



Maina v National Assembly & 4 others; Gachagua, EGH the Deputy President of the Republic of Kenya & another (Interested Parties) (Constitutional Petition E014 of 2024) [2024] KEHC 12296 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12296 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CONSTITUTIONAL PETITION E014 OF 2024**

RM MWONGO, J

OCTOBER 11, 2024

IN THE MATTER OF: ARTICLES 1, 2, 3, 4, 10,19, 21, 22, 23, 145,150, 165, 258, AND 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: INTERPRETATION OF ARTICLES 145 AND 150 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS, PRACTICE AND PROCEDURES RULES 2013

AND

IN THE MATTER OF: THE PROCEDURE FOR IMPEACHMENT OF THE PRESIDENT AND DEPUTY PRESIDENT OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: STANDING ORDERS NO.64. AND 65 OF THE NATIONAL ASSEMBLY STANDING ORDERS

AND

IN THE MATTER OF: STANDING ORDERS NO. 73 AND 74 OF THE SENATE STANDING ORDERS

BETWEEN

HON JANE NJERI MAINA PETITIONER

AND

THE NATIONAL ASSEMBLY 1ST RESPONDENT

THE SENATE OF THE REPUBLIC OF KENYA 2ND RESPONDENT



THE SPEAKER OF THE NATIONAL ASSEMBLY 3RD RESPONDENT
THE SPEAKER OF THE SENATE 4TH RESPONDENT
THE HON ATTORNEY GENERAL 5TH RESPONDENT

AND

**HE GEOFFREY RIGATHI GACHAGUA, EGH THE DEPUTY PRESIDENT OF
THE REPUBLIC OF KENYA INTERESTED PARTY**
THE LAW SOCIETY OF KENYA INTERESTED PARTY

RULING

1. The parties are before this court pursuant to a Certificate of Urgency and Notice of Motion filed on 2nd October 2024, in respect of which the court gave directions on 3rd October 2024. The directions included directions/orders requiring service on the respondents, filing of further pleadings, and an order requiring the respondents to extend public hearings into and at Constituency Level.
2. Most orders/directions have been complied with and where there has been non compliance the directions given in this Ruling and directions shall apply and be in effect.
3. Presently on record and filed by parties are the following pleadings:
 - a) For the Petitioner:
 1. Petition dated 2nd October 2024.
 2. Notice of Motion under Certificate dated 2nd October 2024.
 3. Notice of Motion dated 9th October 2024 under Certificate seeking inter alia:
 - i. Conservatory orders to stay any further proceedings by the Senate and Speaker of the Senate.
 - ii. Summons for contempt of court addressed to the Speaker National Assembly and the Clerk of the National Assembly.
 4. Amended Petition dated 9th October 2024 which seeks to appraise the Petition to reflect the intervening circumstances and events since the time the courts orders were issued on 3.10.2024.
 - b) For the 1st Respondent (National Assembly):
 - 1) Grounds of opposition dated 9th October 2024.
 - 2) Replying Affidavit of the Clerk of the National Assembly dated 10.10.2024.
 - 3) A Preliminary Objection to the Amended Petition on grounds that it was filed without the courts leave and seeking a formal application.
 - 4) An application for consolidation filed 11.10.2024 on grounds, inter alia, that there are eleven (11) other petitions concerning the removal by impeachment of the Deputy President.



- c) The 2nd & 4th Respondents have filed:
 - 1) Grounds of opposition dated 4th October 2024.
 - 2) On receipt of Amended Petition, they have not filed any response to the Petition or Amended Petition and seek time to do so.
- d) For the 3rd Respondent:
 - 1) They are in the process of coming on record as the Speaker of the National Assembly was not served and only appears because, according to counsel, he was served with a summons concerning contempt. They seek to be served with all documents in the petition.

