



**Odinga & another v Independent Electoral and Boundaries Commission
& 2 others; Mwaura (Intended Respondent) (Presidential Election Petition
1 of 2017) [2017] KESC 38 (KLR) (Election Petitions) (27 August 2017) (Ruling)**

*Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission
& 2 others & Michael Wainaina Mwaura (as Amicus Curiae) [2017] eKLR*

Neutral citation: [2017] KESC 38 (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

RAILA AMOLO ODINGA 1ST PETITIONER

STEPHEN KALONZO MUSYOKA 2ND PETITIONER

AND

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

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

H.E. UHURU MUIGAI KENYATTA 3RD RESPONDENT

AND

MICHAEL WAINAINA MWAURA INTENDED RESPONDENT

Guiding principles when determining an application to be enjoined as amicus curiae (friend of the court) in a presidential election petition

Reported by Ribia John and Felix Okiri

Electoral Law – joinder of parties - presidential election petition – application to be enjoined as amicus curiae - guiding principles applicable in determining an application to be enjoined as amicus curiae – where the applicant was a presidential candidate in the presidential election - what were the guiding principles applicable



in determining an application to be enjoined as amicus curiae in a presidential election petition - whether being a presidential candidate in a presidential election was enough consideration for one to be enjoined as amicus curiae in a presidential election petition - whether an application by an independent candidate to be enjoined as amicus curiae could be allowed on grounds of objectivity of the applicant - whether a party who applied to be enjoined as amicus curiae had to demonstrate an identifiable stake or a legal interest in the proceedings - Supreme Court Rules, rule 4(2) and 54.

Brief facts

The applicant filed an application based upon rule 22 of the Supreme Court (Presidential Election Petition) Rules, 2017 and the inherent power of the court to be enjoined as an intended respondent or in the alternative as *amicus curiae* or in such capacity as the court could direct. The applicant relied on the grounds that: he was a relevant party as he was an independent candidate in the August 8, 2017 presidential election; and that he was able to table material that brought objectivity to the process of adjudicating the issues raised in the instant petition because he was as an independent candidate that was not affiliated to any political party.

The petitioner opposed the application on the ground that the applicant had not demonstrated any identifiable stake or legal interest in the proceedings. He averred that the applicant wished to advance his own interest, in the matter and did not demonstrate that he would suffer any prejudice if the application was declined.

Issues

- i. What were the guiding principles applicable in determining an application to be enjoined as *amicus curiae* in a presidential election petition?
- ii. Whether being a presidential candidate in a presidential election was enough consideration for one to be enjoined as *amicus curiae* in a presidential election petition.
- iii. Whether an applicant could apply to be enjoined as an interested respondent or in the alternative as *amicus curiae* or in such capacity as the court could direct.
- iv. Whether the applicant met the legal requirements for admission to the proceedings as an interested party.

Relevant provisions of the Law

Supreme Court Rules, 2012

Rule 54(2)

The Court shall before allowing an *amicus curiae* take into consideration the expertise, independence and impartiality of the person in question and it may take into account the public interest, or any other relevant factor.

Supreme Court (Presidential Election Petition) Rules, 2017.

Rule 4(2)

“(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”

Held

1. The guidelines for one to be enjoined as *amicus curiae* were:

1. An amicus brief should be limited to legal arguments.



2. The relationship between *amicus curiae*, the principal parties and the principal arguments in an appeal, and the direction of *amicus* intervention, ought to be governed by the principle of neutrality, and fidelity to the law.
3. An *amicus* brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tended to compromise their essence as well as the terms of the Constitution's called for resolution of disputes without undue delay. The court could therefore, and on a case- by- case basis, reject *amicus* briefs that did not comply with that principle.
4. An *amicus* brief should address point(s) of law not already addressed by the parties to the suit or by other *amici*, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.
5. The court could call upon the Attorney- General to appear as *amicus curiae* in a case involving issues of great public interest. In such instances, admission of the Attorney- General was not defeated solely by the subsistence of a State interest, in a matter of public interest.
6. Where, in adversarial proceedings, parties alleged that a proposed *amicus curiae* was biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appeared to be partisan on an issue before the court, the court would consider such an objection by allowing the respective parties to be heard on the issue.
7. An *amicus curiae* was not entitled to costs in litigation. In instances where the court requested the appearance of any person or expert as *amicus*, the legal expenses could be borne by the Judiciary.
8. The court would regulate the extent of *amicus* participation in proceedings, to forestall the degeneration of *amicus* role to partisan role.
9. In appropriate cases and at its discretion, the court could assign questions for *amicus* research and presentation.
10. An *amicus curiae* should not participate in interlocutory applications, unless called upon by the court to address specific issues.

