



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

CONSTITUTION AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 4 OF 2019

IN THE MATTER OF ARTICLES 22(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND

FREEDOM UNDER ARTICLES 1 (1) (b), 1 (4)(b), 2(1), 3(1), 10, 19, 20, 21 (1), 22, 23,

27, 28, 40, 47, 232(1) (d) (e) and 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF BREACH OF THE RIGHT TO FAIR ADMINISTRATIVE ACTION

AND

IN THE MATTER OF NATIONAL GOVERNMENT CO-ORDINATION ACT, 2013,

AND

IN THE MATTER OF COUNTY GOVERNMENTS0 ACT, 2012

BETWEEN

ISAAC MUGO.....1ST PETITIONER

BERNARD NYAGA.....2ND PETITIONER

EUSTACE MUTURI.....3RD PETITIONER

GEOFFREY K. WAMUGWETWA.....4TH PETITIONER

JAPHET MICHENI NJERU.....5TH PETITIONER

JASPER M. NJERU.....6TH PETITIONER

SILAS MUTEGLI.....7TH PETITIONER

SABASTIAN N. NJOKA.....8TH PETITIONER

JOSEPH MBUBA MIRIBA.....9TH PETITIONER

JUSTUS N. M'NGITUNG'A.....10TH PETITIONER
NATHAN KEA IBURIA.....11TH PETITIONER
ERASTUS K. NKUNE.....12TH PETITIONER
SAMUEL MUTEKI KIUNGO.....13TH PETITIONER
JOSEPH MBUBA.....14TH PETITIONER

VERSUS

DR. FRED OKENGO MATIANG'I,
THE CABINET SECRETARY, MINISTRY OF INTERIOR AND
COORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT
THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

AND

INDEPENDENT ELECTORAL AND BOUNDARY
COMMISSION OF KENYA.....1ST INTERESTED PARTY
LUANO MUGAMBI KIANIA.....2ND INTERESTED PARTY
PATRICK NYAGA.....3RD INTERESTED PARTY
LEXIOUS NJAGI MUNENE.....4TH INTERESTED PARTY
KAMWARA KIJU.....5TH INTERESTED PARTY
MWIKAMBA KARANJA.....6TH INTERESTED PARTY
ANDREW NYAGA.....7TH INTERESTED PARTY
GILBERT MAINGI.....8TH INTERESTED PARTY
EVERINO K. NGUMOKO.....9TH INTERESTED PARTY
CHARLES KIRIMO.....10TH INTERESTED PARTY
MICHENI KATHENYA.....11TH INTERESTED PARTY
MUGO M'ITHARA.....12TH INTERESTED PARTY
NJUKI KAMUMO.....13TH INTERESTED PARTY
GILBERT KAMWARA.....14TH INTERESTED PARTY
BASILINA CIANTHWA.....15TH INTERESTED PARTY
EUSTUS MUNENE.....16TH INTERESTED PARTY
EDIEL MWITI MICHAEL.....17TH INTERESTED PARTY
AUSTIN M NGAINE.....18TH INTERESTED PARTY

RULING

1. Before me is a Notice of Motion dated 23rd July 2019 brought by **RUFUS KUBAI DANIEL** and 7 others (hereinafter to be referred to as the applicants) under **Sections 1A, 1B, and 3A Civil Procedure Act** and **Rules 10(2), (4)** and 14 of **Civil Procedure Rule** and Rule 7, 19 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules and any other enabling provisions of the law). The Applicants are seeking the following reliefs namely;

- i. Spent
- ii. That they be joined as 19th to 26th Interested parties respectively.
- iii. That costs be provided.

2. The grounds are listed as follows:-

i. That the Applicants are bona fide residents of Maara in Tharaka Nithi County and that the County is constituted of 3 main sub-tribes living in Chuka, Tharaka and Maara/Mwimbi.

ii. That the Applicants are elders who occupy portions of land that share ancestral boundaries with other sub tribes and that they have historical knowledge of the issues pertinent in the substantive petition herein.

iii. That some of the Applicants have worked as local administrators i.e Chiefs and some have been involved in boundary related dispute resolutions between the communities.

iv. That the determination of the dispute in this petition cannot be fairly determined in exclusion of any of the sub tribes and that the creation of Igamba Ng'ombe Sub-County and delineation of its boundaries affects the Applicants and their rights.

v. That the Applicants have crucial information that will offer critical value for the expeditious determination and settlement of the dispute and help forestall any possible future dispute.

3. This application is supported by the affidavit of Rufus Kubai Daniel sworn on 23rd July 2019 where he has reiterated that he is an elder and a retired Chief of Kiera Location which he claims border Igamba Ng'ombe Sub- County.

