



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION NUMBER 14 OF 2017

**IN THE MATTER OF THE ELECTION ACT, NUMBER 24 OF 2011 LAWS OF KENYA AND
THE ELECTION (GENERAL) REGULATIONS, 2012 AND ELECTIONS (PARLIAMENTARY
AND COUNTY) PETITION RULES, 2017**

AND

**IN THE MATTER OF THE GURBERNATORIAL ELECTIONS FOR WAJIR COUNTY, NO.
008, HELD ON 8TH AUGUST, 2017**

BETWEEN

AHMED ABDULAHI MOHAMAD. 1ST PETITIONER

AHMED MUHUMED ABDI. 2ND PETITIONER

AND

HON. MOHAMMED ABDI MAHAMUD. 1ST RESPONDENT

GICHOHI GATUMA PATRICK. 2ND RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION. 3RD RESPONDENT

RULING

1. No doubt the issue of integrity in leadership and accountability in public affairs is one that has bedeviled this country for a very long time. It is for this reason that in their wisdom Kenyans entrenched the issue of integrity in their 2010 Constitution and placed it higher in hierarchy of priority just after providing for the Supremacy of the Constitution, declaration of the Republic, Citizenship, Bill of Rights and Land and Environment. Indeed, even before providing for the governance institutions, i.e. the legislature, the executive and the Judicature, Kenyans provided for leadership and integrity in the conduct of public affairs. Accordingly, integrity in leadership is but a central feature in public affairs in Kenya and is to be stringently enforced.

2. On the 8th August, 2017, like all other Kenyans, the people of Wajir County went to exercise their right under Article 38 of the Constitution on universal suffrage whereby, Hon. Mohamed Abdi Mahamud the 1st Respondent was returned as the Governor of that county. On 6th September, 2017, Ahmed Abdullahi Mohammed and Ahmed Muhumed Abdi petitioned against the election of the said Hon. Mohamed Abdi Mahamud (“the 1st Respondent”). Top of the grounds of the petition was that Hon. Mohamed Abdi

Mahamud was not legally qualified to run for the position of Governor. They questioned his integrity in relation to his educational qualifications, that he relied on to clear him to vie for the Gubernatorial Position.

3. On learning of the petition, Transparency International Kenya Chapter (hereinafter “Transparency International – Kenya”) a well-known International organization whose primary objective is to develop a transparent and corruption free society through good governance and social justice initiatives, applied to be enjoined as an interested party in the said petition. In addition, it sought an order that the 3rd Respondent (hereinafter “IEBC”) be compelled to provide the information requested on the 26th September, 2017. That Notice of Motion was expressed to be brought under Articles 20, 21, 22 and 23 of the Constitution of Kenya. The same was the one argued before me on 16th October, 2017 and this ruling relates to the same.

4. In that motion and the supporting affidavit of Samuel Kimeu, sworn on 6th October, 2017 and further affidavit of Omar Mohamed Elmawi sworn on 16th October, 2017, Transparency International Kenya contended that its primary mandate is to ensure that the values and principles of the Constitution are observed and respected and in particular, the respect for the requirement for integrity and accountability in leadership; that there was a credible basis to believe that the 1st Respondent did not have the requisite academic qualification to contest for the position of governor; that Transparency International – Kenya had sought the necessary information about the 1st Respondent’s clearance by the IEBC and the Ethics and Anti-Corruption Commission (EACC) but that information had not been provided; that the issue of the clearance of the 1st Respondent to run as a candidate on the basis of an alleged forged degree is at the heart of Chapter Six on leadership and integrity and within the mandate of Transparency International – Kenya.

5. Transparency International – Kenya further contended that the failure of IEBC to respond to its request to be provided with the necessary information made it difficult for Transparency International – Kenya to determine whether the 1st Respondent was qualified to run for position of Governor of Wajir County. A letter dated 26th September, 2017 addressed to the IEBC and copied to EACC was produced in support of Transparency International – Kenya’s contestations.

