



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.387 OF 2018

IN THE MATTER OF ARTICLES 1; 2; 3; 10; 19; 20; 21; 22; 23; 24; 38; 48; CHAPTER SIX; 88; 159;160; 165; 180; 181 (1) (a) & (2); 193(b); 258; 260 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER CONTRAVENTION OR BREACH OF THE CONSTITUTION OF KENYA 2010 TO WIT, ARTICLES 2, 3, 10(2) (c), 38; Chapter Six; 180 AS READ 198(1) (b);

AND

IN THE MATTER OF THE ELECTIONS AT 2011; SECTION 22 (AS READ WITH REGULATION 47 OF THE ELECTIONS (GENERAL) REGULATIONS 2012; THE ELECTION LAWS (AMENDMEN) ACT 2016; THE ELECTION LAWS (AMENDMENT) ACT 2017; THE POLITICAL PARTIES ACT 201 AND THE ELECTIONS (GENERAL) REGULATIONS 2012;

AND

IN THE MATTER OF THE LEADERSHIP AND INTERGRITY ACT 2012; THE OATHS AND STATUTORY DECLARATIONS ACT; THE COUNTY GOVERNMENTS ACT 2012; THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT 2011; THE ETHICS AND ATNI-CORRUPTION COMMISSION ACT 2011 & THE UNIVERSITIES ACT 2012.

DR. ADEN MUKHTAR BARE.....PETITIONER

AND

ALI BUNOW KORANE.....RESPONDENT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST INTERESTED PARTY

ETHICS AND ANTI CORRUPTION COMMISSION.....2ND INTERESTED PARTY

COMMISSION FOR UNIVERSITY EDUCATION.....3RD INTERESTED PARTY

ABDI DAGANE MUHUMED.....PROPOSED 4TH INTERESTED PARTY

RULING

1. The petition herein dated 7th November 2018 filed against **ALI BUNOW KORANE** as the Respondent seek amongst other prayers for a declaration that the Respondent is fit for removal from office of the County Governor of Garissa County.

2. The proposed 4th Interested party through a Notice of Motion dated 27th May 2019 pursuant to rule 7 and 19 of the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) Practice and Procedural Rules 2013 seeks leave for the proposed interested party herein **ABDI DAGANE MUHUMED** to be enjoined as the 4th Interested party in this matter.

