



**Kering v Torome & 5 others; Registrar of Political Parties (Proposed Interested Party)  
(Election Appeal E002 of 2023) [2023] KEHC 18318 (KLR) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18318 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
ELECTION APPEAL E002 OF 2023**

**F GIKONYO, J  
JUNE 2, 2023**

**BETWEEN**

**ALICE CHEPKIRUI KERING ..... APPELLANT**

**AND**

**JOSPHINE SENEYIO TOROME ..... 1<sup>ST</sup> RESPONDENT**

**IEBC ..... 2<sup>ND</sup> RESPONDENT**

**JUBILEE PARTY ..... 3<sup>RD</sup> RESPONDENT**

**COUNTY ASSEMBLY, NAROK ..... 4<sup>TH</sup> RESPONDENT**

**SPEAKER, NAROK COUNTY ASSEMBLY ..... 5<sup>TH</sup> RESPONDENT**

**ODM PARTY ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**REGISTRAR OF POLITICAL PARTIES ..... PROPOSED INTERESTED PARTY**

**RULING**

1. The essence of the application dated 14<sup>th</sup> April, 2023 is joinder of the Registrar of Political Parties as an interested party and compulsion to adduce evidence on the membership of the appellant in the Jubilee Party in the appeal.
2. The application is expressed to be brought under article 159(2)(d) of the *Constitution*, section 80 of the *Elections Act*, rules 18 & 19 of the *Practice Directions to Standardize Practice and Procedure in the High Court*, rule 35 of the *Elections (Parliamentary and County Petitions) Rules* and all other enabling provisions of the law.



- 3 The application is premised upon grounds set out in the application, the appellant's supporting affidavit, supplementary affidavit and submissions filed herein.
- 4 The major reason for applying is that the proposed interested party is inter alia the custodian of the register of members of political parties in Kenya, and therefore, the only person who can state with finality the membership of the appellant in Jubilee Party as at 25<sup>th</sup> June, 2022- an issue, according to her, that was introduced through a replying affidavit filed with the submissions by the 1<sup>st</sup> respondent in the trial and which issue was picked by the trial court in its judgment at page 61 of the judgment.
- 5 According to the appellant, the application for joinder is not a quest for additional evidence, but one aimed at helping the court determine the issues at hand effectually and completely.
- 6 In addition, the appellant stated that the application for joinder has not been made by the proposed interested party, but by the appellant, hence, there is no necessity of proving the proposed party's personal and identifiable interest in the matter other than to help the court reach a just and fair decision in this appeal.

### 1st respondent's view

- 7 According to the 1<sup>st</sup> respondent, the question of the appellant's membership in the Jubilee Party was in controversy in the petition and was determined by the trial court. Yet, the appellant did not see the need of joining the proposed interested party in the primary proceedings. The 1<sup>st</sup> respondent has accused the appellant of attempting to re-litigate her case in the appeal in the guise of joinder of the Registrar for Political Parties in this appeal. According to her, this application is a quest for additional evidence.
- 8 The 1<sup>st</sup> respondent also argued that they did not seek any order against the proposed interested party, and none has been sought in the appeal.
- 9 The 1<sup>st</sup> respondent took the view that the proposed interested party has no stake or interest in these proceedings. The proposed interested party will also not be affected by any order that could conceivably be made in this appeal. She is sure any joinder of the proposed interested party will be in vain.
- 10 The 1<sup>st</sup> respondent was clear that the application is not by the proposed interested party but by the appellant. In her opinion, the proposed interested party is intended to make up the shortfalls in, and advance the cause of the appellant to the detriment of the 1<sup>st</sup> respondent.
- 11 The 1<sup>st</sup> respondent urged that the course being proposed by this application for joinder will involve evaluation of new facts and evidence which is in violate section 75 (4) of the [Elections Act](#) which limits appeal to the High Court to matters of law only.
- 12 In the circumstances, the 1<sup>st</sup> respondent posits that the application for joinder and additional evidence does not meet the threshold of law stated in the case of Muruatetu and Mohamed Ahmed, respectively. They also argued that the proposed party is not a necessary party as has been argued by the appellant. They cited Nambuye, J (as she then was) in [Joseph Njau Kingori v Robert Maina Chege & 3 others](#) [2002] eKLR where it was held that:

“...parties cannot be added so as to introduce quite a new cause of action or to alter the nature of the suit. Necessary parties who ought to have been joined are parties who are necessary to the [Constitution](#) of the suit without whom no decree at all can be passed. Therefore, in case of a defendant two conditions must be met:

- (1) There must be a right to some relief against him in respect of the matter involved in the suit.



- (2) His presence should be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit being one without whom no decree can be made effectively and one whose presence is necessary for complete and final decision on the questions involved in the proceedings. A proper party is one who has a designed subsisting direct and substantive interest in the issues arising in the litigation which interest will be recognizable in the Court of law being an interest, which the Court will enforce. A person who is only indicated or commercially interested in the proceedings is not entitled to be added as a party.

