



**Mohamud v Clerk County Assembly of Wajir; Federation of Women Lawyers (FIDA) (Interested Party) (Petition E010 of 2022) [2023] KEHC 27351 (KLR) (28 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27351 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
PETITION E010 OF 2022**

**JN ONYIEGO, J**

**DECEMBER 28, 2023**

**IN THE MATTER OF ARTICLES 2(1), 2(5),3(1), 10,19,  
20,22(1), 23(3) & 24 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION  
ART. 10 AND CONSTITUTIONAL RIGHTS AND FUNDAMENTAL FREEDOMS  
UNDER ARTICLES 26, 27, 28, AND 47 OF THE CONSTITUTIONAL OF KENYA**

**BETWEEN**

**FATUMA HUSSEIN MOHAMUD ..... APPLICANT**

**AND**

**CLERK COUNTY ASSEMBLY OF WAJIR ..... RESPONDENT**

**AND**

**FEDERATION OF WOMEN LAWYERS (FIDA) ..... INTERESTED PARTY**

**JUDGMENT**

1. The matter for determination before me is a petition dated 24.10.2022 filed by the petitioner vide the firm of Amanya & Company Advocates seeking for orders that:
  - i. A declaration that the petitioner's fundamental rights and freedoms as enshrined under articles 26, 27, 28 and 47 of *the constitution*, have been contravened and infringed upon by respondents;
  - ii. A declaration that the petitioner is entitled to the payment of damages and compensation to be assessed by the court for violation and contravention of her fundamental human rights by the respondents herein as provided for under articles 26,27,28 and 47 of *the constitution*.
  - iii. Costs of the petition.



- iv. Any other relief that this Honourable Court may deem just to grant.
2. The petition is anchored on grounds set out on the face of it and further amplified by averments contained in an affidavit supported by Fatuma Hussein Mohamud the applicant herein. It was deposed that; pursuant to the conclusion of the 9<sup>th</sup> August 2022 National general election, the position of the speaker of County Assembly of Wajir was declared vacant and thereafter, invitation for interested candidates made vide an advertisement in the Daily Nation Newspaper.
  3. That she subsequently submitted her application to the respondent on 19.09.2022. It was her position that among the requirements spelt out in the invitation to declare interest was that two members of the county assembly had to certify the suitability of any candidate interested in the advertised position. According to her, Hons. Mahat Mohamed and Aden Adow Abdullahi certified her candidature. That to her surprise, on the evening of 19.09.2022, when the respondent released a publication notifying members of the public the persons who had been cleared for the subject position, her name was missing.
  4. That upon enquiring, she was told that she had not been cleared for the position because the two MCA's who had certified her suitability to the position had also certified and nominated another applicant to the same position; she stated that she wrote a complaint letter of dissatisfaction airing her grievances to which no action was taken by the respondent. According to her, her elimination on grounds that she was not properly nominated was a violation of her constitutional rights.
  5. The respondent vide a response dated 16.11.2022 and filed through the firm of Hassan Osman & Associates Advocates stated that the petitioner did not meet the requirements under Standing Order NO. 5(3) of the Wajir County Assembly which demands that nomination papers of a candidate shall be accompanied by the names and signatures of at least two members who support the candidate and a declaration by them that the candidate is qualified to be elected as a member of a county assembly under article 193 of *the constitution*.
  6. That the Standing Orders require of the clerk of the county assembly upon close of the nomination period to publicize and make available to all members, a list showing all qualified candidates and make to all members copies of the curriculum vitae of the qualified candidates. In the instant case, it was deposed that the petitioner did not qualify as a candidate for nomination of the speaker and further, the standing orders did not oblige the respondent to disclose to the petitioner on her disqualification for that could be deciphered from the list of qualified candidates.
  7. It was the respondent's case that on 19.09.2022, the respondent received two letters from two members of assembly, Hons. Mahat Mohamed and Aden Adow Abdullahi who previously had endorsed the petitioner, withdrawing their endorsement. That the respondent did not violate the petitioner's right by failing to publicize and make her name available among the list of qualified candidates. In conclusion, the respondent called upon this court to dismiss this petition with costs as the same was an abuse of the court's process.
  8. The interested party through its executive director, Anne Ireri filed a replying affidavit sworn on 19.01.2023 vide the firm of Sinana Advocates thus opposing the application. She deposed that although the said Standing Order No. 5(3) provides that the nomination papers of a candidate for the position of the speaker should be supported by signatures of at least two (2) elected members of the County Assembly, there was no requirement or condition that the said nominating members cannot nominate another candidate. It was her position that the petitioner had qualified to vie for the position of speaker but due to the gender inequality propagated in the county, the petitioner's name could not be shortlisted in a position considered to be a preserve for men.



