



**Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aluochier (Interested Party) (Petition 1 of 2017) [2017] KESC 43 (KLR) (27 August 2017) (Ruling)**

*Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 3 others [2017] eKLR*

Neutral citation: [2017] KESC 43 (KLR)

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

**PETITION 1 OF 2017**

**DK MARAGA, CJ & P, PM MWILU, DCJ & VP, MK IBRAHIM,  
JB OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ**

**AUGUST 27, 2017**

**BETWEEN**

**RAILA AMOLO ODINGA ..... 1<sup>ST</sup> PETITIONER**

**STEPHEN KALONZO MUSYOKA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT**

**THE CHAIRPERSON OF THE INDEPENDENT ELECTORAL AND  
BOUNDARIES COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**H.E. UHURU MUGAI KENYATTA ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**ALUOCH POLO ALUOCHIER ..... INTERESTED PARTY**

**Legal requirements relating to joinder of an interested party to a presidential election petition.**

Reported by Beryl Ikamari

***Election Laws** - presidential election petition - joinder of interested parties in a presidential election petition - grounds considered for an applicant to be enjoined as an interested party - relevance and usefulness of the submissions of the intended interested party to the proceedings and the court - Supreme Court (Presidential Election Petition) Rules, 2017, rule 4(2); Supreme Court Rules, 2012, rule 25.*



## **Brief facts**

The applicant sought joinder in the capacity of interested party to the petition. He urged that if he was denied joinder, he, as well as other Kenyan citizens, would suffer prejudice, as there was a real risk that the Government due to assume office, would stand in contravention of articles 1(1), 3(2), 2(2) and 3(1) of the Constitution.

It was the applicant's case that the basis of his application was different from what was presented by the petitioners. He contended that the grounds of the petitioners' case covered issues of the post-nomination day, voting day and post-voting day, as well as vote-counting records, and vote tallying. His grounds were that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not, eligible for election as President or Deputy President in the terms of the provisions of article 137 (1) (b), as read with articles 99 (1) (b), 148(1), and Chapter 6 of the Constitution.

The applicant contended that the 3<sup>rd</sup> respondent was not a 'political party' as defined in articles 91, 92 and 260 of the Constitution and hence it did not have the legal capacity to nominate any person for elective office under the Constitution.

Consequently, it was contended that the election of the 1<sup>st</sup> and 2<sup>nd</sup> respondents as President and Deputy President, was a nullity. The applicant contended that the 3<sup>rd</sup> respondent had not been holding free and fair elections, and had been acting unconstitutionally.

## **Issues**

- i. Whether an applicant seeking joinder as an interested party could introduce new facts, new parties and exclude some of the current parties.
- ii. What were the factors to be considered in enjoining an interested party in a presidential election petition?

## **Held**

1. The applicable law on joinder of interested parties was embodied in the Supreme Court (Presidential Election Petition) Rules, 2017 and the Supreme Court Rules, 2012. Under rule 4(2) of the Supreme Court (Presidential Election Petition) Rules, 2017, where there was no applicable provision in the Act or in those rules, the procedures set out in the Supreme Court Rules, 2012 in so far as they were not inconsistent with the Act or these Rules, would apply to an election petition.
2. Rule 25 of the Supreme Court Rules, 2012 provided for interventions relating to applications to be joined as an interested party. It provided that the contents of an application for leave to be enjoined as an interested party would include:
  - a. description of the interested party;
  - b. any prejudice that the interested party would suffer if the intervention was denied,
  - c. the grounds or submissions to be advanced by the person interested in the proceedings, and
  - d. relevance and usefulness of the submissions to the proceedings and the court.
3. The applicant sought joinder to the suit and also sought to introduce new parties and exclude some of the existing parties. He also wanted the court to delve into issues that featured in the 2013 Presidential election. The applicant was in essence introducing new facts and issues that were not already before the court.
4. Where the applicant introduced a new petition, with issues not laid before the court, he was improperly making claims on a cause that belonged to other parties, in the main proceedings. That could not be allowed. Additionally, the court was also not convinced that the applicant would suffer any prejudice, if his proposed intervention was declined.

*Application dismissed.*

## **Citations**

### **Cases**

### **Kenya**



*Mumo Matemu v Trusted Society of Human Rights Alliance, Attorney General, Minister of Justice & Constitutional Affairs, Director of Public Prosecutions, Kenyan Section of the International Commission of Jurists & Kenya Human Rights Commission* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)

#### **Statutes**

##### **Kenya**

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) In general - (Cited)
2. Constitution of Kenya, 2010 articles 1(1); 2(2)(4); 3(1)(2); 40; 77(2); 90; 91; 92; 99(1)(b); 137(1)(b); 140(3); 148(1); 180; 193; 260 - (Interpreted)
3. Leadership and Integrity Act, 2012 (Act No 19 of 2012) section 13 - (Interpreted)
4. Supreme Court (Presidential Election Petition) Rules, 2017 (Act No 7 of 2011 Sub Leg) rule 4(2) - (Interpreted)
5. Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rule 25 - (Interpreted)