## **Analysis and Determination**

### **Amusing but venial error-use of ‘enjoin’**

- 13 Parties herein have used the words ‘enjoin’ or ‘joinder’ or ‘enjoinment’ when they intend or mean ‘join’ or ‘joinder’ of parties in a suit.
- 14 The word ‘enjoin’ means: -
- a. To legally prohibit; or restrain by injunction;
  - b. To prescribe, mandate, or strongly encourage (*Black’s Law Dictionary*, Tenth Edition, Ed. Bryan A. Garner).
- 15 The word ‘join’ or ‘joinder’ refers to: -
- The uniting of parties or claims in a single lawsuit (*Black’s Law Dictionary*, *ibid*).
- 16 Accordingly, the use of the terms ‘enjoin’ or ‘joinder’ or ‘enjoinment’ in reference to the uniting of parties in a lawsuit is not appropriate. Even if you stretch the second meaning of the term ‘enjoin’- to prescribe, mandate, or strongly encourage- I do not think it will mean the uniting of parties in a lawsuit. I admit the use of ‘enjoin’ to mean the uniting of parties in a lawsuit is common in Kenya. But, I doubt such words which have clear and distinct meaning in law may be synonymous or a ‘borrowing’ or ‘doublets’ of the other with meanings widely diverge or a proper derivative of words. It may perhaps be amusing but venial error- which may be avoided by using ‘join’ or ‘joinder’ in reference to the uniting of parties in a lawsuit. It is not strange that a person who understands ‘enjoin’ to mean ‘prohibit or restrain by injunction’ may assign a request an altogether different meaning than the one intended. Of course, in unfortunate situations, remedy may be elusive on account of use of wrong words. Let me go back to the main.

### **Nature of application**

- 17 The appellant has stated that her application is purely one for joinder rather than for additional evidence. The 1<sup>st</sup> respondent believes that the application is disguised as joinder of parties, yet it is intended to introduce additional evidence to the detriment of the 1<sup>st</sup> respondent.
- 18 Notably, the applicant seeks, inter alia, joinder of the Registrar of Political Parties, and upon such joinder, the Registrar of Political Parties to be ordered to confirm the membership of the appellant as on 25<sup>th</sup> June 2022. In the submissions the appellant calls the confirmation- a clarification of membership. By whatever name called, the court only wonders whether the confirmation or clarification of the appellant’s membership in Jubilee Party by the Registrar of Political Parties- the proposed interested



party- is evidence. It is therefore, futile to try and make a distinction of the application for joinder herein from adduction of additional evidence.

- 19 Therefore, the application is a twinning of joinder of parties and adduction of additional evidence. It must therefore, meet the threshold for joinder of an interested party as well as for adduction of additional evidence in the appeal.

### **Joinder of interested party**

- 20 In the case of *Communications Commission of Kenya and 4 others v Royal Media Services and 7 others* [2014] eKLR the Supreme Court of Kenya held that:

“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 (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...”

- 21 The appellant has argued that the test of the interested party having a stake in the proceedings is inapplicable because the application has not been made by the proposed interested party but by the appellant. She proposes that the court should consider that the presence of the proposed interested party is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in this appeal. They cited Order 1 rule 10(2) of the *Civil Procedure Rules* which provides that: -

“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 to effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

- 22 The 1<sup>st</sup> respondent was of the firm view that the proposed interested party has no legitimate interest or stake in the matter other than to champion the cause of the appellant to the detriment of the 1<sup>st</sup> respondent. According to her, such party is not impartial and should not join these proceedings.

- 23 The court notes that the appellant has placed quite preponderant weight on the argument that the Registrar of Political Parties is a necessary party. Of necessary parties, the general rule in the impleading of parties requires, the joinder of all necessary parties where possible. The test here was enunciated by Nambuye, J (as she then was) in *Joseph Njau Kingori v Robert Maina Chege & 3 others* [2002] eKLR where it was held that:

“...Necessary parties who ought to have been joined are parties who are necessary to the *Constitution* of the suit without whom no decree at all can be passed. Therefore, in case of a defendant two conditions must be met:

- (1) There must be a right to some relief against him in respect of the matter involved in the suit.



- (2) His presence should be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit being one without whom no decree can be made effectively and one whose presence is necessary for complete and final decision on the questions involved in the proceedings. A proper party is one who has a designed subsisting direct and substantive interest in the issues arising in the litigation which interest will be recognizable in the Court of law being an interest, which the Court will enforce. A person who is only indicated or commercially interested in the proceedings is not entitled to be added as a party.

24 See also *Dziwe Pala Zuma & another v IEBC & 2 others* [2023] KLR that: -

Necessary parties are those whose interests in the subject matter of the controversy are separable, and whose absence would not prevent the granting of the proper relief to the parties actually joined; but who should be made parties, if their joinder is feasible, to avoid a multiplicity of actions and to effect a complete adjudication of the controversy. In many jurisdictions, the failure to join a necessary party to an action is a directory omission.

