



**Azimio La Umoja One Kenya Coalition Party v President of Kenya
& 9 others (Petition E153 of 2023) [2023] KEHC 21602 (KLR)
(Constitutional and Human Rights) (4 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21602 (KLR)

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

PETITION E153 OF 2023

LN MUGAMBI, J

AUGUST 4, 2023

BETWEEN

AZIMIO LA UMOJA ONE KENYA COALITION PARTY PETITIONER

AND

THE PRESIDENT OF KENYA 1ST RESPONDENT
THE ATTORNEY GENERAL 2ND RESPONDENT
THE SPEAKER OF NATIONAL ASSEMBLY 3RD RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT
THE INSPECTOR GENERAL OF POLICE 5TH RESPONDENT
THE NATIONAL INTELLIGENCE SERVICE 6TH RESPONDENT
THE NATIONAL COMMISSION OF HUMAN RIGHTS 7TH RESPONDENT
THE PUBLIC SERVICE COMMISSION 8TH RESPONDENT
THE COMMISSION FOR ADMINISTRATIVE JUSTICE 9TH RESPONDENT
**THE INDEPENDENT POLICE OVERSIGHT AUTHORITY ... 10TH
RESPONDENT**

RULING

1. This is a ruling of the following two Notices of Motion applications: -
 - a. The Notice of Motion application dated 13th June, 2013 by the 10th Respondent/Applicant (Independent Policing Oversight Authority) and;



- b. The Notice of Motion application dated 5th June, 2023 by the 8th Respondent/Applicant (the Public Service Commission).
2. The two motions were brought under rule 2 and 5 (d) (i) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*. They seek to have the 8th and 10th Respondents respectively struck out from the instant petition with the main ground being cited in the two motions being that there is no violation of the Constitutional rights and/or fundamental freedom that has been alleged against the 8th and 10th Respondents by the petitioner and as such it discloses no claim against any of them. The 10th Respondent/Applicant adds that the petition is embarrassing as it is impossible to respond when no adverse claim is made against it.
3. The 10th respondent/applicant notice of motion is supported by the affidavit of Elema Halake while that of the 8th Respondent/applicant is sworn by Dr Simon K Rotich.
4. Their affidavits basically reiterate the main ground stated in the application.
5. Elema Halake the deponent in support of the application by the 10th Respondent swears as follows in paragraph 4 of the supporting affidavit:

“...That paragraphs 66 – 67 of the petition, the petitioner claims that the Commission of Inquiry established by the 1st respondent seeks to usurp the mandate of the 10th respondent and the petition is therefore coached as one seeking to protect and safeguard the mandate of the 10th respondent and not one that claims any violation of the Constitution by the 10th respondent...”

At paragraph 5, he continues:

“...There is no claim made in the petition that the 10th respondent has violated any constitutional rights and/or fundamental freedoms of the petitioner or anyone else in any way, shape or form...”

6. A similar position is maintained in the supporting affidavit of the 8th respondent/applicant’s notice of motion.
7. The two applications are opposed by the petitioner through the grounds of opposition dated 22nd June, 2023.
8. The petitioner cited five grounds of opposition, namely: -
- i. That the petition was filed to protect the mandates of the respondents, thus the description of the roles of the 8th and 10th respondents under paragraph 8 and 10 respectively of the petition.
 - ii. That the petition describes the usurpation and the encroaching of the authority of the 8th and the 10th respondents by the mandates that were delegated to the Commission of Inquiry of Shakahola Tragedy.
 - iii. That it is trite law that where proceedings are filed for the benefit of a person who should be a petitioner, that person must be sued as a respondent.
 - iv. That it is necessary that the respondent be enjoined as a respondent since their constitutional mandate are in issue. The hearing and determination of this petition would define their powers and responsibilities, under the Constitution.



- v. That it is the duty of the respondent under Article 3(1) of the Constitution of Kenya to respect uphold and defend the Constitution of Kenya 2010 and this Honourable Court cannot, therefore, excuse their constitutional mandate over Shakahola tragedy.
9. All the parties filed their written submissions as directed by the court.

8th Respondent's Submissions

10. Advocate for the 8th Respondent, Jacqueline Manani filed her written submission dated 8th July, 2023.
11. Counsel submitted that the petition does not disclose any reasonable cause of action against the 8th Respondent and relied on the case of *DT Dobie & Co. (K) Ltd v Muchina* [1982] KLR, where on what amounts to a reasonable cause to set a foundational basis for this line of submission. She thus quoted from the said case what amounts to a cause of action as follows:

“...an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claimed prayer. ...”

