



**Mbiti v Mwilu & another; Attorney General & 2 others (Interested Parties) (Constitutional Petition E002 of 2021) [2021] KEHC 8568 (KLR) (12 February 2021) (Directions)**

*Mwongela Isaiah Mbiti v Philomena Mbete Mwilu & another;  
Attorney General & 2 others (Interested Parties) [2021] eKLR*

Neutral citation: [2021] KEHC 8568 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CONSTITUTIONAL PETITION E002 OF 2021**

**PJO OTIENO, J**

**FEBRUARY 12, 2021**

**BETWEEN**

**MWONGELA ISAAH MBITI ..... PETITIONER**

**AND**

**HON LADY JUSTICE PHILOMENA MBETE MWILU ..... 1<sup>ST</sup> RESPONDENT**

**THE JUDICIAL SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**ATTORNEY GENERAL ..... INTERESTED PARTY**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... INTERESTED PARTY**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... INTERESTED PARTY**

**DIRECTIONS**

1. This file was, for the 2<sup>nd</sup> time, placed before me on the 01/2/2021 on the strength of the notice of motion dated 30/01/2021 and filed by the 1<sup>st</sup> respondent under a certificate of urgency. On that day the court gave directions on how to progress the matter forward.
2. Subsequent to those directions, there have been developments which have seen one Okiya Omtata Okiiti file an application seeking to be joined in these proceedings on the basis that his petition pending in Nairobi has been used as a launch pad by the 1<sup>st</sup> respondent to contest the jurisdiction of the court.
3. There was also filed, in Nairobi, Pet. No. E044/2021 which was ordered transferred to Meru and has been serialized as Meru Pet No. 3B of 2021. In the latter petition the petitioner's counsel, Dr. Khaminwa, says that he adopts the position the 1<sup>st</sup> respondent takes on jurisdiction of the court.



4. I hear both Dr.Khaminwa and Mr. Omtata to plead that they be heard in their respective positions on the all-important matter of jurisdiction.
5. Today parties have all attended, save for the 3<sup>rd</sup> interested party, (DCI), and addressed the court on how to proceed. While the 1<sup>st</sup> respondent submits that jurisdiction ought to be dealt with first and before all else, and prior to determination of joinder of Mr. Omtata and participation of Dr. Khaminwa's client, Dr. Khaminwa is firm that I hear the point on jurisdiction today and now as he will be supporting the 1<sup>st</sup> respondents position. Mr. Omtata on his side insists that he cannot be excluded when his petition is the ground to attack jurisdiction.
6. The second respondent counsel, Mr Kanjama, takes the view and agrees with the rest on the extreme urgency of the matter and the weight of constitutional issues involved and purposes that I proceed with the matter in a wholesome and global manner as concerns all the pending applications, after giving those seeking to be heard a chance to be so heard.
7. Mr. Maranya for the petitioner takes the position that the court admits Mr. Omtata as a necessary party and that Mr. Khaminwa matter be dealt with separately.
8. The position by the 1<sup>st</sup> interested party is that even though served in Nairobi, the instructions were received in Meru only the day before yesterday and she pleads for time to file responses. She however denies having been served with Dr. Khaminwa's petition. From 2<sup>nd</sup> interested party, counsel denied having been served with any of the papers filed and sought to be served.
9. The weight and gravity of the matter before the court in Petition No. Meru E002/21 cannot be gainsaid. Its urgency and need to be dealt with expeditiously cannot be ignored. The law remains that jurisdiction is everything and that when contested, in any matter, it ought to be dealt with before hand and as a threshold issue<sup>1</sup>. I have no basis to ran away from that trite position.
10. However, that determination whether or not the court is seized of jurisdiction, needs to be well informed with all interested in addressing the court being accorded the opportunity to be heard provided they satisfy the court to be necessary parties. In all such endeavors, judicial time, as a public resource, must be guarded for efficient application.
11. Based on such consideration, I do consider Mr. Omtata a necessary party that needs to participate in these proceedings. I also consider the petition and motion by Dr. Khaminwa's client, to assert that the orders given in this matter contravene the provisions of the Constitution, among other prayers, and therefore it is a petition that should best be treated as an opposition to the petition by Mr. Maranya's client. For that reason, I consider that it shall not be an endeavour towards the efficient application and employment of judicial time to deal with the two matters separately. In the words of Dr. Khaminwa, he takes the position taken by the 1<sup>st</sup> respondent. I grant to Kitua cha Sheria, a premier human right public benefit organization and pacesetter in public interest litigation, its desire to share the legal stand taken by the 1<sup>st</sup> respondent, and afford to it the right to canvass that position at the same time the 1<sup>st</sup> respondent will resist the petition by Mr Maranya's client.

<sup>1</sup> In *Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B"* [2008] 1 EA 367 the Court of Appeal expressed itself as follows:

" The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it Jurisdiction is everything and without it, a court has no power to make one more step.



12. In short I consider both Mr. Omtata and Kitua cha Sheria necessary parties to these proceedings all through, starting with the arguments till determination of the question of jurisdiction.
13. For that reason, and to give due regard to the right to fair hearing, I direct that Dr. Khaminwa serves all the parties with his petition within 24 hours from midday today. Mr. Omtata shall also serve the interested parties with his application within the same period.
14. I heard Mr Maina to say that he has not been served with any papers filed so far and no protest was made by any of the parties. I direct that every papers filed herein, so far, be served upon the 2<sup>nd</sup> interested party, in its Meru Office, so that it never becomes an issue that Mr. Maina needs more time.
15. With the need to serve various parties with various papers, comes the need that time be given to all for preparation for arguments on the question of jurisdiction.
16. That leaves the issue of the many applications in the file to be addressed. I do consider the motion by Kituo Cha Sheria to have been addressed by my directions that it is a necessary party to those proceedings.
17. For sake of case management and to fast truck the matter, I do direct that the motion by the petitioner and that by 1<sup>st</sup> respondent as well as the preliminary objection, be heard together and one decision delivered in which decision the determination of the jurisdictional issues shall take precedence and only if it fails shall the other prayers be delved into.
18. In the end and to effectuated these directions, this matter is now stood over to 4/3/2021 for hearing.
19. On invitation by Mr. Havi that I walk into court and hear the parties in person, not virtually, I report that we sat as a Court Users Committee, Meru Law Courts, and resolved that in our circumstances, just now, it is neither prudent nor desirable to conduct open court sessions, in person. As a member of that committee I desire to keep the resolution. In any event, COVID19, with all its negative effect has taught us that with joint efforts we can digitize and reduce costs of litigation with the aid of technology. In my view the little gains accrued so far ought not be lost but need to be maintained, teething problems being expected and confronted on the way.
20. This file and Meru Pet E3A/2021 shall be kept and heard together.

**DATED, DELIVERED AND SIGNED AT MERU THIS 12<sup>TH</sup>DAY OF FEBRUARY, 2021.**

**PATRICK J.O OTIENO**

**JUDGE**

