



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**

**CONSTITUTIONAL PETITION NO. E005 OF 2021**

**AS CONSOLIDATED WITH PETITION NO. E433 OF 2020, E007 OF 2021, E009 OF 2021,  
E011 OF 2021, E012 OF 2021, E013 OF 2021, E015 OF 2021, 019 OF 2021 AND E021 OF 2021  
IN THE MATTER CONCERNING ALLEGED VIOLATIONS OF ARTICLES 1(1), 1(3), 2(1),  
2(3), 2(4), 3(1), 3(2), 6(2), 10, 38(2), 38(3)(B), 73, 74,81,94,165, 174,175, 179, 181, 182(4), 182(5), 182(6),  
183, 185(1), 196, 258, 259(1), 259(3), AND 259(11) OF THE CONSTITUTION OF KENYA 2010:**

**AND IN THE MATTER OF COUNTY GOVERNMENTS(AMENDMENT) ACT, 2020**

**AND IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012**

**AND IN THE MATTER OF PUBLIC APPOINTMENNTS (COUNTY ASSEMBLIES**

**APPROVAL)ACT, 2017 AND IN THE MATTER OF THE ASSUMPTION**

**OF THE OFFICE OF GOVERNOR ACT, 2019**

**BETWEEN**

**OKIYA OMTATAH OKOITI..... 1ST PETITIONER**  
**HABIB OMAR KONGO.....2ND PETITIONER**  
**PATRICK MWANGI KIIRU.....3RD PETITIONER**  
**JOSPHAT KARIUKI.....4TH PETITIONER**  
**ANGELA MWIKALI.....5TH PETITIONER**  
**MUIRURU WAWERU.....6TH PETITIONER**  
**THIRDWAY ALLIANCE KENYA.....7TH PETITIONER**  
**LAW SOCIETY OF KENYA.....8TH PETITIONER**  
**KENYA HUMAN RIGHTS COMMISSION.....9TH PETITIONER**  
**GEOFFREY MAKWORO..... 10TH PETITIONER**

**AND**

ANNE KANANU MWENDA.....1ST RESPONDENT/CROSS-PETITIONER  
NAIROBI CITY COUNTY ASSEMBLY.....2ND RESPONDENT  
THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY.....3RD RESPONDENT  
THE CLERK, NAIROBI CITY COUNTY ASSEMBLY.....4TH RESPONDENT  
THE ATTORNEY GENERAL.....5TH RESPONDENT  
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....6TH RESPONDENT  
THE GOVERNMENT PRINTER.....7TH RESPONDENT

AND

HON. MIKE MBUVI SONKO KIOKO GIDION.....1ST INTERESTED PARTY  
THE SENATE.....2ND INTERESTED PARTY  
KATIBA INSTITUTE.....3RD INTERESTED PARTY  
POLYCARP IGATHE.....4TH INTERESTED PARTY  
JUBILEE PARTY.....5TH INTERESTED PARTY  
NAIROBI CITY COUNTY EXECUTIVE.....6<sup>TH</sup> INTERESTED PARTY  
KRISTINA PRATT KENYATTA .....7<sup>TH</sup> INTERESTED PARTY  
JANE WERU.....8<sup>TH</sup> INTERESTED PARTY  
UNITED DEMOCRATIC MOVEMENT PARTY..... 9<sup>TH</sup> INTERESTED PARTY  
ISAAC CHEGE NJUGUNA.....10<sup>TH</sup> INTERESTED PARTY

**BENCH RULING NO. 1**

1. Kristina Pratt Kenyatta, the 1<sup>st</sup> Applicant, and Jane Weru, the 2<sup>nd</sup> Applicant who are the respective interested parties in the consolidated petitions have brought their notice of motion dated 11<sup>th</sup> January, 2021 under Articles 33(3), 35(2) and 79 of the Constitution; Rules 3(8), 5(d) (i), 19, 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental (Freedoms) Practice and Procedure Rules, 2013; and Order 1 Rule 10(2) and Order 2 Rule 15 of the Civil Procedure Rules, 2010. Through the application they seek orders as follows:

**1. That this Honourable Court be pleased to certify this Application as urgent, service be dispensed with and the same be heard ex parte in the first instance.**

**2. THAT pending the inter partes hearing of this Application, this Honourable Court be pleased to issue an interim conservatory order restraining and/or prohibiting the Petitioner/Respondent or his servants, agents, associates, employees or any other person whomsoever from addressing, commenting on, restating or publishing in any public fora or in any mainstream media platform or social media platform whatsoever/howsoever the alleged 1<sup>st</sup> Interested Party's telephone conversation with the Petitioner/Respondent as pleaded by the Petitioner/Respondent in the Petition herein.**

**3. THAT pending the hearing and determination of this Application, this Honourable Court be pleased to issue an interim conservatory order restraining and/or prohibiting the Petitioner/Respondent or his servants, agents, associates, employees or any other person whomsoever from addressing, commenting on, restating or publishing in any public forum or in any mainstream media platform or social media platform whatsoever/howsoever the alleged 1<sup>st</sup> Interested Party's telephone conversation with the Petitioner/Respondent as pleaded by the Petitioner/Respondent in the Petition herein.**

**4. THAT this Honourable court be pleased to strike out the 1<sup>st</sup> out the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties' names from the Petition and/or suit herein forthwith.**

**5. THAT this Honourable Court be pleased to strike out and/or order the amendment of the Petitioner's pleadings by striking out and expunging from the record herein paragraphs A(iii)(O) & (P), B(20), D(b) (7) of the Petition dated 7<sup>th</sup> January, 2021, paragraphs 14, 15, 36, 37, 38, 44 and 45 of the Supporting Affidavit sworn by Kioko Mike Sonko Mbuvi Gideon on 7<sup>th</sup> January, 2021 and grounds (u), (v) and (w) of the Petitioner's Advocates' Certificate of Urgency dated 7<sup>th</sup>**

January, 2021 as well as any other scandalous, offensive and vexatious content therein which in any way makes reference to or against the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties/Applicants.

**6. THAT this Honourable Court be pleased to strike out and expunge from the record and in all pleadings filed by the Petitioner/Respondent herein or any other material and/or allegation to the extent that it is false, libelous, disparaging of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties herein and/or is without factual evidential support whatsoever and is scandalous, offensive and vexatious and is otherwise and abuse of the process of this Honourable Court.**

**7. THAT the Petitioner/Respondent be condemned to pay costs to the Applicants.**

**8. THAT this Honourable Court grants further or other orders that it deems fit.**

2. The application is supported by the grounds on its face and affidavits sworn by each of the applicants on the date of the application.

3. The applicants' case is that in his petition and supporting documents all dated 7<sup>th</sup> January, 2021 in Nairobi High Court C&HR Division Petition No. 7 of 2021, Hon. Mike Sonko Mbuvi Gidion Kioko v Hon. Benson Mutura; Nairobi City County Assembly; Anne Kananu Mwenda; the Speaker, Nairobi City County Assembly; and the Clerk, Nairobi City County Assembly, the Petitioner, who named the applicants as the respective 1<sup>st</sup> and 2<sup>nd</sup> interested parties in his petition falsely claims that Kristina Pratt Kenyatta contacted Hon. Mike Sonko Mbuvi Gideon Kioko, (the 1<sup>st</sup> Interested Party in the consolidated petitions), on his cellphone immediately prior to his impeachment in December, 2020 and sought the favour of the nomination of Jane Weru as the Deputy Governor of Nairobi City County instead of Anne Kananu Mwenda (the 1<sup>st</sup> Respondent/Cross-Petitioner in the consolidated petitions).

4. It is the applicants, case that Hon. Mike Sonko Mbuvi Gidion Kioko falsely claims that he purportedly revoked the nomination of Anne Kananu Mwenda as the Deputy Governor of Nairobi City County as a consequence of the alleged non-existent telephone conversation with the 1<sup>st</sup> Applicant immediately prior to his impeachment in December, 2020.