12. Further, the case of *Jonathan Munene v Attorney General & 2 others, Kenya Judges and Welfare Association (interested party)* [2021] eKLR, where the court held that it was the Petitioner's duty in a constitutional petition to disclose, with reasonable precision, the right which he alleges has been infringed and where the petitioner fails to discharge such duty, the petition is to be struck out for failing to disclose a cause of action worth being entertained by the court.
13. Importing the reasoning in the above authorities by contextualizing it to the present petition, counsel referred to paragraphs 60, 61 and 62 of the Petition and submitted as follows -

“...The petition in paragraph 60 of the petition alleged that the Commission of Inquiry would usurp the role of the 8th respondent which has exclusive mandate to decide on the discipline of public officers. In this instance the petitioner failed to demonstrate how the 8th respondent impugned any right protected under the Constitution of Kenya, 2010.

The petitioner proceeded to state in paragraph 61, that 8th respondent lays down due process where investigations of disciplinary issue arise and thus Commission of Inquiry would assume this mandate contrary to the provisions of *Public Service Commission Act*. It is our submissions that the petitioner failed to demonstrate how the 8th Respondent contravened the provisions of the *Public Service Act*, 2017.

Further, in paragraph 62, the petitioner asserted the Commission of Inquiry under mandate (e) is to recommend Legal, Administrative, or forms of accountability action against any public official whose actions or omission, are established to have willfully or negligently contributed to the occurrence of Shakahola Tragedy, usurps the powers and undermines the 8th Respondents authority under Article 232, 233 and 234 of the Constitution of Kenya 2010 and Section 65 of *Public Service Commission Act* 2017.....

It is our submission that the petitioner has not demonstrated in any form or way how the 8th respondent contravened any of this constitutional and statutory provisions. The petitioner only explains how the powers of 8th Respondent have been usurped without raising any cause of action against the 8th respondent...”



14. Submitting on whether or not the 8th Respondent should be struck out, counsel cited the provisions of Rule 5 (d) (i) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure rules that allow the court to order the name of a party that has been improperly joined be struck out and buttressed the position with the Court of Appeal Case of [Crescent Construction Ltd v Kenya Commercial Bank Limited](#) [2019] eKLR, where the court observed that it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.
15. The 8th respondent/applicant thus submitted that its name ought to be struck out as a respondent in the present petition.

10th Respondent Submissions

16. The 10th respondent/applicant written submissions dated 4th July 2023 were filed by its advocate, Festus Kinoti.
17. The 10th respondent submitted that it was improperly joined as a respondent. Counsel cited the definition ‘respondent’ in the [Constitution of Kenya \(Protection of Fundamental Freedom\) Practice and Procedure Rules](#), 2010, and maintained no allegation in the petition makes him a respondent within the meaning provided of the word ‘respondent’ as defined in the said rules as there is no claim to the effect that the 10th respondent denied, violated, infringed or threatened to deny, violate or injure a right or fundamental freedom that has been made in the petition. Moreover, that [Black’s law Dictionary](#) describes a respondent as “a party against whom a motion or petition is filed” yet in this petition, no adverse claim had been made against it.
18. It was submitted on behalf of 10th Respondent that whereas the main grievance of this petition is establishment of the Commission of Inquiry by 1st respondent; there is no allegation that was made against the 10th Respondent that it had a hand in the act complained of and the only reason the petitioner impleaded the 10th Respondent is due to the alleged usurpation of the 10th respondent mandate by 1st respondent, meaning the petitioner is only keen to protect the 10th Respondent’s mandate from being encroached and because of any wrong doing by the 10th Respondent. The 10th respondent thus argued that it cannot fall within the rubric of a respondent in law.
19. Counsel relied on the High Court Case of [Owira & 23 Others v Attorney General & Another, Kenya National Commission of Human Rights & 4 Others \(interested Parties\)](#) [2020] eKLR, in where the court explained the distinction between a respondent and interested party by holding that a petitioner cannot lay claim against an interested party for infringements of rights and that if the intention is to lay any claim, then the character of the interested party should changed and impleaded as a respondent.
20. The 10th respondent thus implored the court to find that the petitioner had not made a case for joinder of 10th Respondent/applicant as a respondent in this Petition.

