



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATES COURT AT GARISSA

ELECTION PETITION NO 5 OF 2017

**IN THE MATTER OF ARTICLES 1, 3, 38, 81, 86, 90, 91 AND 177(1) OF THE CONSTITUTION
OF KENYA, 2010**

AND

**IN THE MATTER OF SECTION 34, 36 AND 75 (1A) OF THE ELECTIONS ACT, 2011 (ACT NO
24 OF 2011)**

AND

IN THE MATTER OF THE ELECTION (GENERAL REGULATIONS), 2012

**IN THE MATTER OF THE ELECTION (PARTY PRIMARY AND PARTY LISTS)
REGULATION, 2017**

AND

**IN THE MATTER OF THE KENYA GAZETTE NOTICE NO 8752 VOL CXIX NO 131 OF 6TH
SEPTEMBER 2017**

**IN THE MATTER OF THE PARTY LIST NOMINATION FOR GENDER TOP UP FOR
GARISSA COUNTY ASSEMBLY**

BETWEEN

HAMDI AHMED ALLI.....PETITIONER

VERSUS

VICTORIA CHERUTO LIMO.....1ST RESPONDENT

INDEPENDANT ELECTORAL

AND BOUNDARIES COMMISSION.....2ND RESPONDENT

AND

NATIONAL COHESION AND

INTEGRATION COMMISSION.....INTERESTED PARTY

RULING

This is the ruling on the intended interested party,s motion dated 18th October 2017. The motion is brought pursuant to the provisions of Article 22, 23, 38, 47, 50, 140 and 159 of the Constitution, Section 1A, 1B & 3A of the Civil Procedure Act, Order 51 of the Civil Procedure Rules, Rule 15 of the Election (Parliamentary and County Election) Petition Rules 2017. The application seeks the following Orders:

1. ***This matter be certified as urgent.***
2. ***The applicant, National Cohesion and integration Commission be enjoined as a party.***
3. ***Costs of the application be in cause.***

The application is premised on the grounds on the face of the application and the supporting affidavit sworn on the 18th October 2017 by Hassan.S. Mohammed, the Chief Executive Officer of the applicant herein.

The application is opposed vide the replying affidavit sworn on the 24th October 2017 by the first respondent herein.

In his submissions Mr Muinde, Advocate for the applicant, submits that, the National Cohesion and intergration Commission plays a peculiar role in matters of public interest. Further, the gender top up nomination is a matter of public interest as opposed to general election only. By virtue of section 25 (1) of the National Cohesion and Integration Act, the applicant is supposed to facilitate *inter alia*, equality of opportunity, good relationships, harmony and peaceful co-existence between persons of different ethnic communities. It is for the above reasons that the applicant seeks to be enjoined in this petition. He further submits that the applicant does not intend to file any affidavits or responses. Rather, the applicant intends to file submissions only which may assist the court to arrive at a just decision.

Mr Mwalimu, Advocate for the petitioner, in his submission associates himself with the submissions of Mr Muinde Advocate for the applicant. In his submission, Mr Mwalimu is of the view that the present petition has taken an ethnic dimension which may affect the good relationship between two communities in Garissa County. His posits further that, the direction the petition has taken falls within the objects and functions of the applicant herein as provided for by section 25 (1) of the National Cohesion and Intergration Act. His view is that, the applicant should be allowed to address the impact of Article 92 of the Constitution. He argues further that, counties usually have a concentration of a particular ethnic identity, and therefore, the applicant has an important role to play in the present proceedings.

On the other hand, Mr Ibrahim, Advocate for the 2nd Respondent, pointed out four issues which in his opinion would guide the court on whether to allow the present application or not. Firstly, the value the applicant would bring on board in view of Rule 15 (1) (j) of the Election(Parliamentary and County Election) Petition Rules 2017. Secondly, the issue of costs should be addressed since Rule 30 of the said rules provides that at the end of the petition costs should be awarded. Thirdly, his view was that enjoining the applicant would drag the case. Fourthly, he urges that, should the court allow the applicant to be enjoined, then its participation should be very limited.

In reply to the application, Mr Kibet,Advocate for the 1st Respondent, submits that the application is defective because the applicant intends to submit on matters which this court lacks jurisdiction. He refers the court to section 8 of the Magistrates Court Act which relates to the jurisdiction of Magistrates courts to handle violation human rights. He argues further the legal basis for allowing the present application is lacking. He posits that, the applicant has not demonstrated how this case is a matter of public interest, the present case being an election petition. He argues that the applicants ought to have demonstrated how they intends to discharge their mandate under section 25 of the National Cohesion and Integration Act. He submits that there is no evidence of the applicants involvement in the election process. He argues that the applicant has to demonstrate identifiable interest in the case, which in his view, they have not. In his view, the applicant's interest is very peripheral. Therefore, the applicant will not aid the court in any way whatsoever. He submits that the applicant intends to introduce a new set of facts to the petition. In his view, the petition is about gender top up and not ethnic issues. All in all Mr Kibet argues that the

applicant has not demonstrated the threshold of being enjoining a party to suit, and therefore, has no role to play in this petition. He asks the court to disallow the application.

I have gone through the application and the reply thereto. I have also carefully considered the submissions by the Advocates for all parties and the authorities cited by them. In my view, the relevant question be, what prejudice the other parties will suffer if the applicant is enjoined, rather than what value they will bring to the petition. Clearly, from the submissions by Counsel for the applicant, the applicant intends to play a very limited role in the petition. In his submissions Counsel for the applicant informed the court that their participation is limited to submissions only. They do not intend to file any affidavits or responses. Therefore, the issue of introduction of new facts cannot and shall not arise. Whether, the submissions shall be of any value to the court is a matter the court can only decide at the end of this petition. In the circumstances, I do not see any prejudice whatsoever that the other parties will suffer if the interested party is enjoined. Therefore, in view of the fact that this petition has to be determined within the stipulated time, I will allow the application, but, I limit the applicants participation to filing of submissions only. The issues of costs, if any, shall be determined at the conclusion of this petition.

It is so ordered.

DATED, SIGNED and DELIVERED this 23rd day of November 2017

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J.J.MASIGA

SENIOR RESIDENT MAGISTRATE