears that the words were uttered while the 1st respondent was addressing security concerns surrounding the then pending general elections. Without deciding the issues at hand, it goes without saying that the security in relation to the elections was one of the duties under the docket of the 1st respondent. Of course, the interpretation, meaning and impact of the alleged words remain the subject of the petition.
29. This court, therefore, wishes not to belabour the point. By taking into account the matters as pleaded in the petition, article 156 of the Constitution, the provisions of National Government Coordination Act, the Attorney General Act and various legal decisions including those rendered by the parties, it is apparent that this court cannot, at this point in time, demarcate the boundary between the actions of the 1st respondent which are protected by the law thereby rendering him not personally liable and those which may be deemed as purely outside the protection of the law.
30. The said distinction will await the hearing of the petition. In the event the court finds that the 1st respondent exceeded the legal boundaries such that he would not benefit from the immunity in law, then appropriate orders will be made. It is, therefore, premature for this court to pronounce itself on the issue at hand.
31. Having said so, this court finds no basis of barring the Hon Attorney General from representing the 1st respondent in the instant proceedings. in any event, the petitioner is still at liberty to lodge criminal complaints against the 1st respondent in which case the Hon Attorney General will not show up.
32. Drawing from the foregoing, the following final orders hereby issue: -
- a. The notice of motion dated November 4, 2021 is hereby dismissed.
 - b. Costs of the application shall be in the petition.

Orders accordingly.



DELIVERED, DATED and SIGNED at KITALE this 23rd day of February, 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Miss Biwott for the 6th Respondent

Regina/Chemutai – Court Assistants

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