



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 14 (KLR) (25 March 2013) (Ruling)**

MOSES KIARIE KURIA & 2 OTHERS V AHMED ISSACK HASSAN & ANOTHER [2013]eKLR

Neutral citation: [2013] KESC 14 (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 25, 2013

BETWEEN

MOSES KIARIE KURIA 1ST PETITIONER

DENIS NJUE ITUMBI 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 PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT

AHMED ISSACK HASSAN 2ND RESPONDENT

UHURU KENYATTA 3RD RESPONDENT

WILLIAM SAMOEI RUTO 4TH RESPONDENT

Allowing the Attorney General to participate in a presidential election petition as an *amicus curiae* is not prejudicial to the scope of the Supreme Court's authority

Reported by Kakai Toili

Civil Practice and Procedure - parties to a suit - amicus curiae - whether allowing the Attorney General to participate in a presidential election petition as an amicus would be prejudicial to the scope of