5. It is further the applicants' case that Hon. Mike Sonko Mbuvi Gidion Kioko has fraudulently falsified, forged, fabricated and concocted a CD audio recording and transcript of the alleged telephone conversation with the 1<sup>st</sup> Applicant that purportedly transpired immediately prior to his impeachment in December, 2020 and which allegedly sought the nomination of 2<sup>nd</sup> Applicant as the Deputy Governor of Nairobi City County instead of Anne Kananu Mwenda.

6. The applicants' case is that Hon. Mike Sonko Mbuvi Gidion Kioko has joined them in his petition solely on the basis of the false, non-existent and fabricated telephone conversation with the 1<sup>st</sup> Applicant. It is the applicants' averment that Hon. Mike Sonko Mbuvi Gidion Kioko's claim of a telephone conversation with the 1<sup>st</sup> Applicant has been made knowingly and deliberately in a bid to create the false and misleading impression that the purported revocation of Anne Kananu Mwenda's nomination as Deputy Governor was allegedly done with the knowledge, approval and at the request of the President of the Republic of Kenya through the 1<sup>st</sup> Applicant.

7. According to the applicants, the exposure of the 1<sup>st</sup> Applicant's mobile phone number to the general public has resulted in gross violation of her right to privacy and seriously jeopardized her personal security due to the constant voice and video calls, and text messages received from unknown persons.

8. It is the applicants' case that unless the orders sought in the application are granted, Hon. Mike Sonko Mbuvi Gidion Kioko will continue to publicly address, restate and comment on the alleged telephone conversation to the detriment of the applicants. In support of the averment that Hon. Mike Sonko Mbuvi Gidion Kioko is not averse to republishing the purported telephone conversation, the applicants aver that on 9<sup>th</sup> January, 2021 at a funeral service in Makeni County covered by the national mainstream media the Petitioner highlighted the matter herein thereby exacerbating the issue which was further published in various social media platforms.

9. It is the applicants' case that they will be highly prejudiced and victimised by the general public by being joined as interested parties to the petition solely on the basis of the false, non-existent and fabricated telephone conversation.

10. Further, that Hon. Mike Sonko Mbuvi Gidion Kioko's sole aim in joining them as interested parties was to embarrass, ridicule, malign and harass them with the singular aim of advancing his nefarious agenda and mislead this court.

11. The applicants depose that the paragraphs they seek to expunge in the petition, notice of motion, supporting affidavit and certificate of urgency contain false, misleading, scandalous and vexatious averments as the 1<sup>st</sup> Applicant did not contact Hon. Mike Sonko Mbuvi Gidion Kioko and those averments ought to be struck out forthwith as their inclusion amounts to gross abuse of the court process. Further, that the averments against the applicants are not supported by any valid proof or *bonafide* evidentiary material.

12. It is applicants' averment that this court is enjoined by Articles 33(3) and 35(2) of the Constitution to ensure that the rights and reputations of the applicants are protected, and to correct or delete any untrue or misleading information affecting the applicants.

13. The applicants conclude by deposing that the petition does not raise any genuine grievance or cause of action against them and has only been instituted for personal gain and out of ill motive.

14. Hon Mike Sonko Mbuvi Gidion Kioko opposed the application through a replying affidavit sworn on 21<sup>st</sup> January, 2021. In summary he avers that the applicants are necessary and relevant parties for the full and final adjudication by the issues raised in his petition; that the applicants will not suffer any prejudice if they are retained in the matter; that the absence of the applicants from the proceedings will lead to a

multiplicity of suits in respect of the context of his revocation of the recommendation for the appointment of Anne Mwenda Kananu as the Deputy Governor of Nairobi City County; and that he stands to suffer prejudice if the application is allowed as he will be making reference to parties who are not before the court.

15. Hon. Mike Sonko Mbuvi Gidion Kioko relying on the decision of the Supreme Court in **Francis Karioko Muruatetu & another v Republic & 5 others [2016] eKLR** avers that as a petitioner he is conferred significant standing and that the case of the applicants who are interested parties is subjugated to his petition.