4. He has further deposed that during his tenure as a Chief he was involved in conflict resolutions of boundary disputes between Mutino and Magumoni on either side of Maara and Tharaka. He also states that he is conversant with the boundary demarcations between various regions of the community and has valuable information in that regard.

5. He further depones that the dispute herein is of public nature which requires inclusive and objective approach- which the Applicants feel they can provide. They are on that basis seeking to be enjoined in this matter.

6. The Applicants have termed the opposition of their Application selfish arguing that they have an important input in this petition and that the Respondents are only interested in denying a deserving party from contributing to a matter of great public interest.

7. Albano Mugambi Kiama, the 2nd Interested Party has on behalf of other Interested Parties has opposed this application through a Replying Affidavit sworn on 30th July 2019. He opines that the Applicants have not demonstrated that they have a legitimate interest in this petition or that their joinder would add any value.

8. The 2nd to 18th Interested Party contend that the Applicants are residents of Maara Sub-County and that the petition does not affect Maara Sub-County in any manner.

9. They further contend that the reason that the Applicants are from a neighbouring Sub-County cannot be used as a basis to be enjoined or else all other neighbouring Sub-Counties to Igamba Ng'ombe would equally be entitled to join which would in their view conflate the issues in this petition.

10. The 2nd to 18th Interested Party have faulted the Applicants by not exhibiting the crucial information in their possession and show the relevance of the same in determination of this petition. They further contend that the claim of non-partnership can only be done by an amicus curiae and that the Applicants have not sought to be enjoined in that manner.

11. They further contend that the petition has nothing to do with delineation of tribal boundaries and that the tribal connotations replete in the application in their view confirm that the Applicants are only out to pursue tribal interests without any justifiable legal basis to seek joinder to the petition herein.

12. They submit that under **Order 1 Rule 10(2)** of the **Civil Procedure Rule** a Party must demonstrate their necessity to be enjoined in a

suit and that the Applicants herein have failed in that regard. It is contended that having been involved in boundary related disputes affecting sub tribes of Chuka, Maara and Tharaka has, to them, no relevance to the issues before court arguing that merely being a neighbour does not suffice.

13. They have cited a decision in the case of *Trusted Society of Human Rights Alliance -vs- Mumo Matemu & 5 Others [2013] eKLR* where the court stated that an Interested Party is someone who has stake in the proceedings will be affected by the court's decision and his interests will not be well articulated unless he himself appears in the proceedings.

14. They have further cited the supreme decision in *Francis Muruatetu and another -vs- Republic and 5 Others [2016] eKLR* where the Supreme Court determined that for a party to be enjoined in court proceedings he/she must demonstrate precisely what his/her interests are and show prejudice they would suffered if not included.

15. The 1st and 2nd Respondents have equally opposed this application vide grounds of opposition filed on 31st July 2019. They contend that the application have not met the threshold for grant of orders sought. They have faulted the Applicants for not showing what prejudice they stand to suffer if they are not brought on board stating that their allegations are not supported by any evidence.

16. They further contend that the Applicants have not shown the relevance would they bring to the proceedings pending herein. It is further contended that the expression that creation of new administrative units will cause clashes and disharmony in the area is alarmist and unfounded.

17. In their written submissions the 1st and 2nd Respondents have cited the decisions in *Raila Amolo Odinga -vs- IEBC [2017] eKLR* and *Mumo Matemu case (supra)* to support their contention that the Applicants have not satisfied any of the conditions set in the above two decisions which are:

a) Demonstration of any prejudice the intended Interested Party may suffer if not included.

b) Grounds or facts/evidence they wish to advance.

c) Show or demonstrate the relevance of the grounds/facts or evidence to the proceedings pending and their usefulness in determination of the matter

18. Analysis and Determination

This court has considered this application and the grounds upon which it has been made. I have also considered the responses made. A joinder of a party to civil proceedings pending in court is provided both under **Order 1 Rule 10(1) Civil Procedure Rule** and **Rule 7** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 commonly referred to as Mutunga Rules.

19. Under both the above provisions, a joinder of party or party is a matter of discretion by court. Under the cited civil procedure Rules a court is given discretion to join a party if it finds that the party was inadvertently excluded or it is necessary for the determination of the real matter in dispute. Under the Mutunga Rules the '**Interested Party**' is defined under Rule 2 as;

" a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly in the litigation."

Rule 7 of the said rules provides that a person may with leave of court may oral or written application to be joined as an Interested Party. A court can also on its own motion join any Interested Party to the proceedings before it.

