



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

CONSTITUTIONAL PETITION NO. E348 OF 2021

-BETWEEN-

SENATOR PAUL NJOROGE BEN.....PETITIONER

-VERSUS-

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION & 5 OTHERS.....RESPONDENTS

-AND-

H.E. UHURU MUIGAI KENYATTA & 4 OTHERS.....INTERESTED PARTIES

-AND-

AFRICA CENTRE FOR OPEN GOVERNANCE

(AFRICOG)..... INTENDED INTERESTED PARTY

RULING NO. 1

Introduction:

1. The Petition in this matter raises several cardinal constitutional issues.
2. The germane ones relate to the term of the Presidency in the context of a successful presidential election Petition, the mandate of the Independent Electoral and Boundaries Commission, the 1st Respondent herein, to determine the date of a presidential election, the legitimacy of the decisions by the 1st Respondent in declaring the date of a presidential election when its quorum was contested, among others.
3. Despite the nature of the matter in relation to the presidential election, it has, despite efforts by the Court, not been determined since September, 2021. The determination has now been further curtailed by the filing of the Notice of Motion dated 18th October, 2021 (hereinafter referred to as '*the application*') by *Africa Centre for Open Governance* (ARICOG) seeking joinder as an interested party.
4. This ruling is, hence, on the application.

The Application:

5. The application is mounted on the grounds appearing on its body and is supported by an Affidavit sworn on 18th October, 2021 by *John Githongo*, one of the members of the Board of the Intended Interested Party.
6. The application was further supported by written submissions.

7. The application was opposed by the 1st Respondent whereas the Petitioner left it to the Court's discretion. The rest of the parties did not participate in the hearing of the application.

8. The 1st Respondent filed Grounds of opposition dated 9th November, 2021 and written submissions.

Analysis and Determination:

9. I have carefully perused the documents filed in this matter. Given the nature of this matter, this Court will not, at this point, necessarily reproduce *verbatim* the respective parties' dispositions and submissions. However, the Court has carefully perused all the documents so far filed in this matter and will take the contents thereof into account in the course of this discussion.

10. The Court further appreciates the apt submissions made by the parties and the decisions referred to which comprehensively cover the subject of joinder of interested parties.

11. Having said so, I will, nevertheless, begin this discussion with a look at the law on joinder of interested parties.

12. In this ruling, I will reiterate what I recently stated in Nairobi High Court Constitutional Petition No. E371 of 2021 ***Esther Awuor Adero Ang'awa vs. Cabinet Secretary responsible for matters relating to Basic Education & Others*** (unreported) on the subject. 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. In sum, 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. I will now apply the foregoing considerations to the applications at hand.

15. The intended interested party laid the basis for its quest for joinder. It gave its overall objective and the role it has so far played in several litigations on constitutional issues. If admitted, the intended interested party intended to develop arguments and render submissions on the issues before Court.

16. In its further submissions, the intended interested party posited that it had demonstrated identifiable stake in the matter and that it ought to be accorded an opportunity to present its voice in a matter which has generated a lot of public interest.

17. The 1st Respondent was of the contrary position. It contended that the intended interested party failed to demonstrate any stake or legal interest in the matter, that the intended interested party stood not to be prejudiced in anyway whatsoever in not taking part in the proceedings and that the intended interested party failed to tender the submissions it intended to make before Court.

18. This Court appreciates that the issues raised in this Petition are novel and no doubt excite enormous public interest. In the application and submissions, the intended interested party clearly demonstrated that it intended to apply its expertise in constitutional litigation in aiding this Court to resolve the issues before it. The intended interested party also laid the manner of discharging such role, subject to Court's directions.

19. To this Court, from its objectives, nature and history in litigation relating to constitutional matters, the intended interested party demonstrated the stake and legal interest it has in this particular matter. Since the issues pending determination herein are fresh and unique, allowing the intended interested party to aid the Court in developing the new jurisprudence ought to be permissible.

20. The Court further notes that it has not been shown that the intended interested party will expand the scope of the Petition or will any way be an impediment if allowed to take part in the matter.

21. It is, therefore, the finding and holding of this Court that the application is merited.

22. As I come to the end of this decision, I recall a concern on service herein raised by the 1st Respondent and do reiterate that as the Court takes care of the issue of service, parties herein must also act with speed towards determining this Petition.

Disposition:

23. Flowing from the above conclusion, the following final orders do hereby issue: -

(a) The Notice of Motion dated 18th October, 2021 is hereby allowed.

(b) Africa Centre for Open Governance (ARICOG) is hereby enjoined in these proceedings as the 6th Interested Party.

(c) The Petitioner and the Respondents shall within 2 days serve all the documents filed upon the 6th Interested Party.

(d) The Interested Party shall then file and serve its response to the Petition within 7 days of service.

(e) The Petitioner shall also effect physical service of all the pleadings and a copy of the order arising from this ruling on the 2nd to 6th Respondents and on 1st to 5th the Interested Parties within 7 days of this ruling.

(f) In the event the Petitioner is unable to effect service as ordered in (e) above, he shall so notify the 6th Interested Party herein, Africa Centre for Open Governance (ARICOG), and the 6th Interested Party shall, within 7 days of the notification, effect substituted service through two local newspapers with nationwide circulation.

(g) There shall be no order on costs to the application.

(h) This matter shall be fixed for directions on a date to be fixed by the Court.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF JANUARY, 2022.

A. C. MRIMA

JUDGE