



Mwau v Independent Electoral and Boundaries Commission & 2 others; Attorney General (Amicus Curiae) (Petition 2 of 2017) [2017] KESC 3 (KLR) (14 November 2017) (Ruling)

John Harun Mwau v Independent Electoral and Boundaries Commission & 3 others [2017] eKLR

Neutral citation: [2017] KESC 3 (KLR)

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

PETITION 2 OF 2017

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

NOVEMBER 14, 2017

**IN THE MATTER OF ARTICLES 2,3,10,38,82,88,136,137,138,140
AND 163 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

AND

IN THE MATTER OF ELECTIONS ACT NO.24 OF 2011

AND

**IN THE MATTER OF SPECIAL GAZETTE NOTICE NO. 8751, VOL. CXIX-NO.
130 OF 5TH SEPTEMBER, 2017, SPECIAL GAZETTE NOTICE NO. 9800 OF 2017,
VOL CXIX-NO 145 OF 29TH SEPTEMBER, 2017, SPECIAL GAZETTE NOTICE
NO. 10152, VOL CXIX –NO 153 OF 13TH OCTOBER, 2017, SPECIAL GAZETTE
NOTICE NO. 10562 VOL.XXIX-NO 160 OF 24TH OCTOBER, 2017, AND SPECIAL
GAZETTE NOTICE NO. 10808, VOL CXIX-NO.164 OF 30TH OCTOBER, 2017**

AND

**IN THE MATTER OF THE CHALLENGE OF VALIDITY
OF THE ELECTION OF THE PRESIDENT-ELECT**

AND

IN THE MATTER OF THE SUPREME COURT ACT

AND

IN THE MATTER OF THE SUPREME COURT (PRESIDENTIAL ELECTION PETITION)

BETWEEN

JOHN HARUN MWAU PETITIONER

AND



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

WAFULA WANYONYI CHEBUKATI 2ND RESPONDENT

UHURU KENYATTA 3RD RESPONDENT

AND

ATTORNEY GENERAL AMICUS CURIAE

Whether the Attorney General's amicus brief had addressed points of law that had not been addressed by the parties to the suit

Reported by Robai Nasike Sivikhe

Civil Practice and Procedure - joinder of parties - amicus curiae - application by the Attorney General to be enjoined in a presidential petition as amicus curiae - whether the Attorney General had qualified to be admitted as amicus curiae.

Brief facts

The applicant (the Attorney General) lodged an application to be enjoined in the proceedings as *amicus curiae*. According to the applicant, his joinder in the proceedings would enhance the right of access to justice in terms of the qualitative normative content of the political rights as well as open positive lines of development of electoral law jurisprudence with regard to whether nominations of presidential candidates was a procedural requirement in the conduct of fresh a presidential election arising under article 140(3) of the Constitution.

The applicant contended that the conduct of a fresh presidential election arising under article 140(3) of the Constitution was a matter of great public interest to which joinder of the Attorney General as a defender of the public interest was critical. According to the applicant, the presidential electoral disputes normally raised constitutional questions of great public importance revolving around the interpretation and application of constitutional and legal principles and policy to a given disputed issue.

It was contended that having been involved as *amicus curiae* in the *Raila Odinga, 2013* case where the issue of candidates to participate in a fresh presidential election was raised, and having been involved in post-2013 electoral legal reform as affirmed by the court in the case of *Raila Odinga & Another vs. IEBC & 2 Others*, the Attorney General was in a special position to assist the court in making a determination on the issue. It was argued that the applicant had the relevant expertise to assist the court to make a determination on the pointed issues by placing relevant material and research before the court.

Issues

- i. Whether the Attorney General had qualified to be admitted as *amicus curiae*
- ii. Whether the Attorney General's *amicus* brief would have addressed points of law that had not been addressed by the parties to the suit.

Held

1. The Attorney General had not qualified to be admitted as *amicus curiae* in the proceedings because his application had not met the threshold laid out in the *Mumo Matemu* case. In particular:
 - a. The Attorney General's *amicus* brief had not addressed point(s) of law not already addressed by the parties to the suit so as to introduce only novel aspects of the legal issue in question that aid the development of the law.
 - b. The *amicus* brief neither demonstrated that the submissions intended to be advanced will give such assistance to the court as would otherwise not have been available nor draw the attention of the court to relevant matters of law or fact which would otherwise not have been taken into account. The



issues advanced in the *amicus* brief had been extensively covered by the parties to the petition and no new points of law or legal expertise on the proposed issue of ‘nomination’ had been advanced by the Attorney General.

Application dismissed.