3. The petitioner, 2nd and 3rd interested parties are not opposed to the proposed 4th interested party's application being granted.
4. The 1st Interested party, **IEBC** is opposed to the 4th proposed interested party's application and relies on its grounds of opposition filed on 26th July 2019 raising the following grounds:-
- 1) **The Applicant has not demonstrated his legal interest in these proceedings and is thus not a necessary party in a challenge to the election of the Respondent who only nominated him as his deputy.**
 - 2) **This Petition is specific to the qualification of the Respondent for nomination for the position of Governor, Garissa County in terms of Article 88 (4) (e) of the Constitution and not the nomination of the proposed interested party.**
 - 3) **By dint of Article 180 (5) of the Constitution, the position of Deputy Governor is not a distinctively elective position but is dependent on the election of a Governor.**
 - 4) **Failure to enjoin the Deputy Governor does not invalidate this Petition.**
5. The 4th proposed interested party's application is based on the grounds on the face of the application being inter alia:-
- i) **The applicant is the Deputy Governor of Garissa County.**
 - ii) **The applicant was nominated by the First Respondent as his Deputy Governor during the 2017 General Elections.**
 - iii) **The applicant was consequently declared as the Deputy Governor of Garissa County by the 1st Interested party when Mr. Ali Bonow Korane, the Respondent won the election as Governor of Garissa.**
 - iv) **The applicant has a legal interest in the suit due to the nature of his appointment and his position as Deputy Governor of Garissa County is and will be affected by any negative outcome of this suit.**
 - v) **The Petitioner, the Respondent and the other parties herein do not stand to suffer any prejudice should the orders sought herein be granted.**
6. The application is further supported by the 4th proposed interested party's affidavit sworn on 27th May 2019 which reiterates the grounds in support of the application on the face of the application.
7. At the hearing of the application the applicant through his counsel Mr. Sarene, learned Advocate, relied on the grounds on the face of the application and the contents of the supportive affidavit. He urged the Applicant is a Deputy Governor and has interest in the petition as it seeks to remove the governor and that the outcome of the petition will have effect on the Applicant's position as a deputy governor. He further urged that the Respondent and interested parties shall not be prejudiced if the application is allowed. He further urged the Applicant's presence is necessary as it would enable this court adjudicate sufficiently on the matters in issue. He referred to authorities he was relying on and what the Applicant is required to demonstrate before court for the application to succeed. He urged the application be allowed urging the Applicant has demonstrated he has personal interest, which is identifiable.
8. Mr. C. Kanjama, learned Advocate, for the petitioner referred to a letter to proposed 4th interested party dated 17/6/2019, copied to all parties herein with a copy to Deputy Registrar, herein, indicating that the petitioner shall not be opposing the application. He urged that 4th proposed interested party has demonstrated material interest in these proceedings as the Respondent and the Applicant were on joint ticket of Governor and Deputy Governor in the August 2017 election. That the Applicant will be helpful to the court as the petitioner is challenging the Academic qualification of the Governor to have been elected and to be and remain in the office.
9. Mr. Kirangu Kimani, learned Advocate, for 2nd Respondent left the matter to the court to decide.
10. Miss C. Njagi, learned Advocate, for 1st interested party is opposed to the application and relies on the grounds of opposition filed on 26th July 2019.
11. Mrs. Odipo, learned Advocate, for 2nd interested party is not opposed to the application. Similarly Mr. Gitonga, learned Advocate, for 3rd interested party is not opposed to the application urging no prejudice would be suffered by any party by allowing the application.
12. I have very carefully perused the application, affidavit in support, the grounds of opposition, counsel submissions and written submissions by the Applicant. From the aforesaid, I find that the issue for consideration is one thus:-
- i) **Whether the Applicant has met the threshold for granting an application for joinder as an interested party?**
13. The Article which governs the election of County Governor and Deputy County governor is **Article 180 of the Constitution of Kenya**. Article 180(1) (2) (3) (4) (5) (6) (7) provides:-
- "(1) The county governor shall be directly elected by the voters registered in the county, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year.**

- (2) To be eligible for election as county governor, a person must be eligible for election as a member of the county assembly.
- (3) If only one candidate for county governor is nominated, that candidate shall be declared elected.
- (4) If two or more candidates are nominated, an election shall be held in the county and the candidate who receives the greatest number of votes shall be declared elected.
- (5) Each candidate for election as county governor shall nominate a person who is qualified for nomination for election as county governor as a candidate for deputy governor.
- (6) The Independent Electoral and Boundaries Commission shall not conduct a separate election for the deputy governor but shall declare the candidate nominated by the person who is elected county governor to have been elected as the deputy governor.
- (7) A person shall not hold office—
 - (a) As a county governor for more than two terms; or
 - (b) As a deputy county governor for more than two terms."

14. Further it is provided in respect of vacancy of the office of County Governor under Article 182 (1) and (2) of the Constitution of Kenya as follows:-

"(1) The office of the county governor shall become vacant if the holder of the office—

- (a) Dies;
- (b) Resigns, in writing, addressed to the speaker of the county assembly;
- (c) ceases to be eligible to be elected county governor under Article 180(2);
- (d) Is convicted of an offence punishable by imprisonment for at least twelve months; or
- (e) Is removed from office under this Constitution.

(2) If a vacancy occurs in the office of county governor, the deputy county governor shall assume office as county governor for the remainder of the term of the county governor."

15. The Applicant seeks to be enjoined in this matter as an interested party. The courts have in several cases dealt with applications for joinder of interested parties but before granting such applications the courts have to determine whether the Applicant is an interested party in a matter. So the question for consideration is who is an interested party? In the case of **Trusted Society of Human Rights Alliance vs Muma Matemo & 5 others (2014) eKLR**, the Supreme Court defined an interested party as follows:-

“[18] 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. On the other hand, an amicus is only interested in the Court making a decision of professional integrity. An amicus has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a ‘friend’ of the Court, his cause is to ensure that a legal and legitimate decision is achieved”

16. The law on interested parties has been settled by the apex Court. This was settled in the case of **Francis Kariuki Muruatetu & Another v Republic & 4 Others (2016) eKLR** where the court set out what should be considered before a court admits a proposed Interested Party; it thus observed as follows:

“From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:-

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the

satisfaction of the Court. It must also be clearly outlined and not something remote.

iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

17. From the foregoing, it's quite clear that where a person seeks to be enjoined as an interested party, one must move the court by way of a formal application. The enjoinder is not as of right but is at the discretion of the court. It therefore follows that sufficient grounds must be laid as set out in the cases stated herein above. The personal stake, that a party has in the matter must be set out in the application and the interest must be clearly identifiable and must be proximate enough so as to stand apart from anything that is merely peripheral. In case of non-joinder, the prejudice to be suffered by the intended interested party must be shown to the satisfaction of the court. It must also be clearly outlined and not something remote/far off.

