



REPUBLIC OF KENYA



KENYA LAW
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**Omoke v Kenyatta & 83 others (Petition 11 (E015) of 2021)
[2021] KESC 27 (KLR) (Civ) (9 November 2021) (Ruling)**

Neutral citation: [2021] KESC 27 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

CIVIL

PETITION 11 (E015) OF 2021

PM MWILU, DCJ & VP, MK IBRAHIM, N NDUNGU, I LENAOLA & W OUKO, SCJJ

NOVEMBER 9, 2021

BETWEEN

MORARA OMOKE APPELLANT

AND

UHURU MUIGAI KENYATTA 1ST RESPONDENT

RAILA AMOLO ODINGA 2ND RESPONDENT

**STEERING COMMITTEE ON THE IMPLEMENTATION OF THE BUILDING
BRIDGES TO A UNITED KENYA TASK FORCE REPORT (BBI STEERING
COMMITTEE) 3RD RESPONDENT**

**BUILDING BRIDGES TO A UNITED KENYA, NATIONAL SECRETARIAT (BBI
SECRETARIAT) 4TH RESPONDENT**

ATTORNEY GENERAL 5TH RESPONDENT

DAVID NDII 6TH RESPONDENT

JEROTICH SEH 7TH RESPONDENT

JAMES GONDI 8TH RESPONDENT

WANJIRU GIKONYO 9TH RESPONDENT

IKAL ANGELEI 10TH RESPONDENT

THIRDWAY ALLIANCE KENYA 11TH RESPONDENT

MIRURU WAWERU 12TH RESPONDENT

ANGELA MWIKALI 13TH RESPONDENT

PUBLIC SERVICE COMMISSION 14TH RESPONDENT



AUDITOR GENERAL	15 TH RESPONDENT
NATIONAL EXECUTIVE	16 TH RESPONDENT
SPEAKER OF THE SENATE	17 TH RESPONDENT
SENATE	18 TH RESPONDENT
SPEAKER OF THE NATIONAL ASSEMBLY	19 TH RESPONDENT
NATIONAL ASSEMBLY	20 TH RESPONDENT
COUNTY ASSEMBLY OF MOMBASA	21 ST RESPONDENT
COUNTY ASSEMBLY OF KWALE	22 ND RESPONDENT
COUNTY ASSEMBLY OF KILIFI	23 RD RESPONDENT
COUNTY ASSEMBLY OF TANA RIVER 24 TH	24 TH RESPONDENT
COUNTY ASSEMBLY OF LAMU	25 TH RESPONDENT
COUNTY ASSEMBLY OF TAITA-TAVETA	26 TH RESPONDENT
COUNTY ASSEMBLY OF GARISA	27 TH RESPONDENT
COUNTY ASSEMBLY OF WAJIR	28 TH RESPONDENT
COUNTY ASSEMBLY OF MANDERA	29 TH RESPONDENT
COUNTY ASSEMBLY OF MARSABIT	30 TH RESPONDENT
COUNTY ASSEMBLY OF ISIOLO	31 ST RESPONDENT
COUNTY ASSEMBLY OF MERU	32 ND RESPONDENT
COUNTY ASSEMBLY OF THARAKA-NITHI	33 RD RESPONDENT
COUNTY ASSEMBLY OF EMBU	34 TH RESPONDENT
COUNTY ASSEMBLY OF KITUI	35 TH RESPONDENT
COUNTY ASSEMBLY OF MACHAKOS	36 TH RESPONDENT
COUNTY ASSEMBLY OF MAKUENI	37 TH RESPONDENT
COUNTY ASSEMBLY OF NYANDARUA	38 TH RESPONDENT
COUNTY ASSEMBLY OF NYERI	39 TH RESPONDENT
COUNTY ASSEMBLY OF KIRINYAGA	40 TH RESPONDENT
COUNTY ASSEMBLY OF MURANG'A	41 ST RESPONDENT
COUNTY ASSEMBLY OF KIAMBU	42 ND RESPONDENT
COUNTY ASSEMBLY OF TURKANA	43 RD RESPONDENT
COUNTY ASSEMBLY OF WEST POKOT	44 TH RESPONDENT
COUNTY ASSEMBLY OF SAMBURU	45 TH RESPONDENT
COUNTY ASSEMBLY OF TRANS NZOIA	46 TH RESPONDENT



