



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

ELECTION PETITION NO. 1 OF 2021

DAVID AOKO WEREPETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE CONSTITUENCY RETURNING OFFICER,

JOHN KIPLANGAT KIRUL.....2ND RESPONDENT

NABULINDO PETER OSCAR.....3RD RESPONDENT

RULING

1. Cleophas Wakhungu Malalah has asked the court, through a Motion, dated 28th May 2021, to be joined to these proceedings as an interested party, and that upon his joinder as such, the petitioner be compelled to serve him with the election petition. He also seeks leave to file any pleadings to respond to the said petition. I shall, hereafter, refer to Cleophas Wakhungu Malalah as the applicant.

2. The grounds upon which he seeks joinder are set out on the face of the Motion, as well as in the affidavit that he swore on 28th May 2021, in support. He avers to have been adversely mentioned 45 times in the petition, and he seeks opportunity to defend himself against the serious allegations made against him. He fears that his interest would not be articulated well unless he appears himself in the proceedings, and champions his cause. He avers that due to his mention in the petition, the court may make orders that affect him adversely. He argues that the petitioner invited him to the matter by mentioning him in his petition. He states that he has a duty to help the court to effectually determine the petition. He also avers that he has a duty to uphold the Constitution of Kenya, and advance the rule of law and administration of justice, and assist the court. He has detailed, in the affidavit, the said mentions at paragraphs 7, 9, 28 and 34 of the petition. The other mentions are in the affidavits sworn by the persons that the petitioner proposes to call as his witnesses. These are Hilda Akotsi Angalwa, Galcanos Olinwa Ekesa, Mercy Akoth Muchere, Libinus Juma Oduori, Anaclat Were Nanjira, Julius Kisawayi Mahasi, Joseph Makokha Nyangi, Daniel Ombimo Malala, Nabwera Daraja Nabii, Edith Akinyi Mildred, Mophat Mandela Shikhuyu, Boniface Oduor Odunga, William Opemi, Kelvin Ekesa Olimwa and Patrick Augustine Oduya.

3. When the petition was mentioned on 31st May 2021, directions were given that the parties file and exchange any filings relating to the Motion, dated 28th May 2021. From the record before me, only the petitioner has filed a response to the Motion, taking the form of: an affidavit sworn on 4th June 2021 by the petitioner, David Aoko Were; undated written submissions by the petitioner; and a list and bundle of the authorities by the petitioner. The applicant has also filed written submissions in elaboration of his Motion.

4. In his affidavit, the petitioner avers that the Motion is founded on the wrong provisions of the law, being the Civil Procedure Act, the Civil Procedure Rules and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, also known as the Mutunga Rules, asserting that election petitions are governed by the Elections (Parliamentary and County Elections) Petition Rules 2017. He further avers that the Motion ought to have been filed sooner, in accordance with the Election Petition Rules. He asserts that there was a delay of 2 months in the filing of the Motion, which he says is not explained. He avers that if the applicant is unhappy with his name being mentioned in the petition, then he should seek redress elsewhere.

5. In his written submissions, the applicant states that there are no provisions in the Elections Act, No. 24 of 2011, and the Elections (Parliamentary and County Elections) Petition Rules 2017, on joinder of interested parties in elections petitions, and, therefore, the court has to be guided by the pronouncements of the Court of Appeal and the Supreme Court on the subject. He also submits that the court has to be guided by fair play, natural justice, the right not to be condemned unheard and its wide discretionary powers. On *locus standi*, he cites Rule 2(d) of the Elections (Parliamentary and County Elections) Petition Rules 2017, which defines a respondent, in relation to a petition, as any other person, apart from a candidate or election official, whose conduct is complained of in relation to an election petition.

6. On the principles of joinder of interested parties, he cites *Francis Karioko Muruatetu & another vs. Republic & 5 others* [2016] eKLR (Rawal DCJ/VP, Ibrahim, Ojwang, Wanjala and Njoki SCJJ), where the court identified the elements applicable where a party seeks to be joined in proceedings as an interested party. Firstly, the court must be moved by a formal application. Secondly, joinder of parties is not made as a matter of right, but it is at the discretion of the court, that even where a party meets the relevant criteria for it, the court may still decline to order joinder. Thirdly, sufficient grounds must be laid before the court. The sufficient grounds that ought to be laid out before the court are identified as: the personal interest or stake that the applicant has in the matter, which is clearly identifiable and proximate enough to stand apart from anything that is merely peripheral; the prejudice to be suffered by the applicant in the event of non-joinder, which must be clearly outlined and should not be something remote; and submissions intended to be made before the court, at the main hearing, and to demonstrate the relevance of the submissions, and that the said submissions are not a replication of what the other parties will be making before the court.