2. The applicant did not meet the criteria set out in law and precedent as he was biased and was opposing the application which when put into context revealed that he was partisan. The intended *amicus curiae* was not neutral and his application had to fail. However, on perusal of the record, the applicant met the conditions set out in law on joinder of interested parties to a suit. The applicant was a candidate in the August General Elections, 2017 and he had shown a personal stake or interest in the matter.

3. For one to be enjoined in proceedings as an interested party, they had to move the court by way of a formal application. Enjoinment was not as of right, but was at the discretion of the court; hence, sufficient grounds had to be laid before the court on the basis of the following elements:

1. 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.
 2. The prejudice to be suffered by the intended interested party in case of non- joinder had to also be demonstrated to the satisfaction of the court. It had to also be clearly outlined and not something remote.
 3. Lastly, 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 should also demonstrate that those submissions were not merely a replication of what the other parties would be making before the court.
4. The applicant as a candidate in presidential election had a definitive stake in the outcome of the case.

Application allowed.

Orders

- i. *The applicant was admitted as an interested party.*



- ii. *Applicant written submissions to be filed by 8am on August 28, 2017 and limited to 5 pages only, of font 12, 1.5 spacing.*

Citations

Cases

Kenya

1. *Muruatetu & another v Republic; Kenya National Commission on Human Rights & 2 others (Interested Parties); Death Penalty Project (Intended Amicus Curiae)* Petition 15 & 16 of 2015 (Consolidated); [2016] KESC 12 (KLR) - (Explained)
2. *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* Petition 12 of 2013; [2015] KESC 26 (KLR) - (Explained)

Statutes

Kenya

1. Election Offences Act, 2017 (Act No 37 of 2016) In general - (Cited)
2. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) rules 4(2); 22 - (Interpreted)
3. Supreme Court Rules, 2012 (cap 9B Sub Leg) rule 54(2) - (Interpreted)

Advocates

None mentioned

RULING

1. The applicants notice of motion application dated August 23, 2017 and filed on even date is anchored on rule 22 of the [Supreme Court \(Presidential Election Petition\) Rules, 2017](#) (Rules) and the inherent power of the court. The motion is supported by his affidavit, that of Miriam M Mutua's and George Kariuki Njoroge's all dated August 23, 2017.
2. The applicant seeks joinder in *Raila Amolo Odinga & another v IEBC & 2 others*, Petition 1 2017, in the capacity of intended respondent/ *amicus curiae* but subject to his name only, appearing in the proceedings as he was the presidential candidate.
3. The applicant seeks to move the court for orders that:
 - (1) The notice of motion be certified urgent and heard *ex parte* and service thereof on the respondents be dispensed with in the first instance owing to its extreme urgency.
 - (2) Michael Wainana Mwaura, an independent candidate in the August 8, 2017 presidential election be forthwith enjoined as an interested respondent, or in the alternative as *amicus curiae*, or in such capacity as this honourable court may direct.
 - (3) Upon the grant of order 2 herein, the replying affidavit of Michael Wainana Mwaura sworn on August 23, 2017 and lodged herein be deemed as properly filed and service thereof be effected on the respondents forthwith under such terms and directions as this Honourable Supreme Court shall make.
 - (4) Costs abide in the cause.
4. The application is premised upon the supporting affidavit of the applicant, Miriam M Mutua and annexure therein. The grounds are summarized as:
 - (1) The applicant is complying with the statutory mandate of rule 22 of the petition [Rules](#).



- (2) The applicant is a relevant party as he was an independent candidate in the August 8, 2017 presidential election having garnered 13,257 votes as declared by the 1st respondent.
 - (3) He is able to table material that brings objectivity to the process of adjudicating the issues as an independent candidate not affiliated to any political party.
 - (4) His joinder will aid the court view the involvement of such an independent candidate in the general conduct and the process of the Presidential election sought to be impugned.
 - (5) An IT expert under the auspices of the applicant has demonstrated by means of his IT expertise that the minimum time required for forensic IT data examination of the IEBC IT systems is 2-3 months. These timelines or cost (Kshs 10-30 million) to conduct the audit was never proffered by the petitioners.
5. The applicant in his affidavit in support of the motion deposes that he has perused all the evidence presented by the petitioners and is unable to find merit in the proposition that the presidential elections held on August 8, 2017 should be annulled.
 6. He avers that there are only two discernible grounds in the petition arising for determination; (1) the validity of the conduct of a presidential election (presumably the August 8, 2017 presidential petition); (2) the commission of an election offence as provided under the [Election Offences Act](#) (No 37 of 2016). He deposes that the petitioner has introduced two unsubstantiated grounds; (1) the allegedly discrepant data between the Forms 34A and the poll data results at the National Tallying Center and (2) Alleged ballot stuffing in consequence of alleged eviction of the petitioners' agents at polling stations.
 7. His running mate Miriam Mutua has also filed a supporting affidavit dated August 23, 2017 where she reiterates the contents of the applicants affidavit and also opposing the petition. Further, annexed to the motion is George Kariuki Njoroge's affidavit dated August 23, 2017, IT expert testimony refuting the petitioners IT evidence and also opposing the petition.
 8. In response to the application, the petitioner has filed a replying affidavit to application by intended interested parties and *amicus curiae* dated and filed on August 26, 2017 deposed to by Raila Amollo Odinga. He opposes the application as the applicant has not demonstrated any identifiable stake or legal interest in the proceedings. He avers that the applicant wishes to advance his own interest, in the matter and does not demonstrate that he would suffer any prejudice if the application was denied. He prays the application be dismissed with costs.
 9. The 1st & 2nd respondent are also opposed to the application, and have filed a replying affidavit deposed to by Moses Kiplagat, a Senior Legal Manager of the 1st respondent to that effect. He avers that the applicant fails to meet the threshold of rule 54(2) of the [Supreme Court Rules, 2012](#) as he is not impartial or independent. They urge the court to dismiss the application.

