



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.126 OF 2019

**IN THE MATTER OF ARTICLES 22(1), 23(1) & (3), 159(2) (a, e) 165(3) (b),
d), (6) & (7), & 258 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 3, 10(1),
10(2), 35, 36, 38(2), 47(1), OF KENYA CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE ARCHITECTURAL ASSOCIATION OF
KENYA ELECTIONS HELD ON 25TH MARCH 2019**

BETWEEN

GAD OMONDI OPIYO.....PETITIONER

VERSUS

PETER KIBINDA, SCRUTINEER.....1ST RESPONDENT

ROBERT KARIUKI, SCRUTINEER.....2ND RESPONDENT

JULIUS KIBWAGE, SCRUTINEER.....3RD RESPONDENT

EMMA MILOYO, THE PRESIDENT OF THE

ARCHITECTURAL ASSOCIATION OF KENYA.....4TH RESPONDENT

JACOB MWANGI, THE CEO OF THE

ARCHITECTURAL ASSOCIATION OF KENYA.....5TH RESPONDENT

INFOTRAK RESEARCH AND CONSULTING LIMITED.....6TH RESPONDENT

CREATIVE DIGITAL LAB.....7TH RESPONDENT

MUGURE NJENDU.....8TH RESPONDENT

RULING

The Proposed Respondent's Application

1. Architectural Association of Kenya (**AAK**), the proposed 9th Respondent through an application dated 15th April 2019 brought pursuant to Rule 7(1) and 15(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rule, 2013 prays for courts leave to be enjoined as a Respondent to the petition herein. The application is premised on the grounds (i) – (xii) on the face of the application and is supported by supporting affidavit of Mr. Wilson Mugambi sworn on 15th April 2019.

Petitioners Response

2. The petitioner is opposed to the application through a Replying affidavit dated 29th April 2019. The petitioner contends the application is without merit and lacks resolutions by members of the proposed Respondent to be enjoined and the application is time-barred.

Analysis and Determination

3. I have very carefully perused the 9th Proposed Respondent's Notice of Motion, the Petitioner's Replying affidavit, the Counsel rival submissions and the issue arising for consideration is as follows:-

a) Whether the 9th Respondent has satisfied the conditions to be enjoined as 9th proposed party in this petition?

4. In the instant petition, the petitioner prays in the petition dated 24th March 2019 a declaration that **AAK** elections held on the 25th March 2019 for the position of President of **AAK** were irregular and unconstitutional and therefore null and void. The reliefs sought in view of the petition are adverse to the interest of the Applicant and its members. There is no way the orders can be granted solely against the members in isolation of the Applicant herein. The matter in issue relates to an election of the members of the Applicant, it turns out, that the Applicant's constitution plays a key role in determination of the petition. It is further the Applicant who is supposed to implement the resolutions that are passed by its members. In absence of the Applicant in this petition implementation of any orders may pose a challenge.

5. The nature of the petition relates to the interest of the members of the Applicant, which can be addressed by the Association through the Applicant and as such for the issues to be finally dealt with the presence of the Applicant is important as the Applicant is a key figure in reaching final resolution in the matters raised in the petition.

6. The petitioner contention is that the proposed Respondent should not be enjoined as is seeking to be enjoined as a Respondent and not an interested party. That no resolution was passed by members to enjoin the Association in this petition. The petitioner urges the 1st – 8th Respondents have been sued in their individual capacity in the **AAK** election, urging the petitioner has no issue with the Association. It is further contended, that the Association if not enjoined it would not suffer any prejudice, and that it has not disclosed its nature of submission so as to be considered in the application for joinder and as such the court cannot know the kind of contribution that the Applicant will make in this matter.

7. In granting an application for joinder of an interested party the party is required to establish; personal interest at stake; prejudice to be suffered if not enjoined; and set out the interested party's case.

8. The petitioner contend that it is the petitioner who determines who should be respondents.

9. I have considered the submissions and find that the petitioner has not demonstrated that an organization requires **AGM** to pass a resolution to engage in litigation nor was it demonstrated the Applicant's constitution mandated it to have **AGM** to pass a resolution to litigate. The Applicant avers that the petitioner seek reliefs that are adverse to the interest of the Applicant and its members and as such has demonstrated it has an indefinable state, interest and duty in the proceedings. The Applicant in this matter has chosen to be enjoined as a Respondent and not an interested party so as to protect its interest and that of its members.

10. Upon considering the nature of this petition and the proposed Respondent having demonstrated it has an identifiable stake, interest and duty in these proceedings, I find that the participation of the Applicant in this petition is necessary for just determination of the matters in issue in the petition. I find the joinder will enable the Applicant to protect its interest which may have adversely and negating affect if the application is not granted to enjoin the Applicant as a Respondent to the petition. Its joinder would further enable court to determine any issue or question in the instant petition not only between the petitioner and the Respondents but also between the petitioner and Applicant who has sought court's leave to be enjoined as a Respondent.

11. In Election Petition No. 1 of 2017 **Walter Enock Nyambati vs. IEBC & 4 others (2017) eKLR** while the court was considering an application for joinder as a Respondent, the court quoted the case of **H.E. Raila Amolo Odinga & Another vs. IEBC & 3 others (2017) eKLR** in which the Supreme Court held thus:-

"While interpreting this provision in the Muruatetu case, this Court laid out clear guidelines on instances when a person may be enjoined to proceedings before it as an interested party. At paragraph 37, the Court held:-

.....Enjoinder 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 as replication of what the other parties will be making before the Court."

12. In petition No. 15 of 2015 consolidated with petition No. 16 of 2015 **Francis Kariuki Muruatetu & another vs Republic & 5 others (2016) eKLR**, the Supreme Court dealing with an application for enjoinder of interested party states as follows:-

"One must move the Court by way of a formal application. Enjoinder is not as of right, but is at the discretion of the Court; 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"

13. From the above and considering the nature of the Applicant's application and all parties rival submissions and authorities relied upon, I find the Applicant has met the conditions to be enjoined in this petition, which enjoinder would enable court settle all questions in issue and whose determination will bind all the parties. I find no party would be prejudiced by the enjoinder of the Applicant as a Respondent.

14. Having said that much, I find the application dated 29th April, 2019 to be meritorious. Accordingly I proceed to make the following orders:-

a) The Applicant, the Architectural Association of Kenya referred to as (AAK) is enjoined as the 9th Respondent to the petition herein.

b) The AAK, to file Response to the petition within 15 days from the date of this ruling and serve the same within the same period.

c) Costs of the application be in the cause.

Dated, signed and delivered at Nairobi this 24th day of October, 2019.

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J .A. MAKAU

JUDGE