7. He submits that the petition herein was unique in that it sought nullification of the election of the 3rd respondent on the basis that it was not carried out in accordance of Article 81(e) of the Constitution, based on actions that took place on the ground on the day of the by-election, some of which allegedly involved him. He argues that if the court nullifies the election on those grounds, on findings that he was so ingrained in the alleged incidents, he was likely to stand blamed for the cancellation of the election, and exposed to citation for exclusion from future elections, which would place his political career into jeopardy, given that he sits in Parliament as a member of the Senate. He cites Article 99 of the Constitution, on disqualifications for a Member of Parliament, which include being found to have misused or abused a State office or public office or in any way contravened Chapter Six of the Constitution. He submits that his interest in the petition is clearly identifiable and proximate enough, to stand apart from anything that is merely peripheral, as the outcome of the petition could have a huge impact on the future of his political career.

8. He submits next on Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. He argues that the said rule 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 not be involved directly in the litigation. He has cited the decisions in *Raila Amolo Odinga & another vs. Independent Electoral and Boundaries Commission & 3 others & Ekuru Aukot* [2017] eKLR (Maraga CJ/P, Mwilu DCJ/VP, Ibrahim, Ojwang, Wanjala and Ndungu SCJJ) and *Raila Amolo Odinga & another vs. Independent Electoral and Boundaries Commission & 2 others & Michael Wainaina Mwaura (as Amicus Curiae)* [2017] eKLR (Maraga CJ/P, Mwilu DCJ/VP, Ibrahim, Ojwang, Wanjala and Ndungu SCJJ). In both decisions, two of the other presidential candidates, in the presidential election held in 2017, who were not party to both petitions, sought to be joined to the proceedings as interested party and *amicus curiae*, respectively, claiming that they had identifiable interests in the matter as they had been presidential candidates in the election the subject of the dispute. The court ruled, in both cases, that having been presidential candidates in the election the subject of the dispute, the two had definitive or identifiable stakes in the outcome of the case, and they were admitted as interested party and *amicus curiae*, respectively. He submits that the threshold for joinder is not that high, given that the two, in the cases cited, were joined merely because they had run for office, and their names had been mentioned in that context in the petition, the outcome of the petition was not going to affect them in any significant way.

9. On whether he would suffer prejudice, should he not be joined, he submits that he would stand condemned unheard, as the accusations directed at him would go unanswered. He submits that a damning judgment, around those accusations, could be fatal to his political career, and he may be exposed to drawn out litigation in an effort to clear his name.

10. On the submissions that he intends to make at the main hearing of the petition, the applicant argues that he would be in a position to shed light on the allegations made in the petition, and assist the court answer some of the questions in connection with the events of that day, and thereby help the court reach an informed judgment. He submits that his submissions would not be a replica of what the other parties would be submitting on, because his interest in the matter was separate and unique, but still not changing the pleadings in any way. He further submits that the respondents had reacted, in their responses to the petition, in a manner that did not seek to exonerate him. He cites *Trusted Society of Human Rights Alliance vs. Mumo Matemu & 5 Others* [2014] eKLR (Ibrahim and Wanjala SCJJ), where the court stated that an interested party is one who has a stake in the proceedings, though they are not party to the cause *ab initio*, and that they would be affected by the decision of the court when made whichever way, and feels that their interest would not be well articulated unless they themselves appear in the proceedings and champion their own cause.

11. Finally, he submits that parties are bound by their pleadings, and that in this case, it was the petitioner who dragged his name into the matter, by making allegations that connect him directly to their grievance in the petition. He submits that the petitioner cannot then argue that the applicant is not a necessary party to the petition. He submits that he has a right to a fair hearing and that he should not be condemned unheard. He cites *Moses Wanjala Lukoye vs. Benard Alfred Wekesa Sambu & 3 others* [2013] eKLR (Gikonyo J), where a fund manager of the Webuye Constituency Development Fund had been named as a respondent, in the election petition, and the court declined to have his name struck out, on a preliminary point that he was not a necessary party, on grounds that allegations had been made against that respondent, in the petition, touching on use of funds from his office to influence the election, which bordered on election offences, and it was only proper that he remained in the proceedings. The applicant asserts that he meets the criteria set under Rule 2(d) of the Elections (Parliamentary and County Elections) Petition Rules 2017, to be considered for joinder, as he had been mentioned personally in the alleged malpractices.