COUNTY ASSEMBLY OF UASIN GISHU	47 TH RESPONDENT
COUNTY ASSEMBLY OF ELGEYO/MARAKWET	48 TH RESPONDENT
COUNTY ASSEMBLY OF NANDI	49 TH RESPONDENT
COUNTY ASSEMBLY OF BARINGO	50 TH RESPONDENT
COUNTY ASSEMBLY OF LAIKIPIA	51 ST RESPONDENT
COUNTY ASSEMBLY OF NAKURU	52 ND RESPONDENT
COUNTY ASSEMBLY OF NAROK	53 RD RESPONDENT
COUNTY ASSEMBLY OF KAJIADO	54 TH RESPONDENT
COUNTY ASSEMBLY OF KERICHO	55 TH RESPONDENT
COUNTY ASSEMBLY OF BOMET	56 TH RESPONDENT
COUNTY ASSEMBLY OF KAKAMEGA	57 TH RESPONDENT
COUNTY ASSEMBLY OF VIHIGA	58 TH RESPONDENT
COUNTY ASSEMBLY OF BUNGOMA	59 TH RESPONDENT
COUNTY ASSEMBLY OF BUSIA	60 TH RESPONDENT
COUNTY ASSEMBLY OF SIAYA	61 ST RESPONDENT
COUNTY ASSEMBLY OF KISUMU	62 ND RESPONDENT
COUNTY ASSEMBLY OF HOMA BAY	63 RD RESPONDENT
COUNTY ASSEMBLY OF MIGORI	64 TH RESPONDENT
COUNTY ASSEMBLY OF KISII	65 TH RESPONDENT
COUNTY ASSEMBLY OF NYAMIRA	66 TH RESPONDENT
COUNTY ASSEMBLY OF NAIROBI	67 TH RESPONDENT
JUSTUS JUMA	68 TH RESPONDENT
ISAAC OGOLA	69 TH RESPONDENT
ISAAC ALUOCHIER	70 TH RESPONDENT
DUNCAN OJWANG'	71 ST RESPONDENT
JOHN OSOGO AMBANI	72 ND RESPONDENT
LINDA MUSUMBA	73 RD RESPONDENT
JACK MWIMALI	74 TH RESPONDENT
KENYA HUMAN RIGHTS COMMISSION	75 TH RESPONDENT
MIGAI AKECH	76 TH RESPONDENT
CHARLES MANGA FOMBAD	77 TH RESPONDENT
MUSLIMS FOR HUMAN RIGHTS (MUHURI)	78 TH RESPONDENT



KITUO CHA SHERIA	79 TH RESPONDENT
KENYA NATIONAL UNION OF NURSES	80 TH RESPONDENT
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION	81 ST RESPONDENT
BUILDING BRIDGES TO A UNITED KENYA TASK FORCE (BBI TASKFORCE)	82 ND RESPONDENT
PHYLISTER WAKESHO	83 RD RESPONDENT
254 HOPE	84 TH RESPONDENT

(An application seeking the consolidation of Petition No 11(E015) of 2021, Petition No. 12 (E016) of 2021 and Petition No.13 (E018) of 2021)

Factors considered by the Supreme Court in determining whether to consolidate matters

The application sought court orders for the consolidation of Petition No. 11 (E015) of 2021, Petition No. 12 (E016) of 2021 and Petition No. 13 (E18) of 2021 and for the filing of responses to the consolidated petition. The grounds for the orders sought were that the three petitions had the same subject matter, raised similar issues of law and arose from the same set of facts. The court cited rule 21 of the Supreme Court Rules 2020 and held that consolidation of suits or appeals would be ordered where there were common issues of law or fact in the suits or appeals or where it was desirable for related matters to be disposed of at the same time. In allowing the application the court made the determination that the application met the threshold for consolidation of suits.

Reported by Ribia John

***Civil Practice and Procedure** – suits - consolidation of suits – factors to consider when consolidating suits – purpose of consolidation of suits - factors considered by the Supreme Court when determining whether to consolidate matters – Supreme Court Rules, 2021, rule 21.*

Brief facts

The 71st, 72nd and 73rd respondents (the applicants) sought for leave to consolidate Petition No. 11 (E015) of 2021, Petition No. 12 (E016) of 2021 and Petition No. 13 (E18) of 2021, and for an order directing parties in the three petitions to file responses to the consolidated Petition as opposed to responding to each of the individual petitions. They contended that all three petitions involved the same subject matter, raised similar issues of law, and arose from the same set of facts, and considering the number of parties involved, there was likelihood of duplication and disharmony in the submissions if leave for consolidation was not granted.