16. According to Hon. Mike Sonko Mbuvi Gidion Kioko, some of the averments in the affidavit of the 1<sup>st</sup> Applicant are sworn in the third person and they should be struck out as they do not meet the legal parameters of an affidavit.

17. Turning to the substance of the affidavits sworn by the applicants in support of the application, Hon. Mike Sonko Mbuvi Gidion Kioko refutes the allegation that he fabricated the evidence contained in the CD which he has produced in his case. He stands by the contents of his pleadings and affidavits and maintain that she had a telephone conversation with the 1<sup>st</sup> Applicant in which she proposed that the 2<sup>nd</sup> Applicant be nominated as a Deputy Governor of Nairobi City County. No other party responded to this application.

18. Through their submissions dated 1<sup>st</sup> February, 2021, the applicants started by pointing out the definition and procedure for joinder of an interested party in constitutional petitions as provided in rules 2 and 7 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, (commonly known as the Mutunga Rules)

19. It is the applicants' case that requirement of Rule 7 that a person may be joined as an interested party with the leave of the court or by the court on its own motion was not complied with by the Hon. Mike Sonko Mbuvi Gidion Kioko who joined the applicants as interested parties on the onset of filing the petition. Hon. Mike Sonko Mbuvi Gidion Kioko is faulted for not seeking leave of the court prior to the joinder of the applicants as interested parties. Further, that this court did not on its own motion, join the applicants as interested parties. It is therefore the applicants' submission that they have been dragged into and unfairly constrained to participate in these proceedings in glaring contravention of the law.

20. It is the submissions of the applicants that in addition to the non-adherence to the law, their joinder is heedless of the well-established test and ingredients for a person to participate in court proceedings as an interested party. They urge that a person can only be enjoined in proceedings if he has an identifiable stake, legal interest or duty in the proceedings. According to them, the Petitioner cannot be heard to speak on their behalf with respect to their perceived interest in the matter. It is their contention that they have unequivocally averred in their respective affidavits that they have no identifiable stake, legal interest or duty in these proceedings and it is only them who can speak as to their interest in the matter.

21. The applicants submit that the specific prerequisites must be met prior to joinder of interested parties and joinder of an interested party cannot be made arbitrarily as Hon. Mike Sonko Mbuvi Gidion Kioko has done in his petition. They urge that the law does not envisage a situation where a person is joined as an interested party without their consent as it would amount to an absurdity to compel a person to participate in proceedings as an interested party where the person has no such interest in the matter.

22. The applicants support their arguments with the decisions in **Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2014] eKLR; Francis Karioko Muruatetu & another v Republic & 5 others [2016] eKLR; and Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR.**

23. It is the applicants' position that an interested party who is already joined in the proceedings but lacks any interest or identifiable stake in the proceeding or even whose participation in the proceedings will not aid the court in the determination of the suit ought to be struck out of the proceedings at the earliest possible moment to avoid wasting judicial time and resources as well as prevent the said party from incurring huge legal costs in such unwarranted participation.

24. It is the applicants' case that not only is the alleged call recording fabricated but it does not raise any issue or link them to the substratum of the petition which is the purported revocation of the nomination of Anne Kananu Mwenda as the Deputy Governor of Nairobi City County.

25. The applicants submit that Rule 5 of the Mutunga Rules provides for addition, joinder, substitution and striking out of parties and, in particular, states that a petition shall not be defeated by reason of misjoinder or non-joinder of parties and that the court may order the striking out of any party improperly joined.

26. The applicants urged that no prejudice will be suffered by Hon. Mike Sonko Mbuvi Gidion Kioko if they are removed from the proceedings.

27. The applicants stated that they are the ones to suffer prejudice if they continue being party to these proceedings as they will continue incurring unanticipated legal fees and their reputations shall be unfairly tarnished on account of false and scandalous allegations. The court is therefore implored to strike out the applicants from Hon. Mike Sonko Mbuvi Gidion Kioko's petition with costs.