12. In his written submissions, the petitioner has identified only one ground for determination, whether the applicant ought to be joined as an interested party to the petition. For a definition of interested party, he cites the *Black's Law Dictionary*, where it is said that such person or entity should have a recognisable stake or standing in the matter. He submits that the applicant has no such recognisable stake, and asserts that he named the rightful respondents in his petition. He cites the decisions in *Raila Amolo Odinga & another vs. Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR (Maraga CJ/P, Mwilu DCJ/VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ) and *Francis Karioko Muruatetu & another vs. Republic & 5 others* [2015] eKLR (Rawal DCJ/VP, Ibrahim, Ojwang, Wanjala and Njoki SCJJ), where the court set the criteria for joinder of a person or entity as interested party. It is stated that joinder of an interested party is not a matter of right, for the same is made at the discretion of the court, based on sufficient grounds and facts to be laid out before the court. It is stated that the grounds must be founded on several elements. One, the personal interest or stake of the party, which must be clearly spelt out, which must be proximate enough, to stand apart from anything that is merely peripheral. Two, the prejudice to be suffered by the proposed interested party must be demonstrated, clearly set out, and must not be remote. Three, the party must state its case or the submissions it intends to make before the court, and demonstrate the relevance of the said submissions. Finally, the said submissions ought not be mere replications of those that the other parties would be making.

13. The second aspect, of the case by the petitioner, is that election petitions are *sui generis*, and are governed by a specialised legal regime, which excludes the application of other laws, such as the Civil Procedure Act, Cap 21, Laws of Kenya, the Civil Procedure Rules and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and that election petitions are exclusively governed by the Elections (Parliamentary and County Elections) Petition Rules 2017. He has cited *Japhet Muroko & another vs. Independent Electoral and Boundaries Commission (IEBC) & 3 others* [2017] eKLR (Mboghli-Msagha J), where the court, citing *Samuel Kamau Macharia vs. Electoral Commission of Kenya & 3 others* [1998] eKLR (Mboghli-Msagha J), *Stephen Kimani Gakenia vs. Francis Mwangi Kimani & 2 Others* [1998] eKLR (Mwera J) and *Murathe vs. Macharia* [2008] 2 KLR (EP) 244 (Mboghli-Msagha J), to make the point that the Civil Procedure Act and the Civil Procedure Rules cannot be brought into election petitions to supplement the legislation governing the hearing and disposal of electoral disputes. It was asserted, in that decision, that the legal regime governing election petitions is the Constitution, the Elections Act and the Election Petition Rules, which means that the Civil Procedure Act and the Civil Procedure Rules are excluded.

14. With respect to the citation of Article 159 of the Constitution, as the law under which the Motion is premised, it is submitted that there are constitutional limitations to the hearing of election petitions. *Lemanken Aramat vs. Harun Meitamei Lempaka & 2 others* [2014] eKLR (Rawal DCJ/VP, Tunoi, Ibrahim, Ojwang, Wanjala & Njoki SCJJ), is cited to emphasise on strict adherence to timelines with respect to the hearing of election petitions. *Samuel Kazungu Kambi & another vs. Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR (Korir J) is cited to make the point that the principle stated in Article 159 of the Constitution, and other related principles, such as the oxygen principle, are not designed to overthrow or destroy the rules of procedure, and create a sort of anarchical free-for-all in the administration of justice, so that timelines and other rules set to govern processes are disregarded. A similar point was also made in *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 others* [2013] eKLR (Mutunga CJ/P, Rawal DCJ/-P, Tunoi, Ibrahim, Ojwang, Wanjala & Ndungu SCJJ), where it was said that Article 159 was never meant to oust the obligation on litigants to comply with procedural imperatives as they seek justice from the courts.

15. The final submission is that the applicant has filed a voluminous bundle of affidavits, with his application, opposing the petition, and it is argued that that is an attempt to circumvent the rule on timelines. It is submitted that under Article 87(2) of the Constitution, petitions concerning elections should be filed within 28 days after the declaration of results by the 1st respondent. It is submitted that under Rule 15 of Elections (Parliamentary and County Elections) Petition Rules 2017, there is room from filing of additional evidence. However, that must be done within scope, so that where the additional evidence would have the effect of amending the petition, then the same ought to be made within 28 days under section 76 of the Elections Act, and outside that it should not be allowed. It is submitted that addition of an interested party should not be used to introduce new causes of action. *Francis Karioko Muruateteu & another vs. Republic* [2016] eKLR (Rawal DCJ/VP, Ibrahim, Ojwang, Wanjala and Njoki SCJJ) is cited for the argument that even after the addition of an interested party, the issues to be determined by the court will always remain the issues presented by the principal parties, and an interested party may not frame his own fresh issues, or introduce new issues. It is stated, in that decision, that although one of the principles for admission of an interested party is that such party must demonstrate their stake in the matter before court, that stake cannot take the form of introduction of a new issue altogether.

16. Other than the documents that I have recited above, my exhaustive perusal of the record before me has not disclosed or yielded any other filing or filings by the parties hereto on the matter of the Motion for joinder.