Citations

Cases

Kenya

1. *Aukot, Ekuru v Independent Electoral and Boundaries Commission & 3 others* Petition 471 of 2017; [2017] eKLR - (Mentioned)
2. *Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* Petitions 5, 4 & 3 of 2013; [2013] KESC 8 (KLR) (Consolidated) - (Mentioned)
3. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others* Presidential Election Petition 1 of 2017; [2017] KESC 39 (KLR) - (Mentioned)
4. *Trusted Society for human Rights Alliance v Matemu, Mumo & 5 others* Civil Application 29 of 2014; [2015] KESC 6 (KLR) - (Explained)

Trinidad and Tobago

Peters v Attorney General (2002) 3 LRC 32 - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya articles 81,140(3); 156(5)(6) — Interpreted
2. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) rules 4(2); 54 — Interpreted

Advocates

None mentioned

RULING

1. Upon perusing the application dated November 13, 2017 and filed on even date by the Hon Attorney General to be enjoined in these proceedings as *amicus curiae* on the grounds that:
 - (i) The applicant has a constitutional and statutory obligation to promote, protect and uphold the rule of law and defend the public interest and in particular:
 - a. Authorised under article 156(5) of the *Constitution* and section 6(2)(a) to appear with leave of the court as a friend of the court in any civil proceedings to which the Government is not a party.
 - b. Obligated under article 156(6) of the *Constitution* to promote, protect and uphold the rule of law and defend the public interest.
 - (ii) The Hon Attorney General has been admitted as *amicus curiae* in all the previous presidential election petitions before this court in appreciation of his statutory and constitutional mandate.
 - (iii) The Office of Attorney General has been involved in post 2013 electoral legal reform processes under article 81 of the *Constitution* which puts it in a special position to assist the court to make a determination on the issues raised in the petition.



- (iv) The instant petition raises complex and significant constitutional and legal questions regarding whether the nomination of presidential candidates is a mandatory procedural requirement in the conduct of fresh presidential election under article 140(3) of the *Constitution*.
 - (v) The Hon Attorney General in the case of *Raila Odinga & others v IEBC & Others*; Supreme Court Petition No 5 of 2013 (*Raila Odinga, 2013 case*) raised the issue of candidates to participate in a fresh presidential election arising under article 140(3) of the *Constitution*, which issue is live in this petition and the Attorney General has special insights on the issue.
2. Further, in the affidavit in support of the application sworn on November 13, 2017, the Attorney General avers that throughout his tenure, he has exercised the necessary impartiality and independence as demanded by the constitution and the law throughout the electoral process leading to the conduct of the fresh presidential election.
3. Upon reading the *amicus* brief and upon considering the written submissions in support of the application, the applicant contends that:
 - (i) His joinder in these proceedings will enhance the right of access to justice in terms of the qualitative normative content of the political rights as well as open positive lines of development of electoral law jurisprudence with regard to whether nominations of presidential candidates is a procedural requirement in the conduct of fresh presidential election arising under article 140(3) of the *Constitution*.
 - (ii) The conduct of fresh presidential election arising under article 140(3) of the *Constitution* is a matter of great public interest to which joinder of the Attorney General as a defender of the public interest is critical as enunciated in the case of the *Trusted Society for human Rights Alliance v Mumo Matemu & 5 Others* (2015) eKLR (*Mumo Matemu*) case.
 - (iii) Presidential electoral disputes normally raise constitutional questions of great public importance revolving around the interpretation and application of constitutional and legal principles and policy to a given disputed issue. He referred to the case of *Peters v Attorney General* (2002) 3 LRC 32 CA Trinidad and Tobago at 101 to buttress this submission.
 - (iv) Having been involved as *amicus curiae* in the *Raila Odinga, 2013 case* where the issue of candidates to participate in a fresh presidential election was raised, and having been involved in post-2013 electoral legal reform as affirmed by this court in the case of *Raila Odinga & another v IEBC & 2 others* [2017] eKLR, the Attorney General is in a special position to assist the court in making a determination on this issue.
 - (v) The Hon Attorney General has the relevant expertise to assist the court to make a determination on the pointed issues by placing relevant material and research before the court.
4. Having considered the application, by a unanimous decision of the court, we find that the Hon Attorney General does not qualify to be admitted as *amicus curiae* in these proceedings because his application does not meet the threshold laid out in the *Mumo Matemu* case. In particular:
 - i. The Attorney General's *amicus* brief does not address point(s) of law not already addressed by the parties to the suit so as to introduce only novel aspects of the legal issue in question that aid the development of the law. The Attorney General only points to the decision of the High Court in the case of *Ekuru Aukot v Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR. He then submits that the IEBC was constitutionally bound to follow that decision, being a decision in rem, in conducting the fresh presidential election.



- ii. The *amicus* brief neither demonstrates that the submissions intended to be advanced will give such assistance to the court as would otherwise not have been available nor draws the attention of the court to relevant matters of law or fact which would otherwise not have been taken into account. The issues advanced in the amicus brief have been extensively covered by the parties to the petition and no new points of law or legal expertise on the proposed issue of ‘nomination’ has been advanced by the Hon Attorney General.
5. Consequently, we hereby make the following orders under rule 54 of the [Supreme Court Rules](#) as read with rule 4(2) of the [Supreme Court \(Presidential Election Petition\) Rules 2017](#):
- (i) The notice of motion dated November 13, 2017 seeking orders that this court grants leave for the honourable Attorney-General to appear as *amicus curiae* in these proceedings is hereby denied.
- (ii) No order as to costs.

Orders Accordingly

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2017.

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D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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P. M. MWILU

VICE-PRESIDENT & DEPUTY CHIEF JUSTICE OF THE SUPREME COURT

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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.