6. In the submissions dated 13th October, 2017 that were ably hi-lighted by Mr. Waikwa, learned counsel for Transparency International – Kenya, it was submitted that the people of Wajir County are entitled to legal clarification if their Governor meets the academic qualification and the principles set out in Chapter Six of the Constitution; that the failure by IEBC to disclose the information sought was in breach of Article 35 of the Constitution; that a challenge relating to suitability or qualification of a person to stand for an elective position is a matter to be determined by the Election Court.

7. Mr. Waikwa submitted that the principles applicable in an application for joinder as an interested party are that the applicant must disclose a personal interest or stake in the issue before court, the applicant must establish that he will suffer prejudice if he is not enjoined and that the joinder must add value to the proceedings before court. The cases of **Francis Kariuki Muruatetu & Another Vs Republic & 5 Others [2016] eKLR** and **Raila Amolo Odinga & Another Vs the Independent Electoral and Boundaries Commission and 3 Others S.C Pet No. 1 of 2017 [2017] eKLR**, were relied on in support of the said submission.

8. It was Mr. Waikwa’s submission that Transparency International – Kenya had met this criteria; that having written to IEBC seeking information about the 1st Respondent’s qualification and the issue of integrity being a live issue in these proceedings made Transparency International – Kenya had an identifiable in these proceedings stake; that Transparency International – Kenya has expertise in integrity issues which will add value to these proceedings. That finally, that if Transparency International – Kenya was not allowed to raise this issue before this court, which is the proper forum, there may be no other right forum to do so whereby it will suffer prejudice Mr. Waikwa, therefore, urged that the application be allowed.

9. The 2nd and 3rd Respondents opposed the application through the Replying Affidavit of Douglas Kipruto Bargorett sworn on 10th October, 2017. It was contended that there was no evidence that the letter of 26th September, 2017 had been received by IEBC; that the 21 days period allowed for a public body to respond to a request for access to information had not yet lapsed; that the issue of the non-qualification of the 1st Respondent had already been raised in the petition and, therefore, that no prejudice will be suffered by Transparency International – Kenya if it is not enjoined.

10. Ms. Okimaru learned counsel for the 2nd and 3rd Respondent relied on her written submissions dated 11th October, 2017 and further submitted that the present application was premature in that the 21 days period given to the IEBC to respond to request by Transparency International – Kenya had not lapsed; that in any event, the documents the subject of the application had been submitted to this court thereby extinguishing the application. She distinguished the **Muruatetu** and **Raila Amolo** cases from the present petition. Counsel doubted the expertise of Transparency International – Kenya in verification of academic qualifications and submitted that the application was being made too late in the day.

11. The 1st Respondent also opposed the application relying on his replying affidavit sworn on 13th October, 2017. He contended that the issue being raised by Transparency International – Kenya should have been raised at the pre-nomination stage. That there was no identifiable take that had been disclosed by Transparency International – Kenya as the petitioner had already raised the matter in the Petition. That the issue was being raised too late in the day. Mr. Omuganda learned counsel for the 1st Respondent associated himself with the submissions of Ms Okimaru and further submitted that the body constitutionally mandated to deal with issues of integrity in Kenya was EACC. That the integrity of the 1st Respondent had so far not been questioned; that allowing the application will lead to the delay in the hearing of the petition and will prejudice the 1st Respondent. The case of **Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** was relied on in support of the contention that the issue of integrity or lack of it on the part of the 1st Respondent had not yet been determined.

12. This is an application by Transparency International – Kenya to be enjoined in these proceedings as an interested party. As quite correctly submitted by learned counsel, the principles governing such an application were laid down in the case of **Francis Kariuki Muruatetu & Another Vs Republic & 4 Others (supra)**. In that case the Supreme Court of Kenya held: -

“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.”

13. It is clear from the foregoing that, a party who wishes to be enjoined as an interested party in a proceeding must demonstrate that he has a personal interest or stake in the matter before court which is clearly identifiable and not remote; that he will suffer prejudice if he isn't so enjoined and finally, he must set out the case he will put before court which should not be a replication of what the parties already before court will be making or, in other words he must demonstrate that his joinder will add value to the

proceedings.