28. Turning to the prayers to expunge the paragraphs touching on them from Hon. Mike Sonko Mbuvi Gidion Kioko's pleadings, the applicants point to Article 33(3) of the Constitution as stating that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. Article 35(2) is identified as providing the right of every person to correction or deletion of untrue or misleading information that affects that person.

29. It is urged that the averments of Hon. Mike Sonko Mbuvi Gidion Kioko that he had a telephone conversation with the 1<sup>st</sup> Applicant is

false, baseless, scandalous and not supported by any valid proof or bonafide evidentiary material. It is asserted that Hon. Mike Sonko Mbuvi Gidion Kioko has irregularly, unlawfully and fraudulently caused and/or obtained and doctored the purported telephone audio recordings falsely claiming to be a genuine telephone conversation between him and the 1<sup>st</sup> Applicant.

30. The applicants urged that pleadings filed in court are public records and can be accessed by anyone, including the media, at any time. They submitted that publication of such information will cause irreparable harm to their reputations. The applicant asserted that allowing the impugned paragraphs to remain as part of the court record will undoubtedly result in their being perceived with odium and chastised by members of the public. Further, that it is not justifiable and fair to injure their reputations without just cause. Their claim that reputation is an integral and important part of the dignity of an individual is supported by reference to the decision of the Court of Appeal in **Standard Limited & 2 others v Christopher Ndarathi Murungaru [2016] eKLR**.

31. It is additionally the applicants' case that the impugned paragraphs do not raise any genuine grievance or concern against them and they can only be sustained on grounds of ill motive and vendetta against them. According to the applicants, if the impugned paragraphs are not struck out and expunged from the record at this stage, the same shall result in prejudice, embarrassment and delay of the full trial which is tantamount to abuse of the court process as the offending averments are frivolous, vexatious and scandalous. The decisions of **Royal Media Services Limited & 2 others v Attorney General & 8 others [2014] eKLR**; **Gitau & 2 others v Ukay Estate Limited [2005] eKLR**; and **Musikari Nazi Kombo v Moses Masika Wetangula & 2 others [2013] eKLR** are cited as defining scandalous pleadings and confirming that they can be struck out even in constitutional petitions.

32. It is also submitted that Rule 6 of Order 19 of the Civil Procedure Rules, 2010 (CPR) does indeed allow the striking out from any affidavit any matter which is scandalous, irrelevant or oppressive. Further, that Section 11 of the Oaths and Statutory Declarations Act, Cap. 15 makes it an offence for any person to knowingly and willfully make any statement which is false in a statutory declaration. The court is consequently urged to allow the application with costs.

33. The application before this court raises the following issues:

- a. Whether the joinder of the applicants as interested parties was unlawful;
- b. Whether the paragraphs impugned by the applicants in the pleadings of Hon. Mike Sonko Mbuvi Gidion Kioko should be expunged, and
- c. Whether the applicants should be struck out the proceedings.

34. The identified issues are intertwined and they will be addressed contemporaneously. We did not see any submission by Hon. Mike Sonko Mbuvi Gidion Kioko.

35. The applicants fault their joinder as interested parties on two grounds. Firstly, that their joinder at the institution of the suit violated Rule 7 of the Mutunga Rules which contemplates joinder of an interested party upon application or on the court's own motion. Secondly, that the joinder of the applicants to the proceedings as interested parties was without basis as they have no identifiable stake or legal interest or duty in the proceedings before this court.

36. On their claim that their joinder violated the law, the applicants relied on Rule 7 of the Mutunga Rules which provides that:

**7(1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.**

**(2) A court may on its own motion join any interested party to the proceedings before it.**

37. The applicants submit that the decision of Hon. Mike Sonko Mbuvi Gidion Kioko to join them as interested parties at the time of filing his petition violated the cited rule. According to the applicants, they could only be joined to the proceedings upon their application or on the court's own motion.

