



**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATES COURT**  
**AT NANYUKI**  
**ELECTION PETITION NO. 3 OF 2017**

**BETWEEN**

**DENNIS KANIARU MATHENGE.....PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**WAFULA CHEBUKATI.....2<sup>ND</sup> RESPONDENT**

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

**ZAMZAM SALAMA HUSSEIN.....4<sup>TH</sup> RESPONDENT**

**PETER LEMERIA MATUNGE.....5<sup>TH</sup> RESPONDENT**

**MARY SAMKEN.....6<sup>TH</sup> RESPONDENT**

**CHISTOPHER MARK SAID.....7<sup>TH</sup> RESPONDENT**

**CATHERENE NYOKABI KIBUE.....8<sup>TH</sup> RESPONDENT**

**AND**

**MOHAMED ABDIKADIR SALAH.....INTENDED INTERESTED PARTY**

**RULING**

This petition relates to the nomination of 4<sup>th</sup> -8<sup>th</sup> respondents as members of the Laikipia County assembly. They were nominated to represent the marginalized communities at the Laikipia County assembly. Their nomination is impugned on grounds that they do not represent the marginalised as they are from the Kikuyu community which is adequately represented in the county assembly.

Mohamed Abdikadir salah, the intended interested party and applicant herein is a member of the Jubilee Party being the holder of Jubilee Party Card No. AB 28011745. He had been shortlisted by jubilee party

for nomination to the Laikipia County assembly. His name later appeared on the IEBC list of 30<sup>th</sup> June, 2017 as a representative of the special interest category from Laikipia West Constituency but that it was later substituted. The petitioner is also member of the jubilee party in Laikipia County. He impugns the nomination of members of the Laikipia County assembly on grounds that the party lists published by the 3<sup>rd</sup> respondent at the instance of the 1<sup>st</sup> respondent in gazette Notice no. 8380 dated 28<sup>th</sup> August, 2017, and which were effected by the 3<sup>rd</sup> respondent failed to meet the laid down constitutional and legal threshold on party lists and party nominations.

The applicant/ intended interested party being dissatisfied with the 3<sup>rd</sup> respondent's decision substituting his name on its party's nomination list appeared before the Political Parties Dispute Tribunal where he impugned the interested party's nomination. The tribunal directed the 3<sup>rd</sup> to reconstitute its minority party nomination list and particularly to include the intended interested party/ applicant herein in its party nomination list under the minority category for Laikipia County. The applicant averred that the 3<sup>rd</sup> respondent appealed the Political Parties' Dispute Tribunal's decision to the High Court where the high court overturned the tribunal's decision but agreed with the applicant that had a valid claim whose remedy lay in an election petition. He stated that given an opportunity he will demonstrate to the court that his rights were violated and that he had the 3<sup>rd</sup> respondent's nominees to Laikipia County Assembly were irregularly nominated.

This ruling regards the intended interested party's application dated 3<sup>rd</sup> January, 2018. He seeks to be enjoined as an interested party in this proceedings. The application is supported by the grounds on its face as well as the applicant's affidavit in support of the application. The application is not opposed by the 3<sup>rd</sup> Respondent. The Petitioner, 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents opposed the application by way of grounds of opposition. The 8<sup>th</sup> Respondent filed a replying affidavit in opposition to the application.

The gist of the grounds of opposition is that the application is time barred, an afterthought, bad in law, an attempt by the applicant to be enjoined into the petition, does not disclose the applicants personal stake in the petition, a waste of judicial time, that the applicant is a perennial litigant and that the application undermines the constitutional imperative of timely resolution of election disputes. On her part, the 8<sup>th</sup> respondent in her affidavit in opposition of the application depones that the applicant has not demonstrated his direct and legitimate interest in the petition, she said that this application was filed in 3<sup>rd</sup> January, 2018 and that the applicant has not explained the delay between the time of filing petition and of filing his application. She stated that the applicant is perennial litigant who is only keen on hanging onto any election petition and stated that he had earlier on been enjoined as an interested party in Nanyuki CMC Petition No. 1 of 2017 and that the applicant had filed this application after petition number 1 of 2017 was dismissed. She urged the court to dismiss it.

The application was heard orally in court. The applicant testified that he is a registered member of the Jubilee Party and that his name had been included in the initial party nomination list but was later removed and replaced by Christopher Mark in the minority group. He stated that he had obtained judgement in his favour from the Political parties Dispute tribunal but that the same was appealed by the 3<sup>rd</sup> respondent herein and he lost in the high court. He stated that his application is vital as none of the parties herein will adequately articulate his issues.

