



**Mogeni v Independent Electoral and Boundaries Commission &
2 others; Dickson Machungo Mogaka (Interested Party) (Petition
E006 of 2023) [2024] KEHC 3599 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3599 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
PETITION E006 OF 2023**

WA OKWANY, J

APRIL 11, 2024

**IN THE MATTER OF: THE CONSTITUTION OF KENYA,
2010;**

AND

**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 19, 20, 21, 22,
23, 24, 27, 28, 29, 38, 40 AND 47 OF THE CONSTITUTION
OF KENYA, 2010;**

AND

**IN THE MATTER OF: VIOLATIONS OF FUNDAMENTAL
RIGHTS AND FREEDOMS IN THE BILL OF RIGHTS;**

AND

**IN THE MATTER OF: BREACH OF CHAPTER 6 OF THE
CONSTITUTION OF KENYA BY THE SPEAKER OF THE
NYAMIRA COUNTY ASSEMBLY**

-BETWEEN-

BETWEEN

DENNIS MATUNDURA MOGENI PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ... 1ST
RESPONDENT**

SPEAKER, NYAMIRA COUNTY ASSEMBLY 2ND RESPONDENT



ORANGE DEMOCRATIC MOVEMENT PARTY 3RD RESPONDENT

AND

DICKSON MACHUNGO MOGAKA INTERESTED PARTY

RULING

1. This ruling is in respect to the Application dated 21st November 2023 wherein the Applicant seeks the following orders: -
 1. Spent
 2. The Honourable Court be pleased to join the interested party DICKSON MACHUNGO MOGAKA to the instant proceedings as the Interested Party.
 3. Upon grant of prayer (2) above, the Honourable Court be pleased to allow the interested party to file its Response to the Application filed therewith.
 4. The Honourable Court be pleased to make such other orders and/or further direction, as may be just and expedient in the circumstances.
 5. Costs of this Application be in the course.
2. The Application is premised on the grounds that: -
 1. The instant proceedings herein concern and/or relate to the election through nomination of the interested party herein as a Member of County Assembly of Nyamira representing the Youth.
 2. The interested party actively participated both in the proceedings at Keroka Principal Magistrate's Court in the Election Petition No. E005 of 2022 and Nyamira High Court Election Petition Appeal No. E004 of 2023 and at the Court of Appeal at Kisumu in Election Petition Appeal No. E016 of 2023.
 3. However, the Applicant herein despite being fully aware of the stake and interest of the interested party in the outcome of the proceedings herein, and particularly the fact that the substratum of the instant proceedings touches on the interested party, the same has deliberately omitted him from the proceedings herein.
 4. The move by the Applicant aforesaid is solely meant and/or geared towards depriving the interested party a right to participate in the proceedings herein and to be heard, an action which is contrary to the well set out tenets of fair hearing and natural justice.
 5. The outcome of the instant proceedings will substantially affect the rights of the interested party, and hence the necessity to be joined as a party hereto.
 6. Moreover, there are serious issues and facts which have been withheld by the Applicant herein in the instant proceedings, which issues and facts can wholly and conclusively be determined by joining the Applicant herein as a party to this suit.
 7. If orders are made without the input and hearing of the Applicant herein, same is going to have adverse effects on him.



8. There exist special circumstances that necessitate the instant Application to be heard on priority.
9. There exist special circumstances which render the instant Application urgent.
3. The Application is supported by the Applicant's Affidavit in which he avers that he was elected on 27th August 2022 as a nominated Member of the County Assembly of Nyamira representing the Youth, which election was challenged in Keroka Election Petition No. E005 of 2022. He states that the court at Keroka dismissed the Petition challenging his nomination which dismissal was overturned in an appeal lodged before the High Court in Nyamira Election Petition Appeal No. E004 of 2023 whose outcome the Petitioner now seeks to enforce. He further avers that the Petitioner did not include him in the present proceedings contrary to the tenets of fair hearing and natural justice yet the issues relate to his election. He contends that the outcome of this Petition is likely to adversely affect his rights and interests. The Applicant's case is that he is a necessary party in these proceedings and that he should therefore be enjoined to the suit in order to avoid a multiplicity of suits. He contends that the Respondents will not suffer any prejudice if his prayers are allowed.
4. The Petitioner opposed the Application through his Replying Affidavit dated 27th November 2023 in which he avers that the Application is brought under the wrong provisions of law and ought to be struck out. He states that the intended Interested Party/Applicant has not demonstrated that he has an identifiable stake, legal interest or duty in the proceedings before the Court and that the intended Interested Party/Applicant's rights in grounds (iii) and (iv) were extinguished when the High Court rendered its verdict in Election Petition Appeal No. E004 of 2023 and that there was nothing in the present Petition that calls for a response or rebuttal from the intended Interested Party/Applicant.
5. The Petitioner avers that the intended Interested Party/Applicant is illegally occupying office and drawing salaries as a public officer and that the present Application is a delaying tactic aimed at further prolonging the illegal activities of the County Assembly of Nyamira.
6. The Application was canvassed by way of written submissions which I have considered. The main issues for determination are: -
 - i. Whether the Application is fatally defective on the basis that it is premised on the wrong legal provisions.
 - ii. Whether the Application is merited.