38. Rule 7 should be read together with the other provisions of the Mutunga Rules. The applicants are indeed correct that a constitutional dispute is between the petitioner being the person who alleges that a right or fundamental freedom has been denied, violated, infringed or threatened and the respondent being the person from whom redress is sought. The same rules, nevertheless, recognize that there could be 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."** Such a person is defined in Rule 2 as an "interested party."

39. The applicants' submission that an interested party can only enter a case through application or by admission by the court on its own motions finds no merit when one considers that at the time of filing the petition a petitioner may have identified a person or entity with an identifiable stake or legal interest or duty in the proceedings but from whom no redress is sought. The naming of such a person as an interested party at the institution of the claim cannot be faulted and neither can it be said to violate Rule 7 which in our view gives an interested party who has not been enjoined from the outset an opportunity to participate in the proceedings.

40. Indeed, no prejudice will be suffered by any party improperly joined since Rule 5(d)(i) provides an opportunity to such a party to apply to be struck out of the proceedings.

41. The applicants have admitted that they have been adversely mentioned in the petition and among the orders they seek is an expungement of the portions of the pleadings that refer to them. How could they have sought that order if they had not been named as interested parties in the first place? Indeed, the prayer for expungement of some portions of the pleadings by itself confirm that they have an interest in the

proceedings.

42. We therefore find no merit in the applicants' assertion that Hon. Mike Sonko Mbuvi Gidion Kioko violated Rule 7 of the Mutunga Rules by including them as interested parties at the time of the institution of the petition.

43. The second ground upon which the applicants ask to be struck out of the proceedings is that they have no interest in the outcome of the petition. It is the applicants' case that the Hon. Mike Sonko Mbuvi Gidion Kioko has averred about a non-existent telephone conversation with the 1<sup>st</sup> Applicant with a view to dragging them into this case for the purpose of embarrassing them and damaging their reputations.

44. The Supreme Court in **Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2014] eKLR** stated that **"an interested party is one who has a stake in the proceedings..... will be affected by the decision of the court when it is made, either way"** and **"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..."**

45. In **Francis Kariuki Muruatetu & another v Republic & 5 others [2015] eKLR** the Supreme Court opined that the **"interest must be clearly identifiable and must be proximate enough to stand apart from anything that is merely peripheral"** and the **"prejudice to be suffered by the intended interested party in case of non-joinder"** must be demonstrated.

46. The High court in **Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR** held that it is **"a fundamental consideration that before a person can be joined as a party, it must be established that the party has an interest in the case"** and it must additionally be **"clearly demonstrated that the orders sought in the suit would directly and legally affect the party seeking to be enjoined."**

47. The applicants claim that they have no interest in the outcome of this petition. They, however, seek to have some portions of Hon. Mike Sonko Mbuvi Gidion Kioko's pleadings deleted. They are therefore conflicted because they claim not to have an interest in the matter and at the same time seek to have some parts of pleadings in a case they say they have no interest in expunged. They also say the pleadings injure their reputation. In our view the applicants' actions provide evidence to the assertion that they have an interest in the outcome of the matter. It will affect them whichever way it will go. They are therefore properly before this court as interested parties.

48. We now turn to the applicants' prayers for the expungement of some sections of Hon. Mike Sonko Mbuvi Gidion Kioko's pleadings. There is no provision in the Mutunga Rules similar to Order 19 Rule 6 of the CPR which states:

**"The court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive."**

The Court of Appeal (Maraga, J.A. as he then was) in **Royal Media Services Limited & 2 others v Attorney General & 8 others [2014] eKLR** held that:

**"Counsel for the appellants contended that the learned Judge erred in striking out some paragraphs of the petition and the supporting affidavits without any formal application being made. I agree with counsel for the respondents that the learned Judge was perfectly entitled to strike out scandalous pleadings. The paragraphs struck out related to the allegation in Mr. Gitahi's affidavit that the 6th respondent obtained its BSD license through bribery and corruption. He claimed that that a representative of the 6th respondent confessed in a meeting in June 2013 that it ceded 5% of its shares to Government officials to induce them to grant it the BSD license. Having not said whether he was himself in that meeting and if not having not disclosed the source of that information, that was clearly a scandalous pleading (see *Zolla v. Ralli Brothers*<sup>29</sup>), which the learned Judge was entitled to strike out under Order 19 Rule 6 of the Civil Procedure Rule seven without a formal application".**