17. The Elections Act does not carry any provisions on addition or joinder of interested parties to election petitions, neither does the Elections (Parliamentary and County Elections) Petition Rules, 2017. The issue then, that I have to grapple with, is whether this court, seized as it is, of an election dispute governed by these laws, can then order joinder in circumstances where the applicable law has not made provision for it.

18. The applicant has grounded his application on Order 1 rule 10(2) of the Civil Procedure Rules, Article 159 of the Constitution of Kenya and Rule 5(d)(ii) the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

19. "Interested party" is a concept in civil procedure. Joinder of an interested party is provided for in Order 1 rule 10(2) of the Civil Procedure Rules, which states as follows:

"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

20. In *Sarkar's Code of Civil Procedure*, 11th edition, Reprint, 2011, Vol. 1, page 887, the provision is explained as follows:

"The section should be interpreted liberally and widely, and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties."

21. The courts have generally interpreted Order 1 rule 10(2) of the Civil Procedure Rules to mean that the party who ought to be joined or added to civil proceedings as an interested party should be one whose presence in the proceedings would be necessary in order to assist the court determine the matter effectually and completely. In *Yusuf Abdi Adan & another vs. Hussein Ahmed Farah & 3 others* [2016] eKLR (Nzioka J), the court defined an interested party as a person or entity which has a direct interest or stake in the case, even though they were not parties in the cause *ab initio*, but would be affected by the decision of the court ultimately, hence the need for them to be added to the suit so as to articulate or champion their interests in the cause. In *Habiba W. Ramadhan & 7 others vs. Mary Njeri Gitiba* [2017] eKLR (Gacheru J), the point made was that the court had discretion to order joinder or addition of any party to the suit, at any stage of the proceedings, so long as the party sought to be added or joined is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions in dispute. In *Kenya Medical Laboratory Technicians and Technologists Board & 6 others vs. Attorney General & 4 others* [2017] eKLR (Mativo J), it was stated that a person could only be legally interested in the proceedings if the outcome of the

proceedings could affect him legally, by way of curtailing his legal rights. It was asserted that the interest alleged must be one that is legal, identifiable or demonstrates a duty.

22. The decisions above turned on determinations around Order 1 Rule 10(2) of the Civil Procedure Rules, in pure civil disputes, governed strictly by the Civil Procedure Act and the Civil Procedure Rules. The dispute herein is not a pure civil matter, brought under or governed exclusively by the Civil Procedure Act and the Civil Procedure Rules, but rather it is governed by the Elections Act and the relevant rules, the Elections (Parliamentary and County Elections) Petition Rules, 2017. Section 3 of the Civil Procedure Act makes a saving for special jurisdictions and powers, by stating that the Civil Procedure Act did not limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed by or under any other law in force. The jurisdiction and powers confirmed by the Elections Act and the Elections (Parliamentary and County Elections) Petition Rules, 2017 is a special one. The two, therefore, govern the processes set out in them, and confer special powers jurisdictions, forms and procedures independent of those set out in the Civil Procedure Act and the Civil Procedure Rules. It is in that respect that the said jurisdiction, powers, forms and procedures are said to be *sui generis*, in terms of creating a separate and special civil jurisdiction and process.

23. The applicant is, no doubt, alive to the fact that the governing law, that is the Elections Act and the Elections (Parliamentary and County Elections) Petition Rules, 2017, is silent on addition or joinder of interested parties, and he has said so in his written submissions. He also appears to be alive to the fact that the processes, powers and jurisdiction under the Elections Act and the Elections (Parliamentary and County Elections) Petition Rules, 2017 are *sui generis*. He has been careful, therefore, not to ground his case on the Elections Act and the Elections (Parliamentary and County Elections) Petition Rules, 2017, but has urged that this court be guided by the decisions of the Court of Appeal and the Supreme Court on the subject. Whereas he has cited a number of Supreme Court decisions, he has not placed any from the Court of Appeal before me.

24. Let me dispose of the matter regarding Order 1 Rule 10(2) of the Civil Procedure Rules first. Are these provisions applicable here, given that the processes envisaged under the Elections Act and the Elections (Parliamentary and County Elections) Petition Rules, 2017 are *sui generis*? In *Japhet Muroko & another vs. Independent Electoral and Boundaries Commission (IEBC) & 3 others* [2017] eKLR (Mboghli-Msagha J), the court took the view that since the law governing election petitions was *sui generis*, there was no room for application of Order 1 Rule 10(2) of the Civil Procedure Rules, ostensibly on the basis that, if the framers of the Elections Act and the Elections (Parliamentary and County Elections) Petition Rules, 2017, had intended to apply Order 1 Rule 10(2) of the Civil Procedure Rules to election petitions, nothing would have been easier than for them to provide so, or to insert a rule in the two pieces of legislation in the terms of Order 1 Rule 10(2) of the Civil Procedure Rules. The application before the court, in *Japhet Muroko & another vs. Independent Electoral and Boundaries Commission (IEBC) & 3 others* [2017] eKLR (Mboghli-Msagha J), for joinder of a person as an interested party, was rejected on that ground, among others.

