



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 209 OF 2020

HON. CHARITY KALUKI NGILU.....PETITIONER

-VERSUS-

THE COUNTY ASSEMBLY OF KITUI.....1ST RESPONDENT

THE SPEAKER COUNTY ASSEMBLY OF KITUI.....2ND RESPONDENT

THE CLERK COUNTY ASSEMBLY OF KITUI.....3RD RESPONDENT

-AND-

FRANCIS MUINDE KILIKU.....1ST APPLICANT/INTENDED 2ND PETITIONER

ESTHER KASYOKA MUTHUI.....2ND APPLICANT/INTENDED 3RD PETITIONER

JANE MWENDE KIMUYU

KIBATI.....3RD APPLICANT/INTENDED 4TH PETITIONER

JOSEPH KYAVOA.....4TH APPLICANT/INTENDED 5TH PETITIONER

BERNARD MWENDWA

MUASYA.....5TH APPLICANT/INTENDED 6TH PETITIONER

DAVID MUNYAO.....6TH APPLICANT/INTENDED 7TH PETITIONER

QUEEN MOLI MASILA.....7TH APPLICANT/INTENDED 8TH PETITIONER

GUSTUS JAMES MUTISO.....8TH APPLICANT/INTENDED 9TH PETITIONER

JONES NUNDU.....9TH APPLICANT/INTENDED 10TH PETITIONER

RULING NO. 1

1. This ruling is in respect of two applications dated 3rd July, 2020 and 5th July, 2020 respectively. The applicants in both applications seek to join these proceedings as petitioners. The applicants in the chamber summons application dated 3rd July, 2020 are Francis Muinde Kiliku, Esther Kasyoka Muthui, Jane Mwendu Kimuyu Kibati, Joseph Kyavoa, Bernard Mwenda Munyasya and David Munyao being the respective 2nd to 7th intended petitioners. I will henceforth refer to them as the first set of applicants.

2. The applicants in the chamber summons application dated 5th July, 2020 are Queen Moli Masila, Gustus James Mutiso and Jones Nundu being the 8th, 9th and 10th intended petitioners respectively. They will henceforth be known as the second set of applicants.

3. Each of the two applications is supported by the grounds on its face and an affidavit sworn by one Anyango Bwire an advocate of the High Court.

4. The first set of applicants are said to be persons whose nomination and appointment as members of Kitui County Public Service Board was rejected by the 1st Respondent, the County Assembly of Kitui (“the Assembly”). It is stated that the rejection was arbitral in nature and offended the constitutional and statutory rights of the applicants while denying them fair administrative action, fair hearing and fair treatment. It is averred that the applicants are aggrieved parties with no recourse for the reason that unless otherwise directed by this Court, they cannot be reconsidered for the same positions given that their names have been unfairly and permanently tainted.

5. Based on the above averments, it is urged that the presence of the applicants before this Court is necessary in order to enable the Court to effectually and completely adjudicate upon and settle all questions involved in the suit. Further, that it is in the interest of justice that an order of joinder be granted since failure to grant such an order will greatly prejudice the applicants.

6. The second set of applicants base their case on the grounds that they are registered voters in Kitui County; that they were not involved or consulted prior to the filing of the motion to impeach their Governor; that they were deprived of their sovereign power and democratic will to participate in the impeachment motion; and that the 1st Respondent did not engage in qualitative and quantitative public participation. It is therefore their case that their presence before this Court is necessary in order to enable the Court to effectively adjudicate upon all the issues in the suit. Further, that they will be greatly prejudiced if they are not enjoined in the petition.

7. During the hearing of the applications on 6th July, 2020, the Petitioner (Charity Kaluki Ngilu) who is the Governor of the County of Kitui informed the Court that she was not opposed to both applications. The County Assembly of Kitui (1st Respondent), the Speaker, County Assembly of Kitui (2nd Respondent) and the Clerk, the County Assembly of Kitui (3rd Respondent) strongly opposed the applications.

8. The respondents’ case is that the applicants have failed to meet the threshold for joinder in the matter. The respondents assert that all the nine applicants have not established an identifiable stake in the petition and whatever constitutional rights and fundamental freedoms they seek to protect have already been protected by the Petitioner through her petition.

