



Okoti v Kenya National Commission On Human Rights & another; Independent Electoral & Boundaries Commission & 14 others (Interested Parties) (Advisory Opinions Application 1 of 2017) [2018] KESC 41 (KLR) (13 July 2018) (Ruling)

Okiya Omtatah Okoti v Kenya National Commission on Human Rights & 15 others [2018] eKLR

Neutral citation: [2018] KESC 41 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
ADVISORY OPINIONS APPLICATION 1 OF 2017
PM MWILU, DCJ & VP, MK IBRAHIM, JB OJWANG, N NDUNGU & I LENAOLA, SCJJ
JULY 13, 2018**

IN THE MATTER OF AN APPLICATION BY THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS FOR AN ADVISORY OPINION UNDER ARTICLE 163(6) OF THE CONSTITUTION

–AND–

IN THE MATTER OF ARTICLES 2(1) & (2), 3(1), 4(2), 10, 73, 75, 232, 249 AND 259 OF THE CONSTITUTION OF KENYA, 2010

–AND–

IN THE MATTER OF SECTION 3 OF THE SUPREME COURT ACT NO. 7 OF 2011

–AND–

IN THE MATTER OF CHAPTER 6 OF THE CONSTITUTION ON LEADERSHIP AND INTEGRITY

BETWEEN

OKIYA OMTATAH OKOITI APPLICANT

AND

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS .. 1ST RESPONDENT

HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

AND

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION . INTERESTED PARTY

ETHICS & ANTI-CORRUPTION COMMISSION INTERESTED PARTY



AMANI NATIONAL CONGRESS	INTERESTED PARTY
CHAMA CHA MWANANCHI	INTERESTED PARTY
DEMOCRATIC PARTY OF KENYA	INTERESTED PARTY
FORD KENYA	INTERESTED PARTY
JUBILEE PARTY	INTERESTED PARTY
KENYA AFRICAN NATIONAL UNION	INTERESTED PARTY
LABOUR PARTY OF KENYA	INTERESTED PARTY
MAENDELEO CHAP CHAP	INTERESTED PARTY
NARC-KENYA	INTERESTED PARTY
NATIONAL RAINBOW COALITION	INTERESTED PARTY
ORANGE DEMOCRATIC MOVEMENT	INTERESTED PARTY
WIPER DEMOCRATIC MOVEMENT- KENYA	INTERESTED PARTY
DIRECTOR OF PUBLIC PROSECUTIONS	INTERESTED PARTY

(Being an application by the Proposed Interested Party/Applicant seeking to be enjoined as an Interested Party in the Reference filed by the Kenya National Commission on Human Rights, KNCHR for an advisory opinion under Article 163(6) of the Constitution)

RULING

1. Upon perusing the Notice of Motion application dated 19th May, 2017 and lodged on 22nd May, 2017 by Okiya Omtatah Okoiti seeking to be enjoined in the Reference as an Interested Party and noting that the law or procedural rules Upon which the Application is premised are not stated; and
2. Upon perusing the grounds adduced in support of the Application namely that the Applicant seeks to participate in the Reference as an Interested Party and seeks to submit that;
 - (a) the Kenya National Commission on Human Rights, lacks subject matter locus standi to institute an appeal to this Honourable Court disguised as an application for an advisory opinion under Article 163(3) of the Constitution;
 - (b) the Supreme Court lacks the jurisdiction to entertain appeals under Article 163(6) of the Constitution;
 - (c) the instant Reference for an advisory opinion under Article 163(6) of the Constitution is res sub-judice the following motions pending in the High Court of Kenya at Nairobi, viz
 - (i) Constitutional Petition No. 68 of 2017 *Okiya Omtatah Okoiti v Jubilee Party of Kenya & Others* and
 - (ii) Constitutional Petition No. 142 of 2017 *Okiya Omtatah Okoiti v Hon. Attorney General & 12 Others*;
 - (d) the Kenya National Commission on Human Rights is abusing the process of this Honourable Court by invoking the Court's appellate jurisdiction via its advisory opinion jurisdiction;



- (e) the Applicant has a duty to help this Court arrive at a just determination of these proceedings; and
 - (f) the grave matter which is before this Honourable Court is of huge public interest as it affects the enjoyment of rights and fundamental freedoms enshrined in the Bill of Rights, and other provisions of the Constitution; and
3. Upon further noting the averment that the Applicant has a right of access to this Court to safeguard his rights and those of other Kenyans from being infringed, and to defend the Constitution in general; and
 4. Upon taking notice that none of the other parties to the Reference have filed any pleadings in support of or in objection to the said Application for enjoinder of the Applicant as an Interested Party;
 5. And having carefully considered the Application, the Supporting Affidavit and annexures thereto, by a unanimous decision of this Bench, we make the following orders under Section 23(2)(b) of the Supreme Court Act and Rules 21 and 23 of the Supreme Court Rules, 2012;

Orders

- (a) The Application dated 19th May, 2017 and filed on 22nd May, 2017 by the Applicant seeking to be enjoined as an Interested Party in the instant Reference is hereby allowed;
- (b) The Applicant shall file and serve his submissions on or before 16th July, 2018; and
- (c) There shall be no orders as to costs.

Reasons

- (a) The Application has satisfied the conditions and threshold set out in the case of Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others SC Petition No. 12 of 2013 where this Court, at paras. 14 & 18 stated, *inter alia*;

“[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 cause...”
- (b) The Applicant has established that he has an identifiable stake in the present proceedings in view of his claim that this Court may not have the jurisdiction to issue an advisory opinion as prayed and the Reference may also be sub-judice in view of the pending proceedings before the High Court in Constitutional Petitions Nos. 68 & 142 of 2017 (Okiya Omtatah Okiiti v Jubilee Party of Kenya & Others and Okiya Omtatah Okiiti v Hon. Attorney General & 12 Others) touching on the same subject matter as the Reference. Further, that the Kenya National Commission on Human Rights may also not have subject locus standi and that therefore the Reference may be an abuse of Court process; and
- (c) On costs, the nature of the Reference is that it seeks an interpretation of constitutional issues which are public in nature and therefore, in the public interest, there shall be no order as to costs. (See para. 87 Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (supra)).

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY, 2018



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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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J. B. OJWANG

JUSTICE OF THE SUPREME COURT

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N. S. NDUNGU

JUSTICE OF THE SUPREME COURT

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I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