Issues

What factors did the Supreme Court consider when determining whether to consolidate matters?

Held

1. The jurisdiction to consolidate appeals in the Supreme Court was conferred by rule 21 of the Supreme Court Rules, 2020, which stipulated that the court could, upon application by any party or on its own motion, where satisfied that the issues involved in any two or more proceedings were similar, order that the proceedings be consolidated, on such terms as the court could determine. Consolidation of suits or appeals would be ordered where there were common questions of either law or fact in two or more suits or appeals and where it was desirable that all the related matters be disposed of at the same time.
2. Through consolidation, costs, time and other resources were saved and multiplicity of proceedings avoided. All the three petitions before the court arose from the same set of facts; the same subject matter; they raised similar issues of law; involved the same parties who were before the two Superior



Courts below and ensued from the same judgment. Further, the application was not opposed in substance.

3. The instant application had met the threshold for consolidation and Petition No. 12 of 2021 (E016) of 2021, *Attorney General vs David Ndii & 73 Others*, encapsulated most of the key grounds common to the rest of the other petitions, in contrast with the appellant's Petitions No. 11 (E015) of 2021, which raised only one question.
4. The order of precedence, proceedings and presentation of arguments in the petitions would be determined on November 9, 2021 during the mention for directions by the Supreme Court.

Application allowed.

Orders

- i. *Petition No. 11 (E015) of 2021 - Morara Omoke vs H.E. Uhuru Muigai Kenyatta & 83 Others; Petition No. 12 (E016) of 2021 - The Attorney General vs David Ndii & 73 Others; and Petition No. 13 (E18) of 2021 - Independent Electoral and Boundaries Commission vs David Ndii & 81 Others, were to be consolidated.*
- ii. *Petition No 12 (E016) of 2021, The Attorney General vs. David Ndii & 73 Others would serve as the lead file in the proceedings and parties who had been omitted in it, for example, 74th respondent, Dr. Jack Mwimali and 78th respondent, Muslims for Human Rights (MUHURI) were to be included.*
- iii. *No orders as to costs.*

Citations

Cases

1. David Ojwang' Okebe v South Nyanza Sugar Company Limited (Civil Appeal (Application) 139 of 2008, [2009] eKLR) — Mentioned
2. Law Society of Kenya v Centre for Human Rights & Democracy & 12 Others (SC Petition No. 14 of 2013, [2014] eKLR) — Mentioned
3. Atlantic States Legal Foundation Inc v Koch Refining Co (681 F. Supp 609, 615 (D. Minn. 1988)) — Mentioned

Statutes

1. Supreme Court Rules (2020) — Rule 21 — Interpreted

Advocates

None mentioned

RULING

- [1] Before us is a notice of motion dated October 7, 2021, filed on even date by Dr Duncan Oburu Ojwang, Dr John Osogo Ambani and Dr Linda Musumba, the 71st, 72nd and 73rd respondents, respectively (the applicants), for leave to consolidate Petition No 11 (E015) of 2021, Petition No 12 (E016) of 2021 and Petition No 13 (E18) of 2021, and for an order directing parties in the three petitions to file responses to the consolidated Petition as opposed to responding to each of the individual petitions; and
- [2] Upon perusing the affidavit of Dr Duncan Oburu Ojwang sworn on behalf of the applicants in support of the motion on the October 7, 2021 to the effect that all the three Petitions before us involve the same subject matter, raise similar issues of law, and arise from the same set of facts, and considering the number of parties involved, there is likelihood of duplication and disharmony in the submissions if leave for consolidation is not granted; and
- [3] Further, noting that in an affidavit dated October 14, 2021, Mr Morara Omoke (the appellant) essentially supports the application but urges the court to consider his appeal, Petition No 11(E15) of



2021, *Morara Omoke versus HE Uhuru Muigai Kenyatta and 83 others* as the lead file for reasons that; it was filed first, has, unlike the other two petitions, named all parties who were before the Court of Appeal, and as a result would be easier for all parties to electronically and physically file their pleadings in one file; and

