



**Odinga & another v Independent Electoral and Boundaries Commission
& 2 others; Aukot (Applicant) (Presidential Election Petition 1 of 2017)
[2017] KESC 34 (KLR) (Election Petitions) (27 August 2017) (Ruling)**

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

Neutral citation: [2017] KESC 34 (KLR)

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

PRESIDENTIAL ELECTION 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

H.E RAILA AMOLO ODINGA 1ST PETITIONER

H.E STEPHEN KALONZO MUSYOKA 2ND PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

**THE CHAIRPERSON OF THE INDEPENDENT ELECTORAL BOUNDARIES
COMMISSION 2ND RESPONDENT**

H.E UHURU MUIGAI KENYATTA 3RD RESPONDENT

AND

EKURU AUKOT APPLICANT

Considerations for one to be enjoined as a party in a presidential election petition

Reported by Ribia John and Njeri Mweha

***Election Law** – presidential election petition - application to be enjoined as an interested party – application to be enjoined as an interested party in the presidential election petition – where the applicant was a presidential candidate in the election - what were the considerations for one to be enjoined as an interested party in a presidential*



election petition - whether being a presidential candidate in a general elections was enough consideration for one to be enjoined as an interested party in a presidential election petition – Supreme Court Rules, 2012 rules 25 and 26.

Civil Practice and Procedure – joinder of parties - application to be enjoined as an interested party – application to be enjoined as an interested party in the presidential election petition – where the applicant was a presidential candidate in the election - what were the considerations for one to be enjoined as an interested party in a presidential election petition - whether being a presidential candidate in a general elections was enough consideration for one to be enjoined as an interested party in a presidential election petition – Supreme Court Rules, 2012 rules 25 and 26.

Brief facts

The applicant was a presidential candidate in the August 8, 2017 general election and sought to be enjoined as an interested party in the instant petition. The application was based on grounds that the applicant had a direct and legitimate interest in the instant petition and that the applicant’s interests in the proceedings was to champion the collective cause of his party and constituents in the manner the elections were conducted.

The 1st respondent opposed the application on the grounds that, the applicant sought to pursue a partisan position and therefore was not be enjoined as an intervenor as provided for under rule 25 of the Supreme Court Rules. The 2nd respondent also opposed the application on grounds that the application failed to meet the threshold of rule 25 of the Supreme Court Rules.

Issues

- i. What were the considerations for one to be enjoined as an interested party in a presidential election petition?
- ii. Whether being a presidential candidate in a general elections was enough consideration for one to be enjoined as an interested party in a presidential election petition.

Held

1. The applicant had failed to show in terms of rule 25 of the Supreme Court Rules, 2012 that he would suffer any prejudice if the intervention was denied and that the grounds or submissions to be advanced would be different from the other parties to the proceedings.

2. Enjoinment was not as of right but was at the discretion of the court. Sufficient grounds had to be laid before a court, on the basis of the following elements:

a. The personal interest or stake that the party had in the matter had to be set out in the application. The interest had to be clearly identifiable and had to be proximate enough, to stand apart from anything that was merely peripheral.

b. The prejudice to be suffered by the intended interested party in case of non-joinder, had to be demonstrated to the satisfaction of the court. It had to also be clearly outlined and not something remote.

c. A party had to, in its application, set out the case and/or submissions it intended to make before the court, and demonstrate the relevance of those submissions. It was also demonstrate that the submissions were not merely a replication of what the other parties would be making before the court.

3. The applicant was a presidential candidate in the August 8, 2017 general elections. That was an identifiable stake in the matter, and he would be directly affected by the outcome of the presidential election petition.

Application allowed.