9. The addition, joinder, substitution and striking out of parties in constitutional petitions is governed by Rule 5 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which provides that:-

“The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—

(a) Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties.

(b) A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.

(c) Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.

(d) 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 just—

(i) order that the name of any party improperly joined, be struck out; and

(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

(e) Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents.”

10. It is therefore apparent that an applicant should satisfy the court that the omission was by mistake, that the joinder is necessary for the determination of the matter in dispute and that such joinder will enable the court adjudicate upon and settle the matter.

11. In my view, the principles which guide the court in the consideration of an application for joinder of an interested party are also applicable to an application for joinder of a party either as a petitioner or a respondent. Those principles have been stated in several case. A party who seeks to join a case must demonstrate the existence of those conditions in his or her case. Those principles were stated in **Meme v Republic [2004] 1 KLR 637** as follows:-

“(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.”

12. In **Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2014] eKLR** the Supreme Court confirmed the principles of joinder of an interested party by stating that:-

“Consequently, 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.”

13. The applicants’ counsel in urging the Court to allow the application stated that doing so would avoid a multiplicity of suits and save unnecessary costs for the parties. The argument does indeed highlight one of the reasons for joinder. In **Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR**, it was stated thus:-

“It must be emphasized that, among others, the purpose of joinder of parties is to avoid multiplicity of suits. It is a mandate of the court that as far as possible all matters in controversy between the parties should be completely and finally determined and all multiplicities of legal proceedings concerning any of the matters be avoided.”

14. Turning to the averments of the applicants, I note that the first set of applicants claim that their interest in the petition is that their nominations to the Kitui County Public Service Board were rejected by the Assembly. The grounds and the affidavit in support of the application discloses no nexus between the proposed impeachment of the Governor and the rejection of their nomination by the Assembly.

15. During the hearing of the applications for joinder, the Court was informed that one of the grounds in support of the motion for the impeachment of the Governor relates to the rejection of the nomination of the applicants. If that is the case, then the applicants should have sworn affidavits in support of the Governor’s petition instead of seeking to be petitioners. Otherwise the impression one gets is that they want to introduce a new petition altogether in respect of the rejection of their nomination by the Assembly. That is unacceptable.

16. In **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 3 others [2017] eKLR** one of the reasons for rejecting an application for joinder was that the applicant intended to introduce new facts and new issues. In reaching that finding, the Supreme Court stated thus:-

“We note, in the instant matter, that the applicant seeks joinder, even as his application introduces *new parties* to a cause already resting before the Court; and he, at the same time, excludes some of the current parties. The applicant, in essence, is introducing new facts and issues that were not before the Court. It follows that he is not in a position to advance any submissions that will be helpful to the Court, as it resolves the main question in hand. He is, in effect, introducing a *new petition*, and pre-empting the duly-lodged cause of the parties in the main proceedings. This cannot be allowed. Moreover, we are also not convinced that the applicant would suffer any prejudice, if his intervention is denied. Accordingly, we dismiss this application.”

17. The first set of applicants have therefore completely failed to demonstrate how the impeachment of the Governor of Kitui County affects their constitutional rights and fundamental freedoms. They have not shown how the outcome of the petition will affect them. In short they have no identifiable stake in the matter and no pain will be occasioned to them whichever way the petition is decided.

18. As for the second set of applicants, their claim is that they are registered voters and since they put the Governor in office they ought to be involved in her removal. The respondents have, however, correctly submitted that these applicants have not placed anything before the Court to support the averment that they are indeed registered voters. That aside, it is observed that the applicants are not more special than any of the thousands of voters who elected the Governor. Their claim that they want to defend the constitutional right to public participation does not make them more important than the other voters.

19. The Governor has clearly articulated the issue of public participation in her petition and the three applicants are not going to bring anything new into the proceedings. In fact they are likely to muddle the issues and delay the determination of the matter. Allowing them to come on board would mean that every registered voter from Kitui County will be entitled to join these proceedings as parties or interested parties. That would not only be messy but also unacceptable. It is therefore my finding that the second set of applicants have equally failed to demonstrate the prejudice they will suffer if they are not enjoined in the proceedings.

20. In summary, the two applications for joinder are without merit. They are dismissed with costs to the respondents.

Dated, signed and delivered through video conferencing/email at Nairobi this 8th day of July, 2020.

W. Korir,

Judge of the High Court