The petitioner relied on his grounds of opposition filed on 8<sup>th</sup> January, 2018 and the High Court decision in **Japhet Muroko & Anor vs. IEBC**. He stated that the application is incompetent and bad in law as it raises issue that had been raised by the 3<sup>rd</sup> respondent in their High Court appeal and that allowing the application will delay the hearing and determination of this petition. Relying in the case of **Interested Society of Human Rights Alliance vs. Mumo Matemu & others**, he stated that applications of this nature should have been filed expeditiously and that this application has been filed too late in the day.

On their part, the 1<sup>st</sup> and 2<sup>nd</sup> respondent submitted that the application is an afterthought, misconceived and fatally defective as it seeks to amend the petition both in character and nature. He said that the applicant had lost the appeal in the high court hence had no stake in the nominations. He urged the court

to dismiss this application.

The 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> respondents drew the courts attention to paragraphs 4, 5, 7 and 8 of the petition and submitted that the intended interested party's issues are addressed and urged this court to dismiss the application. On his part, the 6<sup>th</sup> respondent submitted that section 88(4) of the elections Act mandated the IEBC to handle issues emanating from party nominations and stated that the applicant should have filed his own petition if he indeed was aggrieved by their nominations. He stated that the application was an attempt by the petitioner to file a petition out of time. He said that the applicant has not explained the prejudice he is likely to suffer. The 8<sup>th</sup> respondent opposed the application and stated that the applicant was trying to file a petition out of time and that the applicant had failed to explain the delay. He urged the court to dismiss the application.

In reply, the applicant submitted that his application had been filed before pre-trial conference had closed hence within time. He said that enjoinment was a matter of the courts discretion and concluded that his rights were infringed by the 3<sup>rd</sup> respondent herein and he thus stands to suffer prejudice. He stated that the nominations were illegal and urged the court to allow his application.

I have read the application, the supporting affidavits, and the grounds of opposition together with the parties' oral submissions as well as the authorities referred to. The main issue for determination herein is whether the applicant should be enjoined as an interested party in this petition

This court has handled issues of enjoinment before. 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 effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."* (Emphasis provided)

The court further referred to **Black's Law Dictionary, 9<sup>th</sup> Edition**, defines "intervener" (at page 897) thus:

*"One who voluntarily enters a pending lawsuit because of a personal stake in it"* (emphasis provided);

Further, In **Judicial Service Commission – Vs – Speaker of the National Assembly & Another** (2013) eKLR, the court, referring to the definition of an interested party under the Constitution of Kenya ((Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules as defined above stated that:-

*"..... He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly nonpartisan as he is likely to urge the court to make a determination favorable to his stake in the proceedings."*

The court then stated that

*..." It is however a requirement that a person who intends to be joined to existing legal proceedings ought to show that he has "an identifiable stake or legal interest in the proceedings before the court".*

In the supreme court decision in **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 3 others** [2017] eKLR while admitting Mr. Ekuru Aukot as an interested party in that presidential election petition the supreme court while relying on its decision in **Francis**

**Kariuki Muruatetu and Wilson Thirumbu Mwangi v Republic and 4 others**, Supreme Court Petition No. 15 and 16 of 2015 (consolidated) held as follows;

.....*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.*

*iv. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.*

The underlying issue flowing from the above decision is whether the applicant herein has an identifiable stake or legal interest in the proceedings before this court and whether he will suffer prejudice, if not enjoined.

The applicant herein states that he was on the initial nomination list of the 3<sup>rd</sup> respondent into the Laikipia county assembly but that his name was later removed and replaced by Christopher Mark Said who is not in the minority category. Looking at his application, he states that he had been proposed for nomination under the special interest category. These two groups are different and distinct hence his application fails on the 1<sup>st</sup> and 2<sup>nd</sup> limbs of the conditions set out by the Supreme Court.

The intended interested party had submitted that after his name was removed from nominations list, he moved to the political parties' Dispute tribunal. It was pointed out to court that the Political Parties' Dispute Tribunal's decision which the applicant is relying on was overturned by the high court and that the Applicant never challenged the in Court's Decision. The High Court then recommended that the petitioner's redress lay in an election petition which the applicant chose not to file for reasons best known to him. For this reasons, the applicant fails to meet the 3<sup>rd</sup> and 4<sup>th</sup> limbs of the Supreme Court's holding on the threshold for enjoinment into this petition. Besides, he has not explained the delay in filing this application while he knew the existence of this petition.

Having said that, it is my finding that the intended interested party (Mohamed Abdikadir Salah) has not met the threshold for admission into this petition as an interested party. Consequently his application dated 3rd January, 2018 is hereby dismissed with costs.

Orders accordingly.

**Date and delivered** this .....**24th**..... day of ...january... 2018 in open court at Nanyuki.

**L.K.Mutai**

**Chief Magistrate**