Analysis and Determination

i. Whether the Application is fatally defective.

7. The present Application is premised on Order 17 Rule 2 (1) and 2(3) of the Civil Procedure Rules and Sections 3A of the [Civil Procedure Act](#). The said provisions provide as follows: -

Section 3A

Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Order 17 Rule 2:

2. Notice to show cause why suit should not be dismissed [Order 17, rule 2]



- (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
 - (2)
 - (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
8. The main prayer sought in this Application is for the joinder of the intended Interested Party to the suit. The application should have been brought under Order 1, Rule 10(2) of the Civil Procedure Rules 2010, which provides as follows: -
- (2) 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.
9. The Petitioner argued that since the intended Interested Party brought the Application under the wrong provisions of the law, the same was incurable in law and ought to be dismissed.
10. Article 159 of *the Constitution* which provides as follows: -
159. Judicial authority
- (1)
 - (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
 - (d) justice shall be administered without undue regard to procedural technicalities; and
11. In *Hermanus Phillipus Steyn vs. Giovanni Gnechchi-Ruscone* [2013] eKLR, the Supreme Court pronounced itself on the subject of procedural technicalities as follows: -
- “The question then is, whether this omission is fatal to the applicant’s case. It is trite law that a Court of law has to be moved under the correct provisions of the law. We note that this Court is the highest Court of the land. The Court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The Court is alive to the principles to be adhered to in the interpretation of *the Constitution*, as stipulated in Article 259 of *the Constitution*. Consequently, the failure to cite [the relevant provision] will not be fatal to the applicant’s cause.”
- (Emphasis added)
12. My finding is that even though the intended Interested Party quoted the wrong provisions of the law, the same is not fatal to the application as it can be cured under Article 159 (2) (d) of *the Constitution*.
- ii. Whether the Application is merited.**
13. The crux of the Application is the joinder of the Applicant as an interested party to the Petition herein in which the Petitioner seeks to enforce the orders of this Court (differently constituted) issued on 13th July 2023. The said Orders nullified the intended Interested Party/Applicant’s nomination as Member



of County Assembly of Nyamira representing the Youth and declared the Petitioner as the rightful nominee to be sworn into office.

14. The Applicant however argued that he has a stake in the matter before Court because he is the current nominated Member of County Assembly of Nyamira representing the Youth and that his position will be affected by the Court's decision in the present Petition.

15. Black's Law Dictionary 9th Edn. defines an interested party as: -

“a party who has recognizable stake and therefore a standing in a matter.”

16. Similarly, *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 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 directly involved in the litigation.”

17. The Supreme Court of Kenya set out the parameters to be considered by the Court in determining whether or not to enjoin a person as an interested party to a suit in the case of *Communication Commission of Kenya & 4 others vs. Royal Media Services Limited & 7 others* [2014] eKLR as follows:

“(22) In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court's Ruling in the *Mumo Matemo* case where the Court (at paragraphs 14 and 18) held:

“[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...”

(23) Similarly, in the case of *Meme v. Republic*, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- (i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) joinder to prevent a likely course of proliferated litigation.”

18. I have considered the submissions made by the intended interested party and it is my view that the issue of the validity of his nomination as Member of County Assembly was heard and determined in the election petitions. As I have already stated, this court (differently constituted) found that the Applicant herein was not qualified for the nomination. The court found that his nomination was therefore irregular and illegal and further, that his position, as Member of County Assembly, was null and void. To my mind, this means that the Applicant's tenure in office was nullified from the date of the



Court's decision and he therefore cannot regurgitate the same issues of the validity of his nomination or holding of office that were heard and determined with finality by this court.

19. I find that, in the circumstances of this case, the intended Interested Party has no stake in the Petition before the Court for the following reasons: -
- a. The Petition before the Court seeks to enforce the Orders of this court in which the Applicant's nomination was nullified.
 - b. That even though the Applicant will be affected by the enforcement of the High Court's decision in Election Petition Appeal No. E004 of 2023, his fate was already sealed by this Court in a matter where he was an active participant. The Applicant therefore has no identifiable interest in the subsequent Petition that is solely aimed at enforcing this court's earlier decision.
 - c. The intended Interested Party did not present any evidence of the questions of law and fact that may arise in the determination of the Petition, that only he would be knowledgeable about or competent to respond to.
 - d. He did not demonstrate the manner in which his constitutional rights or the rights of the people he is currently represents will be prejudiced.
 - e. The intended Interested Party has further not demonstrated the manner in which his non-participation in the suit will lead to a proliferation of suits considering that his interests were already heard and determined in the previous suit.
 - f. It is has not been demonstrated that the intended Interested party is a necessary party in the enforcement of this Court's orders dated 13th July 2023 as he is neither the person charged with gazetting the duly nominated candidate nor is he the person to preside over the swearing-in ceremony.
20. In a nutshell, I find that the Application does not meet the threshold set for joinder of a party to a suit as an interested party. I therefore find that the instant Application lacks merit and I therefore dismiss it with costs to the Petitioner.
21. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT NYAMIRA THIS 11TH DAY OF APRIL 2024.

W. A. OKWANY

JUDGE