9. That the alleged letter of withdrawal by the two elected members of the county assembly who supported the petitioner's candidature was an afterthought and a scheme to defeat the petitioner's right. It was deponed that denying the petitioner an opportunity to vie for the seat of speaker when she had qualified and further imposing conditions that are not provided in the country's standing orders amounted to gender discrimination thus favouring her male counterparts. This court was therefore urged to allow the petition in order to safeguard women's rights and promote equality of both men and women in politics.
10. The court gave directions that the petition be canvassed by way of written submissions and all the parties complied.

### **Petitioner's submissions**

11. The petitioner submitted on three issues namely; whether the petitioner's constitutional rights were violated; whether the petitioner is entitled to the reliefs sought in the petition and; who should bear the costs of this petition.
12. On the first issue, the petitioner contended that indeed her rights as envisaged under article 27(3) of *the constitution* were violated by the respondent who refused and/or ignored to clear her for the position of the speaker of the County Assembly while clearing the other candidates, all of whom were males. It was argued that the respondent's actions were clear violation of the petitioner's right to equal opportunities in the political spheres. In the same breadth, it was urged that the respondent was bound to inform the petitioner of its alleged decision of disqualifying her and disclose the reasons thereof.
13. That the right to fair administrative action is the soul of a democratic society without which democracy and the rule of law cannot be maintained. Reliance to support the fact that the petitioner was not informed of the said withdrawal of her suitability as a speaker was just an afterthought was placed on article 47 of *the constitution* and; the case of Onjira John Anyul v University of Nairobi [2019] eKLR where it was held that:

“ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the bill of rights...”
14. On the second issue regarding the jurisdiction of this court, the petitioner urged that she had clearly demonstrated how her constitutional rights were violated by the respondent and therefore entitled to the reliefs sought pursuant to Article 23(3) of *the constitution*. As regards costs, the petitioner contended that for the reason that the respondent does not have a sustainable objection, the petition should succeed with costs.

### **Interested party's submissions**

15. The interested party submitted in reference to four issues as follows; whether the petition herein has satisfied the constitutional threshold of proof established under the case of Anarita Karimi Njeru v Republic (1976 –1980) KLR 14; whether it was a requirement of law, standing order and/or regulation that a member of parliament should certify the application of only one applicant; whether the withdrawal of the certification by the two members of the county assembly was an afterthought meant to defeat the petitioner's application and; whether the actions of the respondent violated and/or infringed on the petitioner's fundamental rights and freedoms under article 26,27,28 and 47 as enshrined in *the constitution*.



16. On the first issue, it was the interested party's submission that in constitutional litigation where a person is seeking legal redress from the High Court for an alleged violation of the constitutional right(s), he/she must set out with reasonable degree of precision the nature of the complaint, the provisions that have been infringed or likely to be infringed upon, as well as the manner in which the said provisions have been infringed. It was contended that acknowledging the constitutional protections against gender discrimination and the historical challenges faced by women in Wajir County, the exclusion of the petitioner's name from the shortlist without any legal basis raises serious concerns regarding gender equality hence violates her fundamental rights under [\*the constitution\*](#).
17. That by denying the petitioner the said opportunity, the same impacted her right to life as it obstructed her ability to improve her quality of life, attain economic prosperity and participate in decision making processes that affect her and her constituents. It was alleged that the denial of the opportunity to contest for the position of speaker of the county assembly was solely based on the petitioner's gender hence a clear violation of her inherent human dignity. To support her contention, reliance was placed on article 27 and inter alia the case of *S v Mwakanyane* (1995) (3) 391 (CC) where O' Reagan J emphasized that the right to life is, in one sense, antecedent to all the other rights in [\*the constitution\*](#)...
18. On the second issue, it was contended that Standing Order 5(3) provides that the nomination papers of a candidate should be supported by signatures of at least two (2) elected members of the County Assembly for the sole purpose of declaring that the said candidate is not an elected member but is qualified to be such under article 193 of [\*the constitution\*](#). That there was no requirement or condition that the said members cannot nominate other candidates.
19. On the third issue, it was submitted that the court should interrogate circumstances surrounding the intent and motivation behind the withdrawals of nomination and whether they were made in bad faith or as a deliberate attempt to discriminate against the petitioner. That the petitioner submitted her application on the evening of 19.09.2022 and as per her documents, it could be construed that the signatures of the nominating members of county assembly were acquired on 15.09.2022; that on 19.09.2022, the respondent made a publication of the shortlisted candidates and on the same day, the two nominating members of parliament withdrew their support for the petitioner. It was reiterated that the happenings clearly showed that the said withdrawals by the two members of the county assembly were just an afterthought.
20. On the last issue, it was stated that the actions by the respondent was a clear denial of an opportunity to the petitioner to contest based on her gender. To further emphasize on the question of gender parity aspect, reliance was placed in the case of *Peter K. Waweru v Republic* [ 2006] eKLR, where it was held that ...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured is a violation of one's constitution right. It was submitted that the respondent's actions were discriminatory and without any legal basis and can only be viewed as a violation and infringement of the petitioner's fundamental rights as provided for in [\*the constitution\*](#).