- [4] Noting that the Independent Electoral and Boundaries Commission, the 81st respondent is similarly not opposed to the application but only prefers that its Appeal, Petition No 13 (E18) of 2021 be consolidated with that of the Attorney General, Petition No 12 (E016) of 2021, while the appellant’s Petition No 11 (E015) of 2021 be treated as a cross-appeal; and
- [5] Further, noting that the appellant in a supplementary affidavit, dated October 20, 2021, opposes this suggestion on the grounds that; such a request was not prayed for in the instant application, is unfounded, and insists that if any appeal is to be converted to a cross-appeal, then the appeals by Independent Electoral and Boundaries Commission and by the Attorney General ought to be consolidated; and
- [6] Upon considering the applicant’s written submissions dated October 7, 2021, filed on the same date, citing rule 21 of the *Supreme Court Rules 2020*, and the court’s decisions in *Law Society of Kenya v Centre for Human Rights & Democracy & 12 Others*, SC Petition No 14 of 2013, [2014] eKLR and *David Ojwang’ Okebe v South Nyanza Sugar Company Limited*, Civil Appeal (Application) 139 of 2008, [2009] eKLR as authorities for consolidation of appeals before this court; and considering also a replying affidavit filed on behalf of the Independent Electoral and Boundaries Commission on October 19, 2021; and
- [7] Upon further evaluation of those submissions and applying the convenience test enunciated in the case of *Atlantic States Legal Foundation Inc v Koch Refining Co* 681 F Supp 609, 615 (D Minn 1988 to the effect that in considering whether or not to consolidate cases, it is of paramount importance for the court to weigh the cost, time, effort and judicial resources involved.
- [8] We now therefore opine as follows:
- i. The jurisdiction to consolidate appeals in this court is conferred by rule 21 of the Supreme Court Rules, 2021, which stipulates that;
 - “The court may, upon application by any party or on its own motion, where satisfied that the issues involved in any two or more proceedings are similar, order that the proceedings be—
 - a. consolidated, on such terms as the Court may determine...”.
 - ii. Consolidation of suits or appeals will be ordered where there are common questions of either law or fact in two or more suits or appeals and where it is desirable that all the related matters be disposed of at the same time.
 - iii. When considering an application for consolidation, this court will bear in mind the guiding principles it pronounced in the case of the *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others*, SC Petition No 14 of 2013, [2014] eKLR, that:
 - “The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon



the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.”

- iv. Through consolidation, costs, time and other resources are saved and multiplicity of proceedings avoided. All the three petitions before this court arise from the same set of facts; the same subject matter; they raise similar issues of law; involve the same parties who were before the two superior courts below; and ensue from the same judgment.
- v. We bear in mind that the application is not opposed in substance, save to the extent explained in paragraphs 3, 4 and 5 above.
- vi. Upon perusal and careful consideration of the three petitions, we entertain no doubt that this application meets the threshold for consolidation; and further, that Petition No 12 of 2021 (E016) of 2021, *The Attorney General vs David Ndii & 73 others*, encapsulates most of the key grounds common to the rest of the other Petitions, in contrast with the appellant’s Petitions No 11 (E015) of 2021, which raises only one single question.
- vii. The order of precedence, proceedings and presentation of arguments in the Petitions will be determined on 9th November, 2021 during the mention for directions by the court.

[9] Consequently, we allow the notice of motion dated 7th October, 2021 and make the following orders:

- i. Petition No 11 (E015) of 2021 - *Morara Omoke vs HE Uhuru Muigai Kenyatta & 83 others*; Petition No 12 (E016) of 2021 - *The Attorney General vs David Ndii & 73 others*; and Petition No 13 (E18) of 2021 - *Independent Electoral and Boundaries Commission vs David Ndii & 81 Others*, are hereby consolidated.
- ii. Petition No 12 (E016) of 2021, *The Attorney General vs David Ndii & 73 others* will serve as the lead file in the proceedings and parties who have been omitted in it, for example, 74th respondent, DrJack Mwimali and 78th respondent, Muslims for Human Rights (MUHURI) to be included.
- iii. We make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 9TH . DAY OF NOVEMBER, 2021.

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT

OF THE SUPREME COURT

.....

M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA



JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a

true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