49. In **Musikari Nazi Kombo v Moses Masika Wetangula & 3 others [2013] eKLR**, Gikonyo held that:

**"The allegations or averments in an affidavit should also not be irrelevant; having no probative value; not tending to prove or disapprove a matter in issue. See the Black's Law Dictionary, 17<sup>th</sup> Edition. One more requirement; the averment should be supported by evidence within the affidavit itself or by some other person in the proceeding..."**

50. The applicants depose to the falsity of the averment of Hon. Mike Sonko Mbuvi Gidion Kioko that he held a conversation with the 1<sup>st</sup> Applicant in which it was discussed that the nomination of Anne Kananu Mwenda as the Deputy Governor of Nairobi City County be withdrawn and replaced with the 2<sup>nd</sup> Applicant.

51. In **Joseph Gitau & 2 others v Ukay Estate Limited [2005] eKLR** Ojwang, J. (as he then was) cites Sir Jack Jacob in *Pleadings: Principles and Practice* (London: Sweet & Maxwell, 1990), pages 221 as stating of a scandalous suit thus:

**"Allegations in a pleading are scandalous if they state matters which are indecent or offensive or are made for the mere purpose of abusing or prejudicing the opposite party. Moreover, any 'unnecessary' or 'immaterial' allegations will be struck out as being scandalous if they contain any imputation on the opposite party or make any charge of misconduct or bad faith against him or anyone else."**

52. Among the issues to be determined in the consolidated petitions before this court is whether Hon. Mike Sonko Mbuvi Gidion Kioko actually withdrew the nomination of Anne Kananu Mwenda as the Deputy Governor of the Nairobi City County Assembly. His case is that he withdrew the nomination of Anne Kananu Mwenda following his conversation with the 1<sup>st</sup> Applicant. His averment is therefore

necessary for the determination of the matter in dispute.

53. Whether the averment is false or not will be determined when the court proceeds to weigh the evidence adduced by all the parties as a whole. The impugned averments have come out of Hon. Mike Sonko Mbuvi Gidion Kioko's own mouth and he says he heard them within his own ears.

54. In **Royal Media Services Limited & 2 others v Attorney General & 8 others [2014] eKLR Nambuye, JA** observed that:

**“From the above, it is clear that an affidavit so relied upon by a party in support of his pleadings can only pass the test if the deponent has personal knowledge of the facts deponed to. Excuse from this requirement arises only where leave of the Court has been sought for such a deponent to rely on matters of belief and information whose sources have to be disclosed. It is only in interlocutory matters that an affidavit so deponed may be allowed to pass the test if it is based on belief and information whose sources have been disclosed. Rule 7 excuses an affidavit to pass if the defect is limited to misdescription or technicalities. It is now trite that misdescription is limited to parties' names or litigating positions, while technicalities are limited to things like paragraphing or failure to insert a date. It has nothing to do with the substance of the message intended to be conveyed by the particular affidavit. Since the complaint herein was on the content the affected affidavits failed the test”.**

55. The averments of Hon. Mike Sonko Mbuvi Gidion Kioko may indeed be untrue as alleged by the applicants. However, those averments must be tested against the averments of the applicants and other parties at the trial before the court can reach a conclusion as to whether the statements are true or not. The applicants must hold their horses instead of attempting to mutilate another party's case.

56. In view of what we have stated in this ruling, we find no merit in the applicants notice of motion dated 11<sup>th</sup> January, 2021 and we dismiss it. The applicants will elect whether to participate in the proceedings or not.

57. Costs shall abide the outcome of the consolidated petitions.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 18<sup>TH</sup> DAY OF MARCH 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON 17<sup>TH</sup> APRIL 2020.**

**S. CHITEMBWE**

**JUDGE**

**W. KORIR**

**JUDGE**

**W.A. OKWANY**

**JUDGE**