25. Of course, the argument in *Japhet Muroko & another vs. Independent Electoral and Boundaries Commission (IEBC) & 3 others* [2017] eKLR (Mboghli-Msagha J), and other cases in that league, is persuasive: If legislation is enacted, intended to govern some particular area of the law, and it appears to be exhaustive enough, as to exclude application of the Civil Procedure Act and the Civil Procedure Rules, then anything that is not provided for in the special legislation remains excluded, even if it is covered under the Civil Procedure Act and the Civil Procedure Rules, on the basis that the special legislation is *sui generis* or self-contained. What is not contained in it, is deemed excluded, and there ought to be no recourse to the Civil Procedure Act and the Civil Procedure Rules. That is the position that the petitioner is taking here, that the Elections Act and the Elections (Parliamentary and County Elections) Petition Rules, 2017, are self-contained or *sui generis*, they do not provide for joinder of interested parties, and, therefore, there is no room for such joinder.

26. The applicant has asked me to be guided by the decisions of courts higher than the High Court, and he has cited to me a number of them from the Supreme Court. I am inclined more to decisions that are premised on election disputes, as opposed to those that turn on other areas of law. The decisions in *Francis Karioko Muruateteu & another vs. Republic* [2016] eKLR (Rawal DCJ/VP, Ibrahim, Ojwang, Wanjala and Njoki SCJJ), *Trusted Society of Human Rights Alliance vs. Mumo Matemu & 5 Others* [2014] eKLR (Ibrahim and Wanjala SCJJ) and *Trusted Society of Human Rights Alliance vs. Mumo Matemu & 5 Others* [2015] eKLR (Mohamed Ibrahim and Njoki Ndungu SCJJ), are founded on constitutional petitions, and not elections petitions. The procedure for filing and disposal of constitutional petitions is governed by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, Rule 2 of which defines an interested party. Under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, there is provision for joinder of an interested party, and the criteria for such joinder. For electoral laws governing election petitions, there is no such provision or criteria. The decisions above, on constitutional petitions, are, therefore, not wholly useful here, in terms of assisting me determine whether I can rely on the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules, to allow joinder of the applicant as an interested party. Secondly, I have noted that the applicant has grounded or premised his Motion on the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The petition before me is not a constitutional petition, but an election one. The provisions in the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 cannot possibly, therefore, apply to the election petition, to empower this court to join a person as an interested party to an election petition. *Francis Karioko Muruateteu & another vs. Republic* [2016] eKLR (Rawal DCJ/VP, Ibrahim, Ojwang, Wanjala and Njoki SCJJ), *Trusted Society of Human Rights Alliance vs. Mumo Matemu & 5 Others* [2014] eKLR (Ibrahim and Wanjala SCJJ) and *Trusted Society of Human Rights Alliance vs. Mumo Matemu & 5 Others* [2015] eKLR (Mohamed Ibrahim and Njoki Ndungu SCJJ) are useful, of course, in articulating the principles governing ordering joinder of an interested party, but not in determining whether the High Court has power, when faced with an election petition, to do so.

27. I find the two decisions, in *Raila Amolo Odinga & another vs. Independent Electoral and Boundaries Commission & 3 others & Ekuru Aukot* [2017] eKLR (Maraga CJ/P, Mwilu DCJ/VP, Ibrahim, Ojwang, Wanjala and Ndungu SCJJ) and *Raila Amolo Odinga & another vs. Independent Electoral and Boundaries Commission & 2 others & Michael Wainaina Mwaura (as Amicus Curiae)* [2017] eKLR (Maraga CJ/P, Mwilu DCJ/VP, Ibrahim, Ojwang, Wanjala and Ndungu SCJJ), more relevant, since they turn on an election petition, albeit a presidential one. In the two decisions, the court relied on Rule 25 of the Supreme Court Rules, 2012, and Rule 4(2) of the Supreme Court (Presidential Election Petition) Rules, 2017, to allow joinder of Ekuru Aukot as interested party and Michael Wainaina Mwaura as *amicus curiae*.