On consolidation and Empanelment of a High Court Bench:

- 4. The court having noted that the Petitioner had, in paragraph (j) of their Notice of Motion sought an order that Her Ladyship the Chief Justice be pleased to empanel a bench to determine the Petition, asked parties to submit thereon.
- 5. Mr. Ndegwa and Mr. Sakimpa for Petitioner seek that consolidation be done only after this court, which issued orders an additional public participation, has interrogated the level and effectiveness of compliance with the said orders on public participation.
- 6. All the other parties are in agreement that the file be consolidated and a panel of judges be appointed by the Chief Justice, This makes sense given that there are multiple suits dealing with the issue of impeachment of the Deputy President; that this would aid coherence in the High Court’s decision on the wide range of issues arising as to the processes, procedures and law thereon; that the question of impeachment of a Deputy President is a novel matter in our law as it has never been tried before; that it is a matter of great national and public importance; and that consolidation and empanelment of a bench would save judicial time and resources.
- 7. The question therefore is whether consolidation should be done after this court has interrogated the compliance with the order or additional public hearings at constituency level.
- 8. Mr. Nyamodi, pointed out that as far as the National Assembly was concerned, it had filed a Replying Affidavit with annexures, all consisting of 1,274 pages. According to him, the issue of compliance with the courts order on additional public hearings at constituency level was exhaustively dealt with.
- 9. This court’s orders of 3rd October 2024, are clear and explicit. There is nothing to prevent this specific court, or a panel of judges of the High Court empanelled by the Hon. Chief Justice from appreciating the orders and determining whether or not they were complied with.
- 10. Further given the urgency and great public importance attached to these proceedings, delaying consolidation to enable the writing of a considered determination would not achieve the broader arms of administration of justice. It is clear that the procedure and process of impeachment and the level and nature of public participation will in any event be one of the issues to be determined by the empanelled bench.
- 11. In the circumstances, the question of public participation being a broad question that is likely to be a golden thread running through the suits on impeachment, the issue of compliance therewith can be conveniently dealt with by the bench.



The Amended Petition

12. The other issue which reared its head was the question of the status of the Amended Petition.
13. The Petitioner sought leave orally to have the Amended Petition deemed as regularly filed. The Petitioner asserts that the object of amending the Petition was to appraise the court on the intervening matters since the filing of the original petition. Counsel adds that no prejudice will be suffered by the Respondents.
14. The Petitioner further submitted that Rule 18 of the Mutunga Rules indicates that an amendment may be made with leave of the court; that does not indicate whether leave can be sought orally or only formally, that the gist of the Mutunga Rules tends to favour avoidance of technicalities and instead the promotion of party's rights, access to justice and informality, if necessary. Counsel indicated that Rules 2, 23 and 24 favour such an informal approach, noting that leave is discretionary.
15. The 1st Respondent seeks that a formal application for leave to amend be made. He pointed out that the Amended Petition is substantially different in scope and terrain covered. He pointed out differences such as:

Prayer b and c in the Amended Petition are entirely new prayers.

Prayer (d) (e) and (f) of the Amended Petition are deletions of original prayers (b) (c) and (d) which were the operative reliefs in the petition.

Prayer (g) in the amended petition is entirely new.

Counsel argues that he has not taken instructions on these new matters, and that a formal application would best be filed.

16. The Applicant responded that the 1st Respondent had already filed Preliminary Objection which could be taken as his response to the Amended Petition.
17. Ms. Opola for the 2nd and 4th Respondent submitted that the amendment was an ambush, and as a result their clients would be greatly prejudiced.
18. Rule 18 of the Mutunga Rules (Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules) provide:

“A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the court”.
19. This rule postulates that an amendment is not a merely spontaneous act. The court must of necessity examine the factors in each case to ascertain whether the principles of amendment have been adhered to,
20. In the case of *Social Accountability & Anor v Parliament & 3 Ors* 2014 eKLR a three Judge bench stated as follows on amendment of pleadings:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the Court more effective in determining the substantive merits of the case rather than holding it captive to the form of the action or proceedings.....



The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to amend a multiplicity of suits provided there has been no undue delay [and] no new or inconsistent cause of action is introduced; and no vested or accrued legal rights is affected and that the amendment can be allowed without an injustice to the other side”.