18. In closing the intended/proposed interested party must when making its application set out the case and submissions it intends to present before court. It must show that the submissions are not a mere replication of what the other parties will make before court. It must be noted that whereas the court maintains the discretion to admit third or interested party the overriding interest remains that of the principal parties in the litigation. One cannot therefore join proceedings with the view of either terminating them. This was observed in the case of **Trusted Society of Human Rights Alliance** (supra); where it was stated as follows:-

“[24] A suit in court is a ‘solemn’ process, “owned” solely by the parties. This is the reason why there are laws and rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.”

19. From the above-mentioned authorities the principles which govern joinder of an interested party can be summed up as follows:-

i) Personal interest and/or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough to stand apart from anything that is nearly peripheral.

ii) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.

iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate that these submissions are not merely a replica of what the other parties will be making before the court".

20. Upon considering the grounds on which the Applicant's application is based, the provisions of Article 180(5) and Article 182(1) and (2) and the grounds of opposition as well as the principles which govern joinder of interested parties in a matter, I have no doubt to find and hold that the 4th proposed interested party has demonstrated personal interest and/or stake that he has in this matter as, a deputy Governor, in a matter seeking to remove the governor, taking into account the two were elected on a common ticket during the August 2017 election; that the two are linked in their operation and in case of a vacancy occurring in the office of County governor, the deputy county governor, is required to assume office as county governor for remainder of the term of county governor; and as such I find that the 4th proposed interested party has demonstrated the prejudice to be suffered in case of non-joinder in the application to satisfaction of this court. I find further that the 4th Applicant has finally set out the case he intends to make before court and its relevancy and the same has been shown not to be replica of what the other parties will be making before court.

21. I find that the applicant being the deputy governor of Garissa County, his right will be affected by the outcome of these proceedings; and that by enjoining him as a 4th interested party will enable this court to effectively and completely adjudicate and settle all questions involved in this petition.

22. In the case of **Civicon Limited vs Kivuwatt Limited & 2 others [2015] eKLR** the court while observing that exercise of discretion is called for in applications for joinder stated as follows:-

"Again the power given under the rules is discretionary which discretion must of necessity be exercised judicially. The objective of these rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party and should be enjoined."

23. I further find, that the applicant being a deputy governor of Garissa county, and having been nominated by the governor as a person qualified for nomination for election as County governor as a candidate for deputy governor on single ticket with the respondent has a stake in these proceedings and I find he will be affected by the decision of this court when it is made in this petition. He should therefore be given an opportunity to participate in these proceedings.

24. In the case of **Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohammad & 4 others [2018] eKLR** the court while enjoining the deputy governor as an interested party held:

"That the applicant has direct and legitimate interest in the present petition; he was a running mate of the Appellant in the election for Governor of Wajir County which is the subject of the present petition; he will suffer prejudice if he is not enjoined as a party in the Interested party; he shall advance submissions that are relevant and useful to the petition and

which will be different from those of the other parties that have a direct bearing on the current proceedings and the ultimate outcome; and, that he will be directly affected by the outcome of this petition..."

25. The upshot is that the 4th proposed interested party's application dated 27th May 2019 is meritorious. I find no merit in the 1st interested party's grounds of opposition. The petitioner and other interested parties rightly did not oppose the application. I accordingly make the following orders:-

a) The 4th proposed interested party's application is allowed and the Applicant is enjoined as the 4th interested party in this matter.

b) The 4th interested party do file and serve his response to the petition and pending application within the next 7 days from the date of this ruling.

c) Cost of the application be in the cause.

Dated, signed and delivered at Nairobi this 19th day of September, 2019.

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J .A. MAKAU

JUDGE