



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

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

**CONSTITUTIONAL PETITION NO. E465 OF 2021**

**-BETWEEN-**

**BOAZ ATANGA WARUKU.....PETITIONER**

**-VERSUS-**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....RESPONDENT**

**-AND-**

**1. SMARTMATIC INTERNATIONAL HOLDINGS BV**

**2. INFORM LYKOS (HELLAS) SA.....INTERESTED PARTIES**

**-AND-**

**1. KATIBA INSTITUTE**

**2. AFRICOG.....INTENDED INTERESTED PARTIES**

**RULING NO. 2**

**Introduction and Background:**

1. The Petition herein deals with the elections and the electoral processes in Kenya.
2. The Petitioner herein, *Boaz Atanga Waruku*, variously challenged Tender No. IEBC/OIT/001/21/2020/2021 and Tender No. IEBC/OIT/002/21/2022 for the procurement of the Kenya Integrated Elections Management System (KIEMS) and Election materials respectively.
3. In paragraph 6 of his Petition dated 29<sup>th</sup> October, 2021 the Petitioner framed the following issues for determination: -
  - a. *Whether the Respondent undertook public participation in respect of the procurement proceedings for the KIEMS Tender and the BALLOTS Printing Tender*
  - b. *Whether the Independent Electoral and Boundary Commission was quorate at the commencement and during the procurement proceedings in respect of the KIEMS Tender and the BALLOTS Printing Tender*
  - e. *Whether the KIEMS Tender complied with the requirement for explicit provisioning for preference margins requirements for International Open Tenders.*
  - d. *Whether the Petitioner is otherwise entitled to the orders sought in the Petition.*

4. In the main, the Petitioner sought the following orders: -

1. A declaration that Tender Number IEBC/OIT/001/21/2020/2021 for the Supply, Delivery, Installation, Testing, Commissioning, Support and Maintenance of the Kenya Integrated Elections Management System (KIEMS); and Hardware Equipment and Accessories, related procurement proceedings and consequential decisions arising therefrom are unconstitutional, null and void;

2. A declaration that Tender number IEBC/OIT/002/21/2021/2022 for the Supply and Delivery of Ballot Papers: Register of Voters: Statutory Election Result Declaration Forms to be used at the Polling Station; Election and Referendum Result Declaration Forms to be used at the Constituency, County and National Tallying Centre on a Three Year Framework Contract, all related procurement proceedings and consequential decisions arising therefrom are unconstitutional, null and void.

3. A declaration that all decisions for procurement of Supply, Delivery, Installation, Testing, Commissioning, Support and Maintenance of the Kenya Integrated Elections Management System (KIEMS); and Hardware Equipment and for the Supply and Delivery of Ballot Papers: Register of Voters; Statutory Election Result Declaration Forms to be used at the Polling Station; Election and Referendum Result Declaration Forms to be used at the Constituency, County and National Tallying Centre made prior to are unconstitutional, null and void

4. An order quashing Tender Number IEBC/OIT/001/21/2020/2021 for the Supply, Delivery, Installation, Testing, Commissioning, Support and Maintenance of the Kenya. Integrated Elections Management System (KIEMS); and Hardware Equipment and Accessories, related procurement proceedings and consequential decisions arising therefrom.

5. An order quashing Tender number IEBC/OIT/002/21/2021/2022 for the Supply and Delivery of Ballot Papers; Register of Voters; Statutory Election Result Declaration Forms to be used at the Polling Station; Election and Referendum Result Declaration Forms to be used at the Constituency, County and National Tallying Centre on a Three Year Framework Contract, all related procurement proceedings and consequential decisions arising therefrom.

6. An order directing the Respondent to re-issue the impugned tenders in strict compliance with the Court's Judgment, the Constitution and all Applicable laws.

7. Any other orders and/or reliefs as the court may deem fit.

8. Costs of the Petition

5. Given that matters relating to elections in Kenya generally evoke high public interest, Katiba Institute and AFRICOG filed a Notice of Motion dated 17<sup>th</sup> November, 2021 seeking joinder in the Petition as interested parties.

6. It is also of importance to mention that the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties herein were enjoined as such by the Court on its own motion.

7. This ruling is, hence, on the joinder application.

#### **The Application:**

8. The application is supported by the Affidavit of Lempaa Suyianka. The Applicants also filed skeleton submissions at the filing of the application.

9. The application is supported by the Petitioner and is vehemently opposed by the Respondent and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties. The Respondent filed Grounds of opposition dated 17<sup>th</sup> November, 2021 while the Interested Parties made oral submissions as their Counsel had just been served with the application and given the nature of the matter Counsel opted to proceed on with the hearing, the late service notwithstanding.

#### **Analysis and Determinations:**

10. I have carefully perused the documents filed in this matter.

11. In view of 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 and recapped the submissions on record and will take the contents thereof into account in the course of this discussion.

12. The starting point is a look at the law on joinder of interested parties.

13. 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.*

14. 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.

15. I will now apply the foregoing considerations to the applications at hand.

16. Katiba Institute and AFRICOG posited that they have an identifiable stake in the proceedings as their registered objects and mandate are geared towards the implementation of the 2010 Constitution. In the course of advancing constitutionalism, they have variously participated in litigations including on the Presidential elections and in some where the question of the quorum of the Independent Electoral and Boundaries Commission was litigated which matter is now pending before the Supreme Court. The intended interested parties captured various cases they participated in, in their submissions.

17. It was further posited that the intended interested parties ought to be enjoined in these proceedings given that election related matters generate a lot of public interest.

18. There is no doubt that the intended interested parties' objects include the advancement of constitutionalism. To that end, they have severally participated in many related litigations.

19. In this matter, the Petitioner framed the questions for interpretation and determination. I have already captured them elsewhere above. The issues are on public participation, the quorum of the Independent Electoral and Boundaries Commission and the legality of the tenders in issue.

20. The issues are not novel. In one way or the other, they have been litigated and, maybe, settled.

21. To this Court, it is rather unclear as to what value the intended interested parties really intend to add into this Petition. As said, the issues are not complex.

22. The Court, therefore, is not satisfied that the intended interested parties have attained the threshold for joinder. Of main concern is that the intended interested parties have not demonstrated any identifiable stake in the matter. This is a straight-forward matter which ought to be quickly determined. I am sure the Court will greatly benefit from the jurisprudence so far generated on the issues raised in the Petition and the participation of the intended interested parties is not really necessary.

23. To that end, this Court agrees with the Respondent and the 1<sup>st</sup> and 2<sup>nd</sup> interested parties that even though the intended interested parties are geared towards the advancement of constitutionalism, it cannot be the case they are at liberty to participate in every litigation on the Constitution. In other words, they are duty bound to, in the first instance, demonstrate their identifiable interest in a matter. In this case, the intended interested parties have failed to do so.

24. The application by way of a Notice of Motion dated 17<sup>th</sup> November, 2021 is, hence, a false start. It is hereby dismissed with costs.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF NOVEMBER, 2021**

**A. C. MRIMA**

**JUDGE**

**Ruling No. 2 virtually delivered in the presence of:**

**Miss Kituku**, Learned Counsel for the Petitioner.

**Dr. Mutubua**, Learned Counsel for the Respondent.

**Dr. O’Kubasu**, Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties.

**Mr. Ochiel Dudley**, Learned Counsel for the intended Interested Parties.

**Ochieng** – Court Assistant.