



**Odinga & another v Independent Electoral and Boundaries Commission
& 2 others; Wafula (Interested Party) (Presidential Election Petition
1 of 2017) [2017] KESC 41 (KLR) (27 August 2017) (Ruling)**

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

Neutral citation: [2017] KESC 41 (KLR)

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

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

UHURU MUIGAI KENYATTA 3RD RESPONDENT

AND

BENJAMIN BARASA WAFULA INTERESTED PARTY

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

Reported by John Wainaina and Njeri Mweha

***Electoral Law** – presidential election – application to be enjoined as an interested party – application to be enjoined as an interested party in a presidential election petition – what were the considerations for one to be enjoined as an interested party in a presidential election petition - what were the considerations for one to be admitted as an interested party in Supreme Court proceedings – Supreme Court Rules, 2012 rule 25.*

***Civil Practice and Procedure** – application to be enjoined as an interested party – application to be enjoined as an interested party in a presidential election petition – what were the considerations for one to be enjoined as*



an interested party in a presidential election petition - what were the considerations for one to be admitted as an interested party in Supreme Court proceedings – Supreme Court Rules, 2012 rule 25.

Civil Practice and Procedure – application to be enjoined as an interested party – application to be enjoined as an interested party in the presidential election petition – where the application introduced new parties and excluded other parties – where the application introduced new facts and issues that were not before the court – whether an application to be enjoined as an interested party that introduced new parties whilst excluding other parties and that introduced new facts and issues that were not before the court was valid.

Brief facts

The applicant sought to be enjoined as an interested party in the presidential election petition. The application introduced new facts and issues not before the Supreme Court and also alleged that the 1st and 2nd petitioners were interfering with the trial process of the court by pre-empting the exercise of normal judicial discretion.

The petitioners opposed the application on grounds that the application was made in bad faith and that it was frivolous, vexatious and an abuse of court process. The 1st and 2nd respondents also opposed the application on grounds that the application had the intention of diverting the true issues in contest in the main petition.

Issues

- i. What were the considerations for one to be enjoined as an interested party in a presidential election petition?
- ii. Whether an application to be enjoined as an interested party that introduced new parties and excluded other parties, and that introduced new facts and issues that were not before the court was valid.

Held

1. An applicant for joinder had to satisfy the Supreme Court that they fulfilled the legal requirements for joinder under rule 25 of the Supreme Court Rules.
2. The application introduced new parties and excluded some of the parties in the instant petition. The application introduced new facts and issues that were not before the court. The applicant was not in a position to advance any submissions that would be helpful to the court.
3. The applicant sought to introduce a new petition and pre-empted the duly lodged cause of the parties in the main proceedings. That was not acceptable. The applicant would not suffer any prejudice if his intervention was denied

Application dismissed.

Citations

Cases

Kenya

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

Statutes

Kenya

1. Constitution of Kenya, 2010 article 22 - (Interpreted)
2. Supreme Court (Presidential Election Petition) Rules, 2017 (Act No 7 of 2011 Sub Leg) rule 4(2) - (Interpreted)
3. 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 No 1 of 2017, in the capacity of interested party. His notice of motion, dated August 24, 2017, and supported by his affidavit of the same date, was filed on August 25, 2017.
2. The application is based on article 22 of the [Constitution of Kenya](#), and his prayers are that:
 - (a) This court be pleased to grant *ex parte* orders enjoining the applicant herein as an interested party, in the 2017 General Election Petition, so that his orders under Civil Suit No 05 of 2016, pending in the High Court of Kenya at Bungoma, are not compromised by the decision in the current petition.
 - (b) The costs of this application be provided for.’
3. The application raises several grounds, as follows:
 - (a) That the 2017 general election issues are similar to matters pending in the High Court of Kenya at Bungoma, in Civil Suit No 5 of 2016, and relating to the same parties;
 - (b) That the hon President, Uhuru Muigai Kenyatta, the hon Deputy President, William Samoei Ruto, and the majority leader, the hon Adan Duale, had appeared in the said Civil Suit No 5 of 2016, filed in the High Court at Bungoma; and
 - (c) That the High Court of Kenya at Bungoma had declined to give a hearing date, as its diary was full; and on October 26, 2016, the applicant had requested that the matter be transferred to the Supreme Court, which request was declined by the court. He had then filed a complaint to this court, on December 30, 2016, but the court has not considered the complaint.
4. The applicant contends that the principals of the NASA coalition of parties have forged election results, and attempted to hack the digital tallying system several times, without having to answer to any regulatory agencies of the state.
5. The applicant alleges that the NASA principals are interfering with the trial process in this court, by pre-empting the exercise of normal judicial discretion.
6. The petitioners, through the replying affidavit of Raila Amolo Odinga, dated August 26, 2017, aver that the application rests on bad faith, and is frivolous, vexatious, and an abuse of court process. The deponent avers that the application has the intention of diverting the true issues in contest, which have their relevance only to the conduct of the 1st and 2nd respondents, as well as to the declaration of the 3rd respondent as the winner of the presidential election held on August 8, 2017.
7. The 1st and 2nd respondents also contest the said application through the replying affidavit of Moses Kipkoge, as well as their written submissions – both dated August 25, 2017. They contend that the applicant’s motivation can only serve the purpose of circumventing the due conduct of the electoral process, as provided for in article 140 of the [Constitution](#), as read with the [Supreme Court \(Presidential Election Petition\) Rules, 2017](#).



B. Joinder of Interested Parties: The Law

8. An applicant for joinder has to satisfy this court that he or she has fulfilled the legal requirements of joinder. the relevant law is rule 4(2) of the *Supreme Court (Presidential Election Petition) Rules, 2017*, as read with rule 25 of the *Supreme Court Rules, 2012*. The said rule 4(2) thus stipulates:
- (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 of 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. The significance of these provisions of law is underlined in past decisions of this court, such as: *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others*, Supreme Court Petition No 12 of 2013; and *Francis Kariuki Muruatetu & another v Republic & 5 others*, Petition 15 as consolidated with 16 of 2013 [2016] eKLR.
11. We note, in the instant matter, that the applicant seeks joinder, even as his application introduces new parties to a cause already resting before the court; and he, at the same time, excludes some of the current parties. The applicant, in essence, is introducing new facts and issues that were not before the court. It follows that he is not in a position to advance any submissions that will be helpful to the court, as it resolves the main question in hand. He is, in effect, introducing a new petition, and pre-empting the duly-lodged cause of the parties in the main proceedings. This cannot be allowed. Moreover, we are also not convinced that the applicant would suffer any prejudice, if his intervention is denied. Accordingly, we dismiss this application.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF AUGUST, 2017.

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DK MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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PM MWILU

DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

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MK IBRAHIM
JUSTICE OF THE SUPREME COURT

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J BOJWANG
JUSTICE OF THE SUPREME COURT

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SC WANJALA
JUSTICE OF THE SUPREME COURT

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NS 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

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