



**Kingi v Independent Electoral & Boundaries Commission & another (Constitutional
Petition E038 of 2022) [2023] KEHC 1723 (KLR) (6 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1723 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E038 OF 2022**

OA SEWE, J

MARCH 6, 2023

**IN THE MATTER OF ARTICLES 20, 21, 22 AND 23 OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
ARTICLES 1(2), 2(4), 10, 35, 38, 47, 88(5), 165 AND 180 OF
THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTIONS 17, 38 AND 55B OF THE
ELECTIONS ACT, NO. 24 OF 2011**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF THE GUBERNATORIAL ELECTIONS FOR
MOMBASA COUNTY GOVERNMENT**

BETWEEN

WILLIAM KAZUNGU KINGI PETITIONER

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
RESPONDENT**



RULING

- (1) The notice of motion dated February 6, 2023 was brought by the Kenya National Commission on Human Rights, the proposed interested party. It seeks orders that the applicant be admitted to the instant proceedings as *amicus curiae*; and that upon such admission, directions be made as to the filing and service of the applicant's brief, including any information and/or evidence it may deem important and relevant to facilitate the just disposition of this matter. The applicant also prayed that the costs of the application be in the cause.
- (2) The application was filed pursuant to articles 159(2)(d) and 20(3) of the Constitution, Rules 3(1) to 3(5), 3(6)9(a) and (b), 3(7) and 8, 4(2)(iii), 5(d), 6(a) and (b) of the Protection of Rights and Fundamental Freedoms (Practice and Procedure) Rules, 2013 (the Mutunga Rules). It was premised on the grounds that the applicant is a constitutional commission established under article 59(1) of the Constitution and operationalized under the Kenya National Commission on Human Rights Act, No. 11 of 2011; and that its chief mandate is to promote respect for human rights and develop a culture of human rights in the Republic. It further averred that it is empowered under article 249(1) to protect the sovereignty of the people and secure observance by all state organs of democratic values and principles and promote constitutionalism.
3. The applicant further averred that it has considerable expertise in constitutional and international human rights law and its connection to election-related issues; and therefore would be of assistance to the court as *amicus curiae* in the interpretation and application of the relevant constitutional principles, international law and foreign comparative law within the context of electoral processes, and in particular matters to do with postponement of elections. Within the context of this suit, the applicant proposed the following key questions for consideration, among others:
 - (a) When is it democratic to postpone an election; and is there a strong and democratic case for a time-limited postponement of elections?
 - (b) Does postponement of elections violate the political rights of the affected parties?
 - (c) Does the Kenyan electoral law provide for postponement of elections; and under what circumstances?
 - (d) Is section 55B of the Elections Act unconstitutional?
 - (e) What is the comparative position regionally and internationally on postponement of elections and its ramifications?
- (4) The application was supported by the affidavit sworn on February 6, 2023 by Secretary/CEO of the Commission, Dr Bernard Mogesa. At paragraphs 7 to 12 of his affidavit, Dr Mogesa explained that the applicant has over the years monitored elections and other democratic processes within the country and has, as a result, gained enormous wealth of expertise and experience in election matters. It has also participated in election-related petitions and published reports in that regard. Dr Mogesa further deposed that the instant petition involves matters of public interest and it would only be in the interest of justice that the applicant be admitted as a party to the suit.
- (5) Needless to say that the court has the power, by dint of rule 6 of the Mutunga Rules, to allow any person with expertise in respect a particular issue which is before the court to appear as a friend of the



court. Accordingly, in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2015] eKLR, the Supreme Court discussed at length the considerations that come into play when such an application is made. Thus, at paragraphs 41 and 42 of its Judgment, the Supreme Court set out the following guidelines which bear repeating for the interest of the parties:

- “(42) From our perceptions in the instant matter, we would set out certain guidelines in relation to the role of amicus curiae:
- i. An amicus brief should be limited to legal arguments.
 - ii. The relationship between amicus curiae, the principal parties and the principal arguments in an appeal, and the direction of amicus intervention, ought to be governed by the principle of neutrality, and fidelity to the law.
 - iii. An amicus brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tends to compromise their essence as well as the terms of the Constitution’s call for resolution of disputes without undue delay. The court may therefore, and on a case by case basis, reject amicus briefs that do not comply with this principle.
 - iv. An amicus brief should address point(s) of law not already addressed by the parties to the suit or by other amici, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.
 - v. The court may call upon the Attorney General to appear as amicus curiae in a case involving issues of great public interest. In such instances, admission of the Attorney General is not defeated solely by the subsistence of a State interest, in a matter of public interest.
 - vi. Where, in adversarial proceedings, parties allege that a proposed amicus curiae is biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appears to be partisan on an issue before the court, the court will consider such an objection by allowing the respective parties to be heard on the issue (see: *Raila Odinga & Others v IEBC & Others*; SC Petition No 5 of 2013-Katiba Institute’s application to appear as amicus).
 - vii. An *amicus curiae* is not entitled to costs in litigation. In instances where the court requests the appearance of any person or expert as amicus, the legal expenses may be borne by the Judiciary.
 - viii. The court will regulate the extent of amicus participation in proceedings, to forestall the degeneration of amicus role to partisan role.
 - ix. In appropriate cases and at its discretion, the court may assign questions for amicus research and presentation.



- x. An amicus curiae shall not participate in interlocutory applications, unless called upon by the court to address specific issues.

(42) In addition, we would adopt, with respect, certain guidelines which emerge from Mr Justice Odunga’s decision in the Justice Tunoi case (op.cit.):

- xi. The applicant ought to raise any perception of bias or partisanship, by documents filed, or by his submissions.
- xii. The applicant ought to be neutral in the dispute, where the dispute is adversarial in nature.
- xiii. The applicant ought to show that the submissions intended to be advanced will give such assistance to the court as would otherwise not have been available. The applicant ought to draw the attention of the court to relevant matters of law or fact which would otherwise not have been taken into account. Therefore, the applicant ought to show that there is no intention of repeating arguments already made by the parties. And such new matter as the applicant seeks to advance, must be based on the data already laid before the court, and not fresh evidence.
- xiv. The applicant ought to show expertise in the field relevant to the matter in dispute, and in this regard, general expertise in law does not suffice.
- xv. Whereas consent of the parties, to proposed amicus role, is a factor to be taken into consideration, it is not the determining factor.”

(6) It is also pertinent to mention that, at paragraph [43] the Supreme Court added that:

“In addition to these guiding principles, the following directions may be applied by a court considering an amicus application:

- i. A party seeking to appear in any proceedings as amicus curiae should prepare an amicus brief, detailing the points of law set to be canvassed during oral presentation. This brief should accompany the motion seeking leave to be enjoined in the proceedings as amicus.
- ii. The court may exercise its inherent power to call upon a person to appear in any proceedings as *amicus curiae*.

(7) In this instance, the application was unopposed by both Mr Ndege for the 1st respondent and Mr Mohamed for the petitioner; and although no brief was attached to the application, sufficient detail has been set out in the grounds set out on the face of the application and the supporting affidavit to enable the court appreciate the nature and extent of participation intended by the applicant as well as the wealth of its experience and expertise in election matters. I am therefore satisfied that the application is meritorious. The same is hereby allowed and orders granted as follows:

- (a) That the applicant be admitted to the instant proceedings as *amicus curiae*;



(b) That the applicant's brief, including any information and/or evidence it may deem important and relevant to facilitate the just disposition of this matter, be filed within 7 days from the date hereof.

(c) That there be no order as to costs.

8 It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 6TH DAY OF MARCH
2023**

OLGA SEWE

JUDGE