28. The Supreme Court (Presidential Election Petition) Rules, 2017 provide the procedure at the Supreme Court for handling of presidential election petitions, while the Supreme Court Rules, 2012, govern procedure at the Supreme Court generally. The Supreme Court (Presidential

Election Petition) Rules, 2017, like the Elections (Parliamentary and County Elections) Petition Rules, 2017, do not carry any provision on joinder of an interested party. On the other hand, the Supreme Court Rules, 2012, like its sister, the Civil Procedure Rules, has provisions, at Rules 25 and 54, for joinder of parties, other than the primary parties, taking the form of an interested party and an *amicus curiae*, respectively. Rule 4(2) of the Supreme Court (Presidential Election Petition) Rules, 2017 imports all the procedures of the Supreme Court Rules, including Rules 25 and 54, so long they are not inconsistent with the Supreme Court (Presidential Election Petition) Rules, 2017. The exact wording of Rule 4(2) is that where there is no applicable provision in the Supreme Court (Presidential Election Petition) Rules, 2017, the procedures set out in the Supreme Court Rules, 2012, should apply to all elections, subject to the inconsistency clause.

29. What the above means is that the position that obtains with respect to presidential election petitions is different from that obtaining in respect of other election petitions. There is a clear provision under the Supreme Court (Presidential Election Petition) Rules, 2017, as read with the Supreme Court Rules, for joinder or admission of parties, other than the primary parties, to the election petition. Rule 4(2) of the Supreme Court (Presidential Election Petition) Rules, 2017 imports the provisions in Rules 25 and 54 of the Supreme Court Rules, which make provision for that. At the High Court that is not so. Like in the Supreme Court Rules, the Civil Procedure Rules allow for joinder of interested parties, but the Elections (Parliamentary and County Elections) Petition Rules, 2017 do not, and it does not have the equivalent of Rule 4(2) of the Supreme Court (Presidential Election Petition) Rules, 2017. There is no provision in the Elections (Parliamentary and County Elections) Petition Rules, 2017 which imports Order 1 Rule 10(2) of the Civil Procedure Rules into the processes governed by the Elections (Parliamentary and County Elections) Petition Rules, 2017. The power exercised by the Supreme Court in *Raila Amolo Odinga & another vs. Independent Electoral and Boundaries Commission & 3 others & Ekuru Aukot* [2017] eKLR (Maraga CJ/P, Mwilu DCJ/VP, Ibrahim, Ojwang, Wanjala and Ndungu SCJJ) and *Raila Amolo Odinga & another vs. Independent Electoral and Boundaries Commission & 2 others & Michael Wainaina Mwaura (as Amicus Curiae)* [2017] eKLR (Maraga CJ/P, Mwilu DCJ/VP, Ibrahim, Ojwang, Wanjala and Ndungu SCJJ), to order joinder of the interested party and *amicus curiae* had statutory basis, there is no equivalent legal regime for the High Court to enable it make orders similar. The decisions, in *Raila Amolo Odinga & another vs. Independent Electoral and Boundaries Commission & 3 others & Ekuru Aukot* [2017] eKLR (Maraga CJ/P, Mwilu DCJ/VP, Ibrahim, Ojwang, Wanjala and Ndungu SCJJ) and *Raila Amolo Odinga & another vs. Independent Electoral and Boundaries Commission & 2 others & Michael Wainaina Mwaura (as Amicus Curiae)* [2017] eKLR (Maraga CJ/P, Mwilu DCJ/VP, Ibrahim, Ojwang, Wanjala and Ndungu SCJJ), are, therefore, not necessarily useful, as a guide to me, on what to do, in the circumstances of an application for joinder of an interested party being placed before me, since they were based on statutory provisions, which are lacking in my case. As it is, the legal infrastructure, as it stands, does not allow me to join or add the applicant as an interested party to these proceedings.

30. The applicant has urged me to allow the application on the basis of fairness and natural justice. He does not cite any useful authority to support his submission on this. What I ask myself though, is whether it is just, that, with respect to presidential election petitions, there is room for the court, based on the governing law, to join or add parties, to the presidential election petition, while, for election petitions at the High Court and the magistrate's court, there is no such room. Is it not treatment that is unequal or even discriminatory, that parties before the Supreme Court, have the benefit of getting joined as interested parties and *amicus curiae*, because the law there allows it, while those at the High Court and the magistrate's court do not have that benefit, because the applicable law does not provide similarly? Of course, the problem is with the law. If persons or entities can be joined as interested parties and *amicus curiae* at the Supreme Court, with respect to presidential election petitions, I see no good reason why the same cannot be extended to those that are before the High Court and the magistrate's court. I say so because, when the Supreme Court is seized of a presidential petition, it exercises original jurisdiction, as a primary court, in much the same way that the High Court and the magistrate's court do with respect to election petitions governed by the Elections Act and the Elections (Parliamentary and County Elections) Petition Rules, 2017. The anomaly or oddity in the Elections (Parliamentary and County Elections) Petition Rules, 2017, of not providing for joinder of interested parties, ought to be addressed by way of amendment, to provide for certainty and clarity in the law, to ensure equal treatment of litigants at all levels of the courts. It could take the form of a direct provision in the Elections (Parliamentary and County Elections) Petition Rules, 2017, for admission or joinder of interested parties, or it could be something equivalent to Rule 4(2) of the Supreme Court (Presidential Election Petition) Rules, 2017, linking the Elections (Parliamentary and County Elections) Petition Rules, 2017 to the Civil Procedure Rules, even specifically to Order 1 Rule 10(2) of the Civil Procedure Rules.