### **Respondent's submissions**

21. On its part, the respondent submitted that since the petitioner alleged violations of her constitutional rights, it was incumbent upon her to prove on a balance of probabilities that her averments were correct. The respondent relied on the case of *Leonard Otieno v Airtel Kenya Ltd HC (Nairobi) Pet No. 218 of 2017 [2018] eKLR* to propound the position that a litigant bears the burden of proof in respect of the proposition he asserts to prove his claim.
22. The respondent further contended that no person deprived the petitioner her life nor was her livelihood infringed. While relying on the case of *S v Mwakanyane & Another 1995 (3) 391*, in



interrogating how the petitioner's right to dignity had been infringed, it was contended that the petitioner did not in her affidavit shed light on her previous livelihood and how the lost chance to be nominated as a speaker had deprived her her right to life and dignity.

23. It was reiterated that the petitioner was very economical with the truth by failing to recognize that her suitability was jeopardized by the fact that the members of the county assembly who had seconded her had withdrawn. The respondent reiterated that the petition herein did not meet the reasonable threshold and that the petitioner's rights were not violated whatsoever.
24. Additionally, by relying on the case of *Trusted Society of Human Rights v Mumo Matemu & 5 others* [2014] eKLR, it was submitted that; the petitioner had erred by enjoining the interested party to her suit; it is trite that, an interested party is one who has a stake in proceedings though he or she is not party to the cause ab initio but he or she will be affected by the decision of the court when it is made either way. It was urged that for the reason that the petitioner did not prove any nexus with FIDA and how it would be affected in the outcome of the suit, the interested party's submissions ought to be expunged.

### **Determination**

25. I have carefully considered the petition herein; the respondent's and interested party's replying affidavits as well as party's rival submissions; Issues which germinate for determination are:
  - i. Whether the petition herein has met the test for a constitutional petition.
  - ii. Whether the 2<sup>nd</sup> respondent was correctly enjoined in the matter herein.
  - iii. Whether the petitioner's rights have been infringed upon, thus deserving compensation and/or damages as averred.
26. It is trite that a party claiming violation or threat to violation of his or her constitutional rights must with reasonable degree of precision establish the extent and particular constitutional provision violated or likely to be violated or infringed. See *Anarita Njeru* (supra). According to the petitioner, her rights under Article 10 and 27<sup>th</sup> were violated on account of gender discrimination. That her disqualification from contesting for the position of speaker of County Assembly Wajir County Assembly was based on gender discrimination and not procedural inadequacy in the nomination procedure or process.
27. The respondent raised the issue that the petitioner had failed to precisely disclose any constitutional violation. Rule 10 of the Mutunga Rules, 2013 clearly provides what a competent Petition should include. Rule 21(3) of the Mutunga Rules, 2013 provides that the court may frame the issue for determination at the hearing and give such directions as are necessary for the expeditious hearing of the case and lastly, Rule 22(2)(b) provides that submissions shall contain a brief statement of facts with reference to exhibits, if any, attached to the petition, issues arising for determination ; and a concise statement of argument on each issue incorporating the relevant authorities referred to, together with the full citation of each authority.
28. To determine whether the respondent violated the rights of the petitioner, the respondent urged this Court not to entertain the petition since it does not meet the threshold for constitutional petitions as laid down in *Anarita Karimi Njeru* (supra) and *Mumo Matemu* (supra).
29. In *Anarita Karimi* case the standard for drafting constitutional pleadings was set as follows:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that



of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

30. On its part, the Supreme Court confirmed the importance of complying with the stated principle by stating in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR as follows:

“(349) ...Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Annarita Karimi Njeru v. Republic* (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

31. The first question, therefore, is whether the petitioner has disclosed a violation of *the Constitution*, the constitutional provisions violated and the manner in which the provisions were violated. In her pleadings, the petitioner alleged violation of her rights and principles enunciated and protected by inter alia Articles 2(1), 2(5),3(1), 10,19, 20,22(1), 23(3) & 24 of *the Constitution*. Her case is that the actions of the respondent have affected her rights. She has also specified the orders she is seeking against the respondent which she tied to the statutory and constitutional mandates of the respondent. In my considered view, the petition is properly before the court. Whether her pleadings disclose a constitutional dispute is another issue altogether.

32. On whether the petitioner established a case for the grant of the orders sought, the petition is premised on the articles and sections as indicated on the face of the petition. The alleged infringement of the petitioner’s rights under the said provisions is then tied to inter alia, alleged violation of other constitutional rights being the right to equality & freedom from discrimination under Article 27 (3).

33. The article thus state as follows:

“Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres”

34. From the foregoing, it is clear that Article 27 thus applies to the dispute herein. However, before I substantively deal with the specific issue of infringement of the petitioners’ constitutional rights, I wish to dispose of the issue touching on the interested party’s role in this suit.

35. According to the respondent, the interested party ought not to have been enjoined in the case herein. It is trite that an interested party is one who has stake in proceedings though he or she is not party to the course ab initio, he or she will be affected by the decision of the court when it is made either way.

36. Rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 defines an interested party as:

“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 be directly involved in the litigation”.



37. Order 7 Rule 9 of the Civil Procedure Rule states that;

“The court may even on its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit.”

38. Order 1 Rule (10)(2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or suo moto, to order the name of a person who ought to have been joined or whose presence before the court is necessary to be enjoined for the court to effectively and completely adjudicate upon and settle all questions involved in the suit, to be added as a party.

39. The threshold for joinder was set out in the case of Francis Kariuki Muruatetu & Another v Republic & 5 others in Petition 15 as consolidated with 16 of 2013 (2016) eKLR where the court held that an applicant in a joinder application must move the court by way of a formal application; enjoinder is not as of right, but is at the discretion of the court and sufficient grounds must be laid before the court.

40. Therefore, joinder of parties is permitted by law and can be done at any stage of the proceedings; However, joinder of parties may be refused where such joinder will lead to practical problems of handling the existing cause of action together with the one of the parties being joined as necessary or will occasion unnecessary delay or costs on the parties in the suit.

41. Joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to, or totally different from existing cause of action or relief. The determining factor in joinder of parties is that common question of fact or law would arise between the existing and the intended parties. This is the test that was applied by F. Gikonyo J. in the case of Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited and another in which, the court was of the view that to determine the real issues in dispute among all the parties, the intended respondents must be enjoined.

42. In my view, in deciding an application for joinder, the court must exercise a liberal approach so as not to shut out a genuine litigant who is effectively interested or is bound by the outcome of the suit. However, the court must guard against a frivolous or vexatious litigant whose sole motivation is to complicate and confuse issues that are before court for determination. [ See Judicial Service Commission v The Speaker of the National Assembly & Another Petition No. 518 of 2013 when it was held that:

“*The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012, defines an interested party as “a person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation” .... He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the Court to make a determination favourable to his stake in the proceedings...”

43. In determining whether the applicant has a legal interest in the subject matter sufficient enough to entitle it to be enjoined as an interested party, the true test lies not so much in an analysis of what the constituents of the applicant’s rights are, but rather in what would be the result on the subject matter if those rights could be established. In the case herein, apart from this court, although differently constituted directing that the interested party be served, the interested party also stated that it’s a premier Women’s rights Organization that advocates for women rights and is committed to creating a society that respects and upholds women’s rights.



