



REPUBLIC OF KENYA



KENYA LAW
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**Kuria & 5 others v Hassan & 4 others (Petition 3, 4 & 5 of 2013
(Consolidated)) [2013] KESC 24 (KLR) (26 March 2013) (Ruling)**

Neutral citation: [2013] KESC 24 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 3, 4 & 5 OF 2013 (CONSOLIDATED)
WM MUTUNGA, CJ & P, PK TUNOI, MK IBRAHIM,
JB OJWANG, SC WANJALA & N NDUNGU, SCJJ
MARCH 26, 2013**

BETWEEN

**MOSES KIARIE KURIA 1ST PETITIONER
DENIS NJUE ITUMBE 2ND PETITIONER
FLORENCE JEMATIAH SERGON 3RD PETITIONER**

AND

**AHMED ISSACK HASSAN 1ST RESPONDENT
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND
RESPONDENT**

**AS CONSOLIDATED WITH
PETITION 4 OF 2013**

BETWEEN

**GLADWELL WATHONI OTIENO 1ST PETITIONER
ZAHID RAJAN 2ND PETITIONER**

AND

**AHMED ISSACK HASSAN 1ST RESPONDENT
UHURU KENYATTA 2ND RESPONDENT
WILLIAM SAMOEI RUTO 3RD RESPONDENT**

**AS CONSOLIDATED WITH
PETITION 5 OF 2013**



BETWEEN

RAILA ODINGA 1ST PETITIONER

MOSES KIARIE KURIA, DENIS NJUE ITUMBI & FLORENCE JEMATIAH
SERGON 2ND PETITIONER

GLADWELL WATHONI OTIENO & ZAHID RAJAN 3RD PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT

AHMED ISSACK HASSAN 2ND RESPONDENT

UHURU KENYATTA 3RD RESPONDENT

WILLIAM SAMOEI RUTO 4TH RESPONDENT

Perception of bias and partisanship disqualifies an applicant as amicus curiae to a presidential election petition.

Reported by Emma Kinya Mwobobia

***Election Law** - presidential election petition - parties to a presidential election petition - amicus curiae - court's consideration in admitting a party to the status of an amicus curiae - requirement for the applicant to be non-partisan in the petition - allegations that the applicant had previously released a biased report on the President-elect - whether the application had merit in the circumstances.*

Brief facts

Katiba Institute (applicant) made an application seeking admission to the status of *amicus curiae* in the presidential election petition proceedings at the Supreme Court. The applicant submitted that the institution had been admitted to the status of *amicus curiae* in the past by the courts and further that the Institute had carried out research on matters of interpreting the Constitution and had great and singular expertise in constitutional law.

The application was opposed on grounds, *inter alia*, that a party seeking to be enjoined as *amicus curiae* must have been non-partisan and neutral. Further, a report which was co-written by the Katiba Institute titled "Implications of Kenyatta/Ruto Presidency" was submitted to court and was alleged that it implied the deep-seated resentment the applicant held towards the President-Elect and his Deputy.

Issues

Whether the applicant should be admitted to the status of *amicus curiae* in the presidential election petition despite allegations of previous bias and partisanship.

Held

1. While it was true that the applicant had previously enjoyed the status of *amicus curiae* before the court, the adversarial nature of the presidential election petition was different from that of an advisory opinion hearing by the court to which the applicant had previously enjoyed audience.
2. Where in adversarial proceedings parties had alleged a proposed applicant for *amicus curiae* was biased or hostile to 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 had to consider such an objection seriously.



3. The court, though unable to ascertain the veracity of every claim that was made in the application, was convinced of the perception of bias and partisanship with regard to the applicant in the presidential election petition.

Application disallowed.

Citations

Cases

None referred to

Statutes

Kenya

Constitution of Kenya In general — (Cited)

Advocates

Mr Regeru for the 3rd petitioner

Mr Rubello for the 1st respondent

Mr Karori for the 2nd respondent

Mr Katwa Kigen for the 4th respondent

RULING

1. An application has been made before this court by the Katiba Institute seeking admission to the status of *amicus curiae*. Professor Yash Ghai and Mr Waikwa Wanyoike made both oral and written representations for the purpose of this application.
2. Prof Ghai narrated the objectives of the Institute and submitted that the Institute has been admitted to the status of *amicus curia* in the past by this court and in other courts. He states that it carries out research on matters of interpreting the Constitution, commenting on all matters of law and has great and singular expertise in constitutional and comparative constitutional law.
3. The Application is opposed by several counsel - the 3rd petitioner and the all of the respondents - in this matter.
4. Mr Karori for the 2nd respondent, and who has filed written grounds of opposition to the application, submits that a party seeking to be enjoined *amicus curiae* must be non partisan and neutral. He states that the applicant does not meet these requirements and has previously adopted positions adverse to both the 1st and 2nd respondents. He submits several documents and articles written by the Institute and Prof Ghai, to support this. Mr Regeru for the 3rd petitioner also submits documents to emphasise the same point.
5. Further, Mr Karori, states that the Application has not been brought in good faith as the Applicant had a duty to disclose to the court that he has a personal grudge against the 2nd respondent and that the applicant did not disclose this nor his position previously taken on the subject matter of this case, and on some of the other parties involved in it.
6. Mr Karori also states that the Institute has failed to show any special knowledge of the law which it will bring to this matter and there are no special circumstances that would necessitate its admission to the status of *amicus curia*.
7. Mr Ngatia, for the 3rd respondent, opposes this application, stating that the Institute is partisan in this matter. He submits to the court a report co-written by the Katiba Institute entitled: Implications of



Kenyatta/Ruto Presidency, which he suggests shows deep seated resentment by the Applicant towards the 3rd and 4th respondent.

8. These grounds for opposition to the Application are also supported by Mr Katwa Kigen for the 4th respondent and Mr Rubello for the 1st respondent.
9. While is true that the Katiba Institute has enjoyed the status of *amicus curiae* before this court, it is clear to us that the adversarial nature of this matter, is different from that of an advisory opinion hearing of this court, to which the Institute previously enjoyed audience.
10. We are of the opinion that where in adversarial proceedings, parties allege a proposed applicant for *amicus curiae* is biased or hostile to one or more of the parties or where the applicant through previous conduct appears to be partisan on an issue before the court, then we must consider such an objection seriously.
11. Having perused the authority submitted by the Applicant on the issue of impartiality and admission of *amicus curiae*, we find that the test established in that matter has no direct correlation to the kind of case which is before us, a contested and highly adversarial election petition.
12. Having listened to all arguments from counsel and studied the documentation submitted to the court with regard to this Application, and even though we are unable to ascertain the veracity of every claim, the court is convinced of the perception of bias and partisanship with regard to the Applicant in this matter exists.
13. In view of the foregoing, the court's position is:
14.
 - a. That the application by the Katiba Institute for admission to the status of *amicus curiae* is disallowed.
 - b. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MARCH, 2013.

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W.M. MUTUNGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME court

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P.K. TUNOI

JUSTICE OF THE SUPREME court

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M.K. IBRAHIM

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

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N.S. NDUNGU

JUSTICE OF THE SUPREME court

I certify that this is a true copy of the original

REGISTRAR

SUPREME court OF KENYA