The Law

10. Rule 54 of the [Supreme Court Rules, 2012](#) read with rule 4(2) of the [Supreme Court \(Presidential Election Petition\) Rules, 2017](#) set out criteria to be met when applying for *amicus*.
 54. (2) The court shall before allowing an amicus curiae take into consideration the expertise, independence and impartiality of the person in question and it may take into account the public interest, or any other relevant factor.



11. The court has found occasion to pronounce its self on its inherent power to admit *amicus curiae*, in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others*, Supreme Court Petition No 12 of 2013,[2015] eKLR (an application by Katiba Institute), it considered the role and set out the guiding principles applicable in determining an application to be enjoined in that capacity. The court held (at paragraph 41), that:

- “(i) An *amicus* brief should be limited to legal arguments.
- (ii) The relationship between amicus curiae, the principal parties and the principal arguments in an appeal, and the direction of amicus intervention, ought to be governed by the principle of neutrality, and fidelity to the law.
- (iii) An *amicus* brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tends to compromise their essence as well as the terms of the Constitution’s call for resolution of disputes without undue delay. The court may therefore, and on a case-by-case basis, reject amicus briefs that do not comply with this principle.
- (iv) An *amicus* brief should address point(s) of law not already addressed by the parties to the suit or by other amici, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.
- (v) The court may call upon the Attorney- General to appear as amicus curiae in a case involving issues of great public interest. In such instances, admission of the Attorney- General is not defeated solely by the subsistence of a State interest, in a matter of public interest.
- (vi) Where, in adversarial proceedings, parties allege that a proposed *amicus curiae* is biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appears to be partisan on an issue before the court, the court will consider such an objection by allowing the respective parties to be heard on the issue (see: *Raila Odinga & others v IEBC & others*; SC Petition No 5 of 2013-Katiba Institute’s application to appear as *amicus*).
- (vii) An *amicus curiae* is not entitled to costs in litigation. In instances where the court requests the appearance of any person or expert as *amicus*, the legal expenses may be borne by the Judiciary.
- (viii) The court will regulate the extent of amicus participation in proceedings, to forestall the degeneration of amicus role in to partisan role.
- (ix) In appropriate cases and at its discretion, the court may assign questions for amicus research and presentation.



- (x) An *amicus curiae* shall not participate in interlocutory applications, unless called upon by the court to address specific issues” [emphases supplied].
12. The applicant herein does not meet the criteria set out in law and precedent as he is biased and is opposing the application which when put into context reveals that he is partisan. As such the intended *amicus curiae* is not neutral and his application must fail.
13. However, on perusal of the record, the applicant meets the conditions set out in law on joinder of interested parties to a suit. The party herein was a candidate in the just concluded General Elections, and this has shown a personal stake or interest in the matter.
14. Rule 4(2) of the [Supreme Court \(Presidential Election Petition\) Rules, 2017](#). Rule 25 of the [Supreme Court Rules, 2012](#) is headed Interventions, and provides:
- “(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”
15. The principles set out in paragraph 37 of [Francis Kariuki Muruatetu & another v Republic & 5 others](#) Petition 15 as consolidated with 16 of 2013 [2016] eKLR demonstrate elements applicable where a party seeks to be enjoined in proceedings as an interested party , they are:
- One must move the court by way of a formal application. 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.
16. We find that the applicant as a candidate in presidential election, has a definitive stake in the outcome of the case.



Consequently, we make the following order:

17. The application is hereby allowed.
 - (a) To the extent that the applicant is admitted as an interested party.
 - (b) 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.

D.K. MARAGA

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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 COURT

J.B. OJWANG

.....

JUSTICE OF THE SUPREME COURT COURT

S.C. WANJALA

.....

JUSTICE OF THE SUPREME COURT

N.S. NDUNGU

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JUSTICE OF THE SUPREME COURT COURT

I. LENAOLA

.....

JUSTICE OF THE SUPREME COURT