Petitioner’s Submissions

21. Written submissions dated 6th July, 2023 were filed by Paul Mwangi & Co. Advocates on behalf of the Petitioner.
22. In respect of 8th Respondent/Applicant; the Petitioner’s Advocate zeroed on paragraph (e) of the Commission of Inquiry’s mandate and contended that it is substantially identical to the constitutional mandate given to the 8th Respondent/Applicant under Article 232 of the [Constitution](#) which even if it were to be delegated, the Constitution empowers only the 8th Respondent to delegate it and not the President. Moreover, It was contended that the [Public Service Commission Act](#) No. 10 of 2017 also has



- elaborate procedures that are followed in case adverse action has to be taken against a public officer and this protection stands to be undermined by the duplicitous mandate of the Commission of Inquiry.
23. Similarly, advocate for the petitioner singled paragraph (d) & (e) under the commission of inquiry terms of reference allows it to take evidence against organizations among others and contended that Section 7(1)(a)(i) and (ix) of the *Independent Policing Oversight Act*, confers the authority on IPOA to investigate matters relating to the Police Service, hence it is tantamount to undermining the authority of 10th respondent under the *Act* to provide civilian oversight over the role of Kenya Police.
 24. The petitioner thus submitted that the constitutional mandates of 8th and 10th respondents/applicants are in issue hence necessary to enjoin so that they may protect and safeguard that mandate.
 25. The petitioner relied on Article 3 (1) of the *Constitution* which obligates every person to respect, uphold and defend the constitutional and submitted that the obligations of 8th and 10th Respondent are both positive and negative that they do not only have a positive obligation to promote the rule of law and protection of sovereignty of the citizenry, but also negative obligation to provide derogation of the same.
 26. In that regard, the petitioner submitted that to the extent that the mandate of commission of inquiry under Article (d) purports to donate powers of making recommendations or other forms of accountability or action against public officials whose dereliction of duty led to the Shakahola Tragedy, it violated Article 234(2) and (5) of the *Constitution* which gives the same duty to 8th respondent and thus the 8th respondent has a public duty under constitution to protect its role from usurpation.
 27. Further, that the Commission's term of reference in paragraph (d) and (e) a mandate of the 10th respondent pursuant to Section 7(1) of the *Independent Policing Oversight Authority*.
 28. Accordingly, it was the Petitioners submission that this petition presents the 10th and 8th Respondents with an opportunity for defending their constitutional mandate which has been usurped or threatened. The Petitioner submitted that when there is threat of attack to their mandates, the 8th and 10th respondents are duty to defend that mandate from emasculation.
 29. The petitioner relied on the case of *Sallo Nzuki v Salaries and Remuneration Commission & 2 others* (2019) eKLR, in which the court held thus: -

“... Since Article 3(1) of the Constitution places an obligation on every person to respect, uphold and defend the Constitution, the invitation to approach the court for redress as long as the person hold bona fide grounds for believing that the Constitution under threat ought to be welcome...”

And the case of *Law Society of Kenya Versus Attorney General & another* JSC (interested party) (2020) eKLR where the court quipped: -

“From the above-quoted provisions of the Constitution, it is clear that every member of the public whether individually or collectively is enjoined to respect, uphold and defend the Constitution and any alleged violation of the Constitution by any individual is a very serious matter and an affront to the Constitutionalism, and sets a dangerous precedent in the violation of the Constitution; which can, if not checked, result in serious harm to the country and every citizen...”



30. The petitioner thus submitted that the 8th and 10th respondents/applicants have a constitutional duty to ensure the constitutional provisions are respected and upheld and cannot, therefore, abandon their constitutional mandate over Shakahola Tragedy.
31. The petitioner prayed that the two notices of motion be struck out.

Analysis & Determination

32. Having reviewed the submissions of the parties, it is my considered view that the two notices of motion raise only one major issue for determination; that is whether the joinder of the 8th and 10th applicants as respondents in this petition is merited.
33. From the submissions of 8th and 10th respondent/applicants it is clear to me that their objection to be joined as the respondents in the instant petition is founded on the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 where the bone of contention is that they do not fall within the meaning attributed to the word ‘respondent’ in the said rules as no allegation was made against them by the petitioner that they denied, violated, infringed, or threatened to deny, violate or infringe a right or fundamental freedom.
34. They thus urged the court to apply Rule 2 which defines who a “respondent” in finding that they are non-suited and thus strike out their names as respondents under Rule 5(d) (i).
35. The petitioner vehemently opposed the application to strike them out as respondents. The petitioner contended that the foundation of its petition is the constitutional mandate given by the Constitution to the constitutional agencies or institutions such as the 8th and 10th respondents. The Petitioner argued that Article 3(1) of the *Constitution* places an obligation on every person to respect, uphold and defend the Constitution which includes the 8th and 10th Respondents as the creatures of the Constitution.
36. For the Constitutional agencies/institutions in question, the petitioner argued that they are primarily responsible protecting their own mandates from emasculation or usurpation by any other authority in a manner is not in line with the Constitution.
37. The petitioner thus argued in failing to defend despite the obvious threat of encroachment as alleged in the petition; then the petitioner is entitled to cite them as respondents in order to have them answer for their inactivity in respect of the actions the petitioner complains about of the 1st Respondent and by extension, the 8th and 10th Respondent for apparently overlooking the same despite the fact that it pertains a threat to their mandate.
38. Article 258 (1) of the *Constitution* provides as follows:

Article 258 (1) Every person has the right to institute court proceedings, claiming that this constitution been contravened, or is threatened with contravention...”
39. My considered view is that in opposing their joinder as respondents, the 8th and 10th respondents/applicant misapprehended the purpose of this petition to be premised on violation of rights of the petitioner under Article 22 (1) which states that: “Every Person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of rights has been denied, violated or infringed or is threatened.” However, the petitioner is not complaining that his rights or fundamental freedoms have been violated or are threatened with violation so as to plead as such in the petition and bring itself within the definition of the word ‘respondent’ per *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules*, 2013. My view is that if that definition is to apply, then it has to be done with some necessary modification for the reason that



this petition is not strictly based violation or threatened violation of rights and fundamental freedoms of the petitioner under the Bill of Rights but on the threat of constitutional governance where the main issue not just the responsibility of constitutional bodies to uphold the Constitution but also their responsibility in protecting it in regard to performance of their functions hence the more suitable article under which it is anchored is Article 258 (1) and not Article 22 which relates to the violations of the Bill of Rights and where the rules specifically relate.

40. A violation or threatened violation under Article 258 is broad and may cover a broad variety of violations or threatened violation of the Constitution as in the instant petition.
41. In the instant petition, the petitioner focusses on the functions assigned to various constitutional institutions/or agencies by the Constitution and alleges that through the actions of the 1st Respondent, those responsibilities have been infringed upon; he thus charges the institutions/agencies have must defend themselves from any encroachment or usurpation in compliance with Article 3 (1) of the Constitution and if they do not, then the petitioner is entitled to bring this petition not only against the 1st Respondent but also against the 8th and 10th Respondent for not defending themselves against the invasion of their mandate.
42. Constitutional governance ensures that the scope of governmental powers and responsibilities are clearly defined and dispersed to various organs and constitutional bodies to promote the rule of law as a guarantee for the common good of citizens especially their protection against arbitrariness those wielding authority.
43. Accordingly, where the Constitution creates and assigns a specific body with a defined mandate, the person or body to whom that mandate is given must understand that the performance of those functions is meant for the common good of the people hence the reason why they came up with the constitutional institution or body. Consequently, such body or institution assumes the primary duty of defending such mandate from erosion or interference from any authorized 3rd parties for the interest of safeguarding functioning constitution for the benefit of the people from whom the mandates is derived.
44. Where the person, an organization or institution responsible for the particular mandate fails in the eyes of a reasonable observer to offer responsive and credible defence to a threat directed to its constitutional mandate; then a concerned citizen can pursuant to Article 258 (1) of the Constitution institute a petition alleging that the act or conduct in question is a threat to the functioning of the Constitution and the citizen is thus perfectly entitled to join such constitutional body or institution that is allegedly failing to defend or assert its mandate thereby endangering the rule of law or constitutional governance exposing the general populace to the risk of constitutional deviation with all its attendant consequences.
45. By enjoining the Institution or body against which the claims of failure to rise to the occasion and protect themselves from encroachment is made as respondents, it is providing them with an opportunity to explain their position on the accusation or to demonstrate any efforts made pursuant to article 3 (1) if any by way of defence.
46. In that regard, since the petitioner submits and alleges that the named institutions mandate has been encroached yet they are nowhere in the frontline to defend their mandates from interference despite the potential risk to the rule of law and constitutional governance; I would find that the 8th and 10th Respondents are bound to respond to these allegations in view of article 3 (1) of the Constitution.
47. I thus find that the 8th and 10th Respondents are properly joined in this petition and accordingly dismiss their applications to strike them out from this petition.



48. Costs in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF AUGUST, 2023.

L. N. MUGAMBI

JUDGE

COURT

This ruling is transmitted digitally to the Advocates for the Parties on record through their respective email addresses provided.

L.N. MUGAMBI

JUDGE