19. The legal provisions above gives this court latitude in determining if and whether a party has a cognizable stake in the proceedings pending before it and therefore should be enjoined. In exercising this discretion a number of guiding principles have been emerged through various court decisions some of which have been cited by the Respondents in this Application. In *Communication Commission of Kenya and 4 Others -vs- Royal Media Services Ltd and 7 Others [2014] eKLR* the Supreme Court made the following observations:-

" In determining whether the Applicant should be admitted into these proceedings as an Interested Party, we are guided by this court's decision in Mumo Matemu case where the court at paragraph 14 & 18) held;

"[An] Interested Party is one who has a stake in the proceedings though he or she was not a 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 herself appears in the proceedings and champions his or her case."

Similarly in the case of *Mewe -vs- Republic [2004] 1 EA 124* the High Court observed that a party could be enjoined in a matter for the reason that;

i. Joinder of a person because his presence will result in the complete settlement of all question involved in the proceedings

ii. Joinder to provide protection for the rights of a party who would otherwise be adversely affected.

iii. Joinder to prevent a likely course of proliferated litigation. We ask ourselves the following questions:-

a) What is the intended party's stake and relevance in the proceedings.

b) Will the intended Interested Party suffer any prejudice if denied joinder?"

20. The petition herein seeks several reliefs mostly aimed at stopping the creation of Igambang'ombe Sub-County which they claim is imposed on the administrative boundaries of Chuka and was done without public participation and therefore unconstitutional.

21. The Applicants herein claim that they are from a neighbouring Sub-County of Maara. They have not stated or demonstrated how the creation of Igambang'ombe will affect them. They have not stated that as residents of Maara they would be adversely or negatively affected by the creation of another Sub-County to be known as Igambangombe. Furthermore though they claim to have valuable information in solving boundary related disputes, they have not exhibited the information they possess so that this court can determine whether the information is really valuable and important in the determination of the dispute pending in Court. The question therefore remains what is this "**critical information**" that the Applicants so confidently claim they possess that they cannot reveal? In applications of this nature as we have seen from the authorities cited above, a party applying to be enjoined in proceedings in court must demonstrate the nature and the relevance of the information it has before its application for joinder can be considered favourably.

22. In this application, the Applicants say they are residents of Maara, and elders for that matter and this court cannot ignore the fact that at times elders can have solutions to conflicts in a given region. However in the just concluded census the total population of Tharaka Nithi is slightly over **393,000** people. Without doubt, all persons of this County may be interested in the happenings of their County. That however does not mean that they can all be enjoined in this petition because each would want to make a contribution. Court proceedings are not a public participation exercise. A party must show that it has an identifiable stake in the proceedings and can add value to the determination of the petition in a way that none of the parties already in the proceedings can. This is the guiding principle in the above cited cases and more specifically in the decision of **Francis Karioko Muruatetu & Another -vs- Republic & 5 Others [2016] eKLR** where the court held as follows:-

"i. The personal interest or stake that a 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 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 other parties will be making before the court."

23. Going by the above guiding principles, the present Applicants in my view have failed to meet the threshold required to be enjoined as interested parties. Apart from failing to show the nature of the information they claim to hold, they have also failed to demonstrate how the determination of this petition will affect them or how they will be prejudiced if they are not enjoined in the proceedings pending before this court. It is not enough to just state that the creation of Igambang'ombe Sub-County will affect socio-economic and political interests of Applicants. The law however requires to show some identifiable stake or legal interest or duty in the petition herein and demonstrate how they will be prejudiced in order to invoke the exercise of this court's discretion.

24. The petitioners had no objection to the applicants being enjoined and in fact told this court through counsel that they are glad that the Applicants are joining them. However determination of a matter in court is not about numbers, it is about the facts and the law. So if the petitioners feel they can make do with additional "**crucial**" information from any of the Applicants or any other witness for that matter nothing prevents them from calling such witnesses or adducing such information as they opine will assist/foster their cause.

25. This court is not persuaded that the Applicants herein have adequately made a case to be enjoined as Interested Parties. The Application dated 23rd July 2019 lacks in merit and is disallowed. Costs in the cause.

Dated, signed and delivered at Chuka this 12th day of November, 2019.

R.K. LIMO

JUDGE

12/11/2019

Ruling signed, dated and delivered in the open court in presence of Otieno for Petitioner, Bundi holding brief for Mbogo for 1st Interested Party Kariuki for 2nd to 19th Interested Party and Kungu for 1st and 2nd Respondents.

R.K. LIMO

JUDGE

12/11/2019