25 There is no case against the Registrar of Political Parties. There is no right to some relief against the Registrar of Political Parties in respect of the matter involved in the primary suit and appeal. There is no order which could possibly issue against the Registrar of Political Parties. And, the Registrar of Political Parties is not such party without whom no decree can be made effectively, and one whose presence is necessary for complete and final decision on the questions involved in the proceedings. The Registrar of Political Parties is therefore not a necessary party in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the appeal.

#### **Of additional evidence**

26 Given the arguments coming through, some of the important considerations in this application for additional evidence include;

- i) whether a party would reasonably have been aware of and procured the further evidence in the course of trial in order to ensure fairness and due process;
- ii) the further evidence is not intended to fill-up some gaps or omissions or lacunae in evidence or patch-up the case or the weak points in the case of the party seeking to adduce further evidence;
- iii) proportionality and prejudice to the parties in allowing or refusing adduction of further evidence. See *Mohamed Abdi Mahamud v Ahmed Abdullabi Mohamed & 3 others* [2018] eKLR.

27 The explanation given by the appellant to exempt the proposed interested party from the test of personal and identifiable stake in the proceedings signifies some sort of dilemma the application for joinder of the interested party in the appeal creates. The court strongly feels the dilemma could have been avoided if the evidence by the proposed interested party was filed and adduced before the trial court. The proposed interested party or the office thereof, could easily have become a witness in the suit rather than a party. The intended further evidence was also readily available during the trial and could easily have been obtained without much struggle. The records of the Registrar being public document, certified extracts thereof would have been produced in the trial through the affidavit of the appellant.

28 Alternatively, if it became absolutely necessary and circumstances permitted, the appellant could have asked the trial court to invoke section 80 of the *Elections Act* to inter alia: -



- a) summon and swear in witnesses...in the exercise of its civil jurisdiction...;
  - b) compel the attendance of any person as a witness who appears to the court to have been concerned in the election or in the circumstances of the vacancy or alleged vacancy;
  - c) examine a witness who is compelled to attend or any other person who has not been called as a witness in court, and examined by a party to the petition and after examination the witness may be cross examined by or on behalf of the petitioner and respondent or either of them; and
  - d) decide all matters that come before it without undue regard to technicalities
29. And if necessary the coercive power of the court was available under section 80(2) of the [Election Act](#) that: -

A person who refuses to obey an order to attend court commits the offence of contempt of court.

30. The court is aware and appreciates the functions of the Registrar of Political Parties in section 34 of the [Political Parties Act](#) which inter alia is to;
- i) maintain a register of political parties; and
  - ii) ensure and verify that no person is a member of more than one political party and notify the Commission of its findings. But, in light of the nature of these proceedings an appeal from the decision of an election court and the fact that the evidence being sought as further evidence was available during trial and nothing prevented its adduction at the trial, militates against the order sought.

Similarly, the function stated in section 34 of the [Political Parties Act](#) does not, in itself, make the Registrar a necessary party or place it in the category of *amicus curie* to be joined in the appeal.

31. In the circumstances, the apprehensions by the 1<sup>st</sup> respondent that the proposed interested party is only being introduced to patch-up the case for the appellant to the detriment of the 1<sup>st</sup> respondent, make sense.
32. The court does note also that, the evidence required to be provided relate to the membership of the appellant in Jubilee Party which is, in accordance with the memorandum of appeal, one of issues for determination in this appeal. And, the appellant claims such was a pre-election dispute that ought to have been addressed by the Jubilee Party's internal dispute resolution mechanism and by the Political Parties Disputes Tribunal, and not the trial court.
33. The question of the appellant's membership in the Jubilee Party will be comprehensively argued by the parties and determined by the court in accordance with the law and does not require further input by the Registrar of Political Parties.
34. Proportionality, fairness and justice tilt in favor of rejecting the request for joinder and additional evidence.
27. In the upshot, I find that no basis has been established for joinder of the Registrar or calling for additional evidence in the appeal. The application dated 14<sup>th</sup> April, 2023 is therefore dismissed.
35. In light of the outcome of the application, costs shall abide by the appeal. Orders accordingly.

**DELIVERED THROUGH MICROSOFT TEAMS ONLINE APPLICATION ON 2ND JUNE 2023.**

.....



**F. GIKONYO M.**

**JUDGE**

In the presence of: -

1. Naibei for Ms. Rotich for appellant
2. Kere and Kamwaro for 1<sup>st</sup> respondent
3. Odunga for 2<sup>nd</sup> respondent
4. No appearance for the 3<sup>rd</sup> respondent
5. No appearance for the 4<sup>th</sup> respondent
6. No appearance for the 5<sup>th</sup> respondent
7. No appearance for the 6<sup>th</sup> respondent
8. No appearance for the proposed interested party