21. In the present case, the applicant has acted without delay; indeed, the applicant filed and served the Amended Petition. The explanation given was that there is great urgency on the proceedings that matter raised issues of great national importance; and that the impeachment process has moved at a fast pace resulting into changes in the facts on the ground and the nature of prayers sought.
22. I adopt the dicta in the case of the Institute of Social Accountability. It fits squarely into the circumstances of this case. The Mutunga rules give the over-arching guidance that amendments can be made at any stage of the proceedings with leave of the court.
23. The 2nd & 4th Respondents complained that they would be prejudiced as the amendment would, in effect, amount to an ambush.
24. I think the court can remedy any possible prejudice to the respondents by allowing them to file amended responses to the Petition at this stage, rather than delaying the hearing as to amendment until a formal application is made.
25. Accordingly, I am inclined to allow the Amended Petition to be deemed to have been properly filed with leave, which is hereby granted. Consequently, to obviate any prejudice to the respondents, they too shall be granted leave to file Amended responses to the Amended Petition by noon, on 17th October, 2024.
26. To revert to the question of empanelment by the Chief Justice, there was no opposition by the parties. The only issue is whether the matters to be determined invoice the threshold under Article 165 (4) of *the Constitution* the provision is as follows:

“ Any matter certified by this court as raising a substantial question by law under clause (3) (b) or (d) shall be heard by an uneven numbers of judges being not less than three, assigned by the Chief Justice”.
27. On my motion I had perused the file and considered that:the matters being considered on impeachment of the Deputy President of the Republic of Kenya are novel; thatthere exists no statutory or subsidiary legislative framework for impeachment of the Deputy President, and thatthere exists no statutory framework for public hearings and public participation in respect of impeachment of a Deputy President under Article 145 of *the Constitution*, andthat there have been several bills on Public Participation and also on the question Impeachment in Parliament but that such bills have never been passedthat the law on these questions has not been settled.
28. I have had the benefit of reading the ruling of Mugambi J in Petition No. E522 of 2024 delivered today, 11.1.0.2024 in the case of Rigathi Gachagua v The Speaker of the National Assembly, the Speaker of the Senate and The Senate of Kenya. There, parties in Petition Nos E522, E509, E537 E528, E524 and E506 all of 2024 appeared before him for directions. He determined that he should refer them all to the Chief Justice for empanelment of a bench,
29. I would make a similar direction in the present case with the following addition.



30. Petition E013/2024 also came for direction before me. The parties are Thomas Kimotho Maingi v The Deputy President of Kenya, the Hon. AG, The National Assembly the Senate and the Speaker of the Senate. One of the key prayers sought is the stay of Impeachment proceedings against the Deputy President. This petition should also be consolidated and heard by the empanelled judges.

Conclusion & Determination and Directions

31. Petition No. E014 and Petition No. E013 are hereby consolidated. Directions as to which is the lead file to be given by the court that will hear the Petitions.

32. The Petitions are certified as raising weighty constitutional and national issues in terms of Article 165 (3) (b) (d) and 165 (4) and are hereby referred to the Chief Justice for empanelment of a bench.

33. The Amended Petition is allowed as duly filed with no right to further amendment.

34. Directions are issued as follows with respect to pleadings.

1. The Petitioner in Petition E014/2024 to serve their Amended Petition on all parties.
2. Similarly the Petitioner in Petition E013/2024 to serve their Petition on all parties.
3. Respondents to the Petitions to file their responses by Noon on 17th October 2024.
4. Given that the files are being routed to the Hon. Chief Justice forthwith, the Parties' response to the Amended Petition and Petition E013/2024 may be filed in Kerugoya or under the Kerugoya Case Tracking System online, where upon they shall be forwarded to Nairobi.

35. Orders accordingly.

DATED AT KERUGOYA THIS 11TH DAY OF OCTOBER 2024

R. MWONGO

JUDGE

DELIVERED IN THE PRESENCE OF:

1. Sakimpa - for Petitioner
2. Nyamodi - with Kipkogei & Moli - for 1st Respondent
3. Kuyioni - for 3rd Respondent
4. Opola - for 2nd & 4th Respondent
5. Kimotho - for Petitioner in Petition E013/2024
6. Murage - Court Assistant