Orders

- i. Applicant was to file the alleged report in his affidavit by 8.00 am on August 28, 2017 and serve upon all parties.
- ii. Applicant written submissions to be filed by 8:00 am on August 28, 2017 and limited to 5 pages only, of font 12, 1.5 spacing

Citations

Cases

Kenya



1. *Muruatetu, Francis Kariuki & another v Republic & 4 others* Petitions 15 & 16 of 2015; [2017] KESC 2 (KLR) - (Explained)
2. *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* Petition 12 of 2013; [2015] KESC 26 (KLR) - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 22, 23, 140, 159, 140(2) - (Interpreted)
2. Elections Act, 2011 (Act No 24 of 2011) In general - (Cited)
3. Supreme Court (Presidential Election Petition) Rules, 2017 (Act No 7 of 2011 Sub Leg) rules 21, 22 - (Interpreted)
4. Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rules 25, 26 - (Interpreted)

Advocates

None mentioned

RULING

An application for joinder as an interested party under rule 25 of the *Supreme Court Rules, 2012* as read with rule 4 (2) of the *Supreme Court (Presidential Election Petition) Rules, 2017*

1. By a notice of motion dated August 21, 2017 under a Certificate of Urgency premised on article 22, 23, 140, and 159 of the *Constitution of Kenya 2010*, the provisions of the *Elections Act 2012*, rules 21 and 22 of the *Supreme Court (Presidential Election Petition) Rules 2017*, rules 25 and 26 of the *Supreme Court Rules, 2012* and all other enabling provisions of the law), the applicant seeks the following reliefs:
 - (i) That the application be certified as urgent and heard on priority basis; and
 - (ii) That the applicant, Ekuru Aukot, be enjoined as an interested party in the petition.
2. The application is premised on the following grounds:
 - a. That the intended interested party has direct and legitimate interest in the petition herein related to the issues subject for determination by this honorable court.
 - b. That the intended interested party was a Presidential candidate during the National General elections held on the 8th of August 2017.
 - c. That the results of the said elections were announced and declared on the 11th day of August whereby the 2nd respondent declared and announced the 3rd respondent as the duly elected President of the Republic of Kenya.
 - d. That the said election and declaration has since been challenged by the petitioners herein and by dint of article 140(2) of the *Constitution*, this court has 14 days to hear and determine the said petition and the set timelines started running on August 18, 2017
 - e. That the applicant herein, Dr Ekuru Aukot was a presidential candidate on a Third-way Alliance Kenya party ticket in the just concluded elections who had several agents monitoring the electoral process and he has compiled his own independent audit of the electoral process with a view of establishing its transparency, credibility, verifiability and accountability hence he is entitled to be a party in these proceedings to help the court reach a judicious and fair determination of the matter at hand.



- f. That being a presidential candidate in the elections which are subject of the petition herein, the applicant is entitled to join as a petitioner and he will suffer prejudice if he is not joined as a party in these proceedings.
 - g. That as demonstrated in the annexed affidavits, the submissions to be advanced by the applicant in this petition are of relevance and useful to the court and different from those of the other parties herein in that the applicant has been an active player in these elections and he has gathered crucial information, facts and analysis that have a direct bearing on the proceedings herein and the ultimate outcome.
 - h. That in light of the mandatory constitutional time constraints, this application ought to be disposed of expeditiously to avoid a delay in the hearing of the main petition.
 - i. That the applicant wishes to be heard before a determination can be made on this matter because he will be directly affected by the outcome of this petition.
3. The annexed affidavit of Martin Gavole Aguya Mwenesi, the Secretary General of the applicant's party (Thirdway Alliance Kenya) deposes that:
 - a) The applicant, if enjoined to these proceedings, will enrich existing democratic space in Kenya (paragraph 5 of the affidavit)
 - b) The applicant will raise the issue of failure of the electronic transmission of votes (paragraphs 8 and 9 of the affidavit)
 - c) The applicant's party has compiled a report revealing the discrepancies in the forms availed by the 1st respondent (a copy of this report is however not annexed to the affidavit)
 - d) That there were numerous failures of the Kenya Integrated Elections Management (KIEMS) system.
 4. The application is also supported by the affidavit of Mr Miruru Waweru the chairman of the applicant's political party (Thirdway Alliance Kenya) sworn on the August 25, 2017 and filed on August 25, 2017; the affidavit of Mr Martin Gavole Aguya Mwenesi, the Secretary General of the applicant's party (Thirdway Alliance Kenya) sworn on the August 21, 2017 and filed on August 25, 2017, annexing a preliminary report of the party's review of the various IEBC reports and process.
 5. The applicant submits that his interest in these proceedings is to champion's the collective cause of his party and constituents in the manner that the elections were conducted. He contends that he has direct and legitimate interest in the present petition since he was a presidential candidate in the August 8, 2017 general election; that he will suffer prejudice if he is not enjoined as a party in the proceedings; and, that the submissions he shall advance during the hearing of the petition will be different from those of the other parties in the proceedings.
 6. There are two responses opposing the application. The first is a replying affidavit of the 1st and 2nd respondent sworn by Moses Kipkogei, the legal officer of the 1st respondent dated August 25, 2017 and filed August 26, 2017; and the second is by the replying affidavit of the 3rd respondent's sworn by Mr. Davis Kimutai Chirchir, the chief agent of Jubilee Party, sworn on the August 25, 2017 and filed on the August 25, 2017.
 7. It is the 1st respondents evidence that the applicant intends to pursue a partisan position and cannot be joined as an intervenor as provided under rule 25 of the *Supreme Court Rules, 2012* a position