31. Having found that the omission, on the Elections (Parliamentary and County Elections) Petition Rules, 2017, to provide for joinder of interested parties is an anomaly or an oddity, and that the same has worked against fairness in the treatment of parties before different levels of the courts, I am persuaded that the High Court can intervene and exercise inherent power, under the oxygen principle and the Constitution, to allow an application of the nature of the Motion that is now before me. The spirit in the Supreme Court (Presidential Election Petition) Rules, 2017 and the Supreme Court Rules is that parties wishing to be joined as interested parties, to election petitions, ought to be so joined, where they make out a proper case for it. I am persuaded that the applicant herein has a bigger stake in these proceedings than the applicants in *Raila Amolo Odinga & another vs. Independent Electoral and Boundaries Commission & 3 others & Ekuru Aukot* [2017] eKLR (Maraga CJ/P, Mwilu DCJ/VP, Ibrahim, Ojwang, Wanjala and Ndungu SCJJ) and *Raila Amolo Odinga & another vs. Independent Electoral and Boundaries Commission & 2 others & Michael Wainaina Mwaura (as Amicus Curiae)* [2017] eKLR (Maraga CJ/P, Mwilu DCJ/VP, Ibrahim, Ojwang, Wanjala and Ndungu SCJJ), given that he has been adversely mentioned in the petition as a perpetrator of violence, which, according to the petitioner, contributed significantly to undermining the integrity of the elections that were conducted by the 1st and 2nd respondents, in which the 3rd respondent was declared winner. The applicant has a stake in the matter, in view of those numerous allegations, and the possible consequences on his career, should the allegations be proved or established at the trial. The outcome of the proceedings could have an effect on his legal rights. His interest is personal, and I am persuaded that it has been established or identified. It is also proximate enough, if not direct, given that he has been mentioned in the petition itself and in the affidavits filed by the persons that the petitioner proposes to call as his witnesses.

32. From my searches, I have noted that my peers have allowed similar applications or expressed the view that such applications are allowable, based on in *Francis Karioko Muruateteu & another vs. Republic* [2016] eKLR (Rawal DCJ/VP, Ibrahim, Ojwang, Wanjala and Njoki SCJJ) and *Raila Amolo Odinga & another vs. Independent Electoral and Boundaries Commission & 3 others & Ekuru Aukot* [2017] eKLR (Maraga CJ/P, Mwilu DCJ/VP, Ibrahim, Ojwang, Wanjala and Ndungu SCJJ). See *Julius Makau Malombe vs. Charity Kaluki Ngilu & 2 others* [2017] eKLR (Nyamweya J),

33. Would the applicant suffer prejudice if the application is not allowed? I note, from the pleadings in the petition, that he is mentioned, in terms of having acted in concert with the 3rd respondent. I would have presumed that the 3rd respondent would, in his replies to the petition, offer a response that covers both the himself and the applicant, and that, in his answer to those allegations, he would make the applicant one

of his witnesses, which would then give the applicant a platform to confront the allegations made against him, by taking to the witness stand. The applicant complains that both respondents have not dealt with the allegations adverse to him in a manner that would exonerate him. I have closely perused through the responses filed by the 1st and 2nd respondents. There is no reference to the applicant in them, nor any exoneration of him. In the response by the 3rd respondent, he distances himself from the applicant, in that he avers that the acts of violence pleaded by the petitioner were not attributed to him, but to named individuals, who were not even candidates, and none of whom were his agents, and that there was no cause of action specific to him. Clearly, there is credence to the argument by the applicant that respondents have not responded to the petition in a manner that addresses the specific allegations made against him, and that he is better placed to articulate his own case. I believe he would, in the circumstances, suffer prejudice, if he is not joined to these proceedings as an interested party.

34. On the matter of the submissions that he would make at the trial, and whether they would not be a replication of what the respondents will place before the court, I believe what I have set out above addresses this aspect of the case by the applicant. The three respondents have not answered the pointed allegations made against the applicant. The 1st and 2nd respondents are content with denying the violence, and saying that if there was any violence, the same did not affect anything. The 3rd respondent has taken the position that the allegations of violence were not directed at him, but at other individuals, who were neither candidates nor his agents, and as a consequence there was no cause of action against him, and implying that the cause of action actually lay against the persons named, who happen to include the applicant. To that extent, his submissions would not replicate those to be filed or presented or made by the respondents. The violence is largely attributed to him and others, and I believe his joinder would assist the court to effectually and completely determine the matter with regard to the alleged violence.