#### **Advocates**

None mentioned

## **RULING**

### **A. The Application**

1. The applicant seeks joinder in *Raila Amolo Odinga v Independent Electoral & Boundaries Commission & 2 others*, Presidential Election Petition No1 of 2017, in the capacity of interested party. His notice of motion is dated August 23, 2017, supported by an affidavit of the same date.
2. He urges that if he is denied joinder, he, as well as other Kenyan citizens, will suffer prejudice, as there is a real risk that the government due to assume office, would stand in contravention of articles 1 (1), 3 (2)1(1), 2(2) and 3(1) of the Constitution.
3. It is the applicant's case that the grounds of his application are different from those presented by the petitioners. He contends that while the grounds of the petitioners' case cover issues of the post-nomination day, voting-day and post-voting-day, as well as vote-counting records, and vote tallying, his grounds are that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not, and are not, eligible for election as President or Deputy President, in the terms of the provisions of article 137 (1) (b), as read with articles 99 (1) (b), 148(1), and chapter 6 of the Constitution.
4. The applicant contends that the 3<sup>rd</sup> respondent is not a 'political party' as defined in articles 91, 92 and 260 of the Constitution; and hence it did not have the legal capacity to nominate any person for elective office under the constitution. Consequently, it is contended, the election of the 1<sup>st</sup> and 2<sup>nd</sup> respondents as President and Deputy President, is a nullity. The applicant contends that the 3<sup>rd</sup> respondent has not been holding free and fair elections, and has been acting unconstitutionally.
5. The applicant asks the court to determine the following points of law:
  - a) Possible contravention of section 40 of the former Constitution;
  - b) Possible contravention of article 77 (2) of the present Constitution;
  - c) Possible contravention of section 13 of the Leadership and Integrity Act.
6. The applicant seeks the following reliefs:



- a) An order that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are not eligible for election as President and Deputy President, pursuant to article 137(1)(b) as read with articles 99(1)(b) and 148(1) of the *Constitution*;
  - b) That for purposes of the general elections held on 8 August 2017, the 3<sup>rd</sup> respondent had no legal capacity to nominate any person as a candidate pursuant to articles 90, 99, 137, 180 and 193, and that, pursuant to article 2(4) of the *Constitution*, the nominations of the 1<sup>st</sup> and 2<sup>nd</sup> respondents registered by the IEBC, were invalid;
  - c) An order to invalidate the election of the 1<sup>st</sup> and 2<sup>nd</sup> respondents as President-elect and Deputy President-elect respectively;
  - d) An order to conduct a fresh election for president within sixty days of the date of the court's order, pursuant to article 140(3) of the *Constitution*;
  - e) An order that costs of, and incidental to this application abide the result of the said presidential election petition.
7. The applicant has not tendered any written submissions. But his application has been contested by the said 1<sup>st</sup> and 2<sup>nd</sup> respondents, through the replying affidavit of Moses Kipkoge, and by way of written submissions dated August 25, 2017. Their essential point is that the applicant has shown no personal stake in the proceedings, such as would provide a basis for joinder.

#### **B. Joinder of Interested Parties: The Law**

8. The applicable law on joinder of interested parties is embodied in rule 4(2) of the *Supreme Court (Presidential Election Petition) Rules, 2017* as read with rule 25 of the *Supreme Court Rules, 2012*. Rule 4(2) aforesaid thus provides:
- “ (2) Where there is no applicable provision in the Act or in these rules, the procedures set out in the *Supreme Court Rules, 2012* in so far as they are not inconsistent with the Act or these rules, shall apply to an election petition.”
9. Rule 25 of the *Supreme Court Rules, 2012* is headed “interventions”, and provides thus:
- “ (1) A person may at any time in any proceedings before the court apply for leave to be enjoined as an interested party.
- (2) An application under this rule shall include –
- (a) A description of the interested party;
  - (b) Any prejudice that the interested party would suffer if the intervention was denied; and
  - (c) The grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceedings and the reasons for believing that the submissions will be useful to the court and different from those of the other parties” [emphasis supplied].
10. While the applicant seeks joinder in the suit as it is, his application introduces new parties, and excludes some of the current parties. He seeks to be the petitioner; to have Uhuru Muigai Kenyatta as the 1<sup>st</sup> respondent; William Samoei Ruto as the 2<sup>nd</sup> respondent; Jubilee party as the 3<sup>rd</sup> respondent; Wafula Chebukati as the 4<sup>th</sup> respondent; and the Independent Electoral and Boundaries Commission as the



5<sup>th</sup> respondent. The applicant also wants us to delve into issues that featured in the 2013 presidential election.

11. The applicant is, in essence, introducing new facts and issues that are not before us. This court, in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others*, Supreme Court Petition No 12 of 2013, had thus held (para.24):

" A suit in court is a 'solemn' process, "owned" solely by the parties. This is the reason why there are laws and rules, under the *Civil Procedure Code*, regarding parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings."

12. When the applicant introduces a new petition, with issues not already laid before the court, he is improperly making claims on a cause that belongs to other parties, in the main proceedings. This cannot be allowed. We are also not convinced that the applicant would suffer any prejudice, if his proposed intervention is declined.

13. We are inclined, in the circumstances, to dismiss the instant application. We make orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF AUGUST, 2017.**

.....  
**D K MARAGA**

**CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT**  
.....

**P M MWILU**

**DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT**  
.....

**M K IBRAHIM**

**JUSTICE OF THE SUPREME COURT**  
.....

**J B OJWANG**

**JUSTICE OF THE SUPREME COURT**  
.....

**S C WANJALA**

**JUSTICE OF THE SUPREME COURT**  
.....

**N. S. NDUNGU**

**JUSTICE OF THE SUPREME COURT**  
.....

**I. LENAOLA**



**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR**

**SUPREME COURT OF KENYA.**