confirmed by the Supreme Court in *Trusted Society of Human Rights Alliance vs Mumo Matemu & 5 others* [2014] eKLR. The application must fail.

8. The third respondent avers that the applicant has failed to meet the threshold in rule 25 of the *Supreme Court Rules, 2012* already conceded defeat if the concluded General Elections and cannot suffer any prejudice nor will he be directly affected by the outcome of the petition, therefore the application must fail;
9. The respondents have written submissions on record that affirm their positions.
10. Although the applicant highlights the principles set by this court on interventions/joiner of interested persons in the case of *Francis Kariuki Muruatetu and Wilson Thirumbu Mwangi v Republic and 4 others*, Supreme Court Petition No 15 and 16 of 2015 (consolidated) (the Muruatetu case), he fails to show (in terms of rule 25 of the *Supreme Court Rules, 2012* that:
 - (i) he would suffer any prejudice if the intervention was denied
 - (ii) the grounds or submissions to be advanced will be different from the other Parties to the proceedings.
11. Rule 25 of the *Supreme Court Rules, 2012* provides:
 - (1) A person may at any time in any proceedings before the court apply for leave to be joined 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
 - (3) 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.
 - (4) An application under this rule shall be determined on the basis of written submissions.
Provided that the court may, where the applicant is unrepresented, direct that submissions may not be made orally.

This rule is applicable in this instance by dint of rule 4(2) of the *Supreme Court (Presidential Election Petition) Rules, 2017*:

- (2) Where there is no applicable provision in the Act or in these rules, the procedures set out in the *Supreme Court Rules, 2017* in so far as they are not inconsistent with the Act or these rules, shall apply to an election petition.
12. While interpreting this provision in the *Muruatetu* case, this court laid out clear guidelines on instances when a person may be enjoined to proceedings before it as an interested party. At paragraph 37, the court held:

.....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. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court. [Emphasis added]

13. Consequently, the application conforms to the principles laid out in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others*, (an application by LSK) in Supreme Court Petition No. 12 of 2013, [2015] eKLR and *Francis Kariuki Muruatetu & another v Republic & 5 others*, Supreme Court Petition No 15 & 16 of 2015 (consolidated); [2016] eKLR in that the applicant: was a presidential candidate in the August 8, 2017 general elections. This is an identifiable stake in the matter, and he will be directly affected by the outcome of the present presidential election petition.

14. Accordingly, we make the following orders:

- (a) The application is hereby allowed.
- (b) The applicant is to file the alleged report in his affidavit by 8.00 am on August 28, 2017 and serve upon all parties.
- (c) Applicant written submissions to be filed by 8am on the August 28, 2017 and limited to 5 pages only, of font 12, 1.5 spacing.

Orders accordingly.

DATED, SIGNED AND DELIVERED ON THIS 27TH DAY AUGUST 2017.

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D.K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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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

.....

J.B. OJWANG

JUSTICE OF THE SUPREME COURT

.....



S.C. WANJALA
JUSTICE OF THE SUPREME COURT

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N.S. NDUNGU
JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA
JUSTICE OF THE SUPREME COURT