14. It was the contention of Transparency International – Kenya that it was a personal stake in the matter before court because firstly, it has requested information from the IEBC on the academic qualifications of the 1st Respondent and secondly, it deals with matters of integrity which is one of the matters raised in the present proceedings. Although the Respondents contended that there was no evidence that the request made in a letter dated 26th September, 2017 had been received by IEBC, this court holds otherwise. I have seen the subject request produced as “SM 1”. The same was clearly delivered to IEBC on 2nd October, 2017 at 10.17 a.m. as it clearly shown in exhibit “**OME 1**”. To my mind Transparency International – Kenya had made a request as it is entitled under Article 35 of the Constitution and it is entitled to expect a response thereto.

15. The other issue is the general objective of Transparency International – Kenya. It was contended that Applicant’s primary objective is concern with issues of integrity in public affairs. That it was established in Kenya in 1999 with the aim of developing a transparent and corruption free society.

16. To this court’s mind, Transparency International – Kenya has established that its primary objective is to instill integrity in public affairs. That having learnt that an issue of integrity had been raised in this Petition, it made a request to IEBC to be supplied with information relating to that issue. That on being supplied with the requested information, it will be able to pursue the issue of integrity in this Petition to its logical conclusion thus upholding Chapter six of the Constitution. This court is satisfied that since integrity is clearly one of the issues in this Petition and the Applicant’s primary objective is ensuring integrity in public affairs in Kenya, the Applicant has demonstrated that it has a clearly identifiable personal stake in the petition.

17. As regards the second limb of the *Muruatetu* case, it was the applicant’s contention that it will suffer prejudice if it is not enjoined because this is the right forum to agitate the issue of integrity and the 1st Respondent’s academic qualifications.

18. Firstly, the issue of the 1st Respondent’s academic qualification is an issue which must have been raised way back in April, 2017 during nominations. There was no explanation by the Applicant why it had not raised the issue before this petition was filed.

19. Secondly, it would seem that if the petitioner had not raised the red flag regarding the 1st Respondent’s academic qualification, the Applicant would have had no issues with the election of the 1st Respondent. It was not demonstrated how failure to be enjoined in these proceedings, will prejudice the Applicant’s effort in pursuing the matter in a constitutional court regarding the breach of Chapter Six. The actual prejudice to be suffered in my view was not clearly demonstrated in the application before me.

20. As regards the last limb, i.e. value addition, the Applicant was alleged to have expertise in integrity issues; that if it was enjoined in these proceedings, it will help this court in arrive at a just and fair finding which would have been enriched by the Applicant’s research on issues of integrity.

21. I have carefully considered the affidavit in support of the application as well as the submission made in support thereof. I did not find anything new that the Applicant proposed to add to what the petitioner had already supplied the court with. Indeed, while the petitioner had supplied the court with amongst others, copies of the impugned degree certificate, graduation list for 1st March, 2012 from Kampala University and proceedings of a Parliamentary Committee on Defence and Foreign Relations held on 3rd September, 2014, the Applicant did not produce anything in relation to the issue of integrity of the 1st Respondent. It only relied on a letter dated 26th September, 2017 which it has written to the IEBC requesting for information.

22. In the *Muruatetu* case, the Supreme Court was categorical that a proposed interested party must demonstrate that the submission that it will offer will be over and above what the parties already in the

case will give. It is not to rehearse what the parties will give the court. In the present case, the contrary is the position. The petitioner seems to have offered a dearth of evidence in respect of the issue in question which is far superior to a mere letter of request relied on by the Applicant. This court would have expected that the Applicant would have further and better material or evidence so as to add value on these proceedings. It should have showed that its admission would add to or improve on what the Petitioner has already availed. That is not the case. To my mind, there is nothing to show that joining Transparency International – Kenya to these proceedings will add any value. I am satisfied that rather, it would lead to further delay in the prosecution of this petition.

23. In the circumstances, I am satisfied that a case for joinder has not been made and the application therefore lacks merit.

24. So as not to prejudice the Applicant's position if it requires to pursue the issue before another forum at a later date, I will strike out the application so as to avoid the matter becoming *res judicata*. I will not order any costs. It is so ordered.

Dated and Delivered at Nairobi this 17th day of October, 2017.

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A MABEYA

JUDGE