35. The petitioner submitted at length on the matter of timelines, that the Motion was brought outside the set timelines. The applicant is not named in the petition as a party, although he is named in the body of the petition as one of the perpetrators of the violence and other ills that allegedly bedevilled the election, according to the petitioner. He was not served with the petition, and, therefore, the issue of compliance with the timelines is not relevant to him. The petitioner should have named him as a respondent, given the allegations made against him, and going by the definition of respondent in Rule 2(d) of the Elections (Parliamentary and County Elections) Petition Rules, 2017, and the remarks of the court in *Moses Wanjala Lukoye vs. Benard Alfred Wekesa Sambu & 3 others* [2013] eKLR (Gikonyo J), with respect to adverse mention of a person in an election petition. If he had been properly named as respondent in the petition, and failed to file his papers within the timelines given, there would then be sense in the argument that the petitioner has articulated in his submissions. I am also persuaded that the application was filed timeously, to the extent that it was filed before the pre-trial conference was held. See Rule 15(2) of the Elections (Parliamentary and County Elections) Petition Rules, 2017.

36. I am informed by the petitioner, in his written submissions, that the applicant has filed voluminous affidavits in response to the petition. I have perused the file of papers before me, and I have seen the said bundle of affidavits, which was lodged together, or simultaneously, with the Motion on 28th May 2021. The applicant has not been admitted as an interested party, and no directions have been given allowing him to file any evidence. So, if he has purported to file any documents in purported response to the petition, then all such filings are nullities. More importantly, should I allow the application, the applicant would only come into the proceedings in a limited capacity, as interested party or intervener. That would not place him in the same footing with the other parties, for he would not be a principal party, but a peripheral figure, playing at the second league, at best. In most cases, such a party would only be allowed to file legal arguments, by way of written submissions, but not present any evidence, whether oral or in affidavit form. Where he is allowed to file any evidence, it would be limited to the allegations made against him, and he would not call any witnesses, save for himself.

37. Consequently, I conclude that the Motion, dated 28th May 2021, aligns with the principles set out in *Francis Karioko Muruateteu & another vs. Republic* [2016] eKLR (Rawal DCJ/VP, Ibrahim, Ojwang, Wanjala and Njoki SCJJ), *Trusted Society of Human Rights Alliance vs. Mumo Matemu & 5 Others* [2014] eKLR (Ibrahim and Wanjala SCJJ) and *Trusted Society of Human Rights Alliance vs. Mumo Matemu & 5 Others* [2015] eKLR (Mohamed Ibrahim and Njoki Ndungu SCJJ), on joinder of interested parties, in that the applicant is mentioned in the petition and the affidavits in support of the petition as a perpetrator of violence which allegedly undermined the impugned election. His stake in the matter is identifiable, and he is likely to be directly affected by the outcome of the election petition, should it be found that there was violence as alleged, which is established to have been caused or contributed to by his conduct or actions.

38. Having so found or held, as above, I hereby order:

(a) that the applicant be joined to these proceedings as an interested party;

(b) that his role or participation in the proceedings shall be limited to the matters around the allegations made against him in paragraphs 7, 9, 28 and 34 of the petition, and the affidavits of Hilda Akotsi Angalwa, Galcanos Olinwa Ekesa, Mercy Akoth Muchere, Libinus Juma Oduori, Anacleth Were Nanjira, Julius Kisawayi Mahasi, Joseph Makokha Nyangi, Daniel Ombimo Malala, Nabwera Daraja Nabii, Edith Akinyi Mildred, Mophat Mandela Shikhuyu, Boniface Oduor Odunga, William Opemi, Kelvin Ekesa Olimwa and Patrick Augustine Oduya;

(c) that at the trial, the applicant shall be at liberty to testify, after the respondents close their case, to the limited extent of the allegations made against him, as stated above, but he shall not call any witnesses;

(d) that the applicant shall be at liberty to cross-examine the other parties and their witnesses, but limiting himself to the allegations made against him;

(e) that, in view of the orders above, I hereby direct the petitioner to serve the petition on the applicant, within 48 hours of delivery of this ruling;

(f) that upon being served, the applicant shall file a response to the petition and an affidavit of evidence in response, limited as stated above, within 48 hours of service, and he shall serve his filings on all the parties hereto;

(g) that, as the bundle of affidavits filed herein on 28th May 2021, in opposition to the petition herein, was filed without leave of the court, is hereby declared null and void, and shall be expunged from the record;

(h) that the matter shall proceed, to the full hearing of the petition, as earlier scheduled; and

(i) that, from now henceforth, no other or further applications shall be accepted at the registry or entertained by the court.

39. It is ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 22nd DAY OF June 2021

W. MUSYOKA

JUDGE