44. That it is keen on empowering women to engage in politics and vie for political seats which are considered as male dominated. Further, that they are keen in the attainment of a just and gender equitable society and economy where women have equal access to opportunities in the political, economic, cultural and social spheres of life.
45. In my humble view, not only did this court find the importance of enjoining the interested party in the suit herein but also, the said interested party equally demonstrated that it had a legal and identifiable interest in the subject matter of this case and further, a right to participate in the proceedings herein.
46. Coming back on the merits of the case herein, the petitioner urged that she submitted her application on the evening of 19.09.2022 and as per her documents, it could be construed that the signatures of the nominating members of county assembly were acquired on 15.09.2022; There is no dispute that on 19.09.2022, the respondent made a publication of the shortlisted candidates and on the same day, the two nominating members of county assembly withdrew their support for the petitioner.
47. The respondent on the other hand submitted that the petitioner was very economical with the truth by failing to recognize that her suitability was jeopardized by the fact that the members of the county assembly who had seconded her had withdrawn their support.
48. Having regard to the said Standing Order No. 5(3) of the County Government of Wajir on nomination of candidates, it is stated thus:
  1. Upon the Governor notifying the place and the date for the first sitting of a new County Assembly pursuant to Standing Order 3, the clerk shall by notice in the Gazettes notify that fact and invite interested persons to submit their nomination papers for election to the office of Speaker.
  2. ....
  3. The nomination papers of a candidate shall be accompanied by the names and signatures of at least two members who support the candidate and a declaration by them that the candidate is qualified to be elected as a Member of County Assembly under article 193 of *the constitution* and is willing to serve as a speaker of the County Assembly.
49. Article 193 on the other hand enumerates the qualifications for election as a member of county assembly.
50. This court has noted that on 19.09.2022, the respondent received two letters from the two members of assembly, Hons. Mahat Mohamed and Aden Adow Abdullahi withdrawing their support in as much as they had previously endorsed the suitability of the petitioner's candidature.
51. It therefore follows that in as much as the petitioner was possessed of the qualifications to be elected as a member of county assembly, her candidature lacked the support of two county assembly members as stipulated under Standing Orders No. 5(3) of the County Government of Wajir on nomination of candidates. In my view therefore, the line was drawn in this case as the two members who had previously supported the suitability of the petitioner for the position of the speaker for whatever reason withdrew their said support. It therefore follows that she lacked the necessary requirements for the position she was seeking.
52. I do not subscribe to the petitioner's submission that there was no wrong committed in being proposed by members who had nominated another applicant. Standing order number 5(3) is clear on its face. There is a reason why the legislature put that requirement hence this court cannot enter the arena of



legislation where there is no ambiguity in the implementation of the law. The requirement was lawful hence no discrimination.

53. It is my belief that endorsement by the two members was of their own volition and therefore could not be compelled to support the petitioner against their own wishes.
54. In my view, the petitioner failed to discharge the burden of proof to the required standard. The legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd v Smith & Associates Far East Ltd* [2007] SGCA: -
- “The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”
55. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. In the circumstances of this case, the issue of gender discrimination does not arise. It was all about nomination ground rules which were not gender specific. There were no set rules meant for males or females.
56. The petitioner could not expect lenient treatment simply because she was a woman. To hide behind gender discrimination is to run away from the truth. Women should be ready to compete with men on level ground rules and not to expect softer treatment on account of gender. The petitioner simply did not meet the criteria of nomination. The only members of County Assembly who nominated her withdrew thus leaving her exposed.
57. Had the disqualification solely been based on grounds that the nominating MCAS had nominated other candidates, the court could have gone further to interrogate whether those other candidates nominated by the same nominating MCAS had been cleared or disqualified. In this particular case, the petitioner was not duly endorsed by at least two elected MCAS as required by the relevant house standing order. Why her nominating MCAS withdrew their endorsement of her candidature at the eleventh hour is upon her to ask them. The petitioner is to blame for her failure to meet the requisite conditions. Failure to qualify had nothing to do with gender parity.
58. I do not find anything unconstitutional in her disqualification. At most, she wanted to be treated preferentially on account of gender. There is no proof of any single violation of her rights nor threat to her rights. In fact, I do not see any damage suffered as a result of her lawful disqualification. The petitioner is simply seeking sympathy from this court as a form of relief which unfortunately is not available. In the same vein and on the same ground, the interested parties have no standing. Once the petitioner’s interest falls by the wayside, their interest equally fails.
59. In view of the foregoing, I am unable to agree with the petitioner that she deserves the orders prayed for. As a result, I find that the petition herein is unmeritorious hence dismissed with costs to the respondents;

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28<sup>TH</sup> DAY OF DECEMBER 2023**

**J. N. ONYIEGO**

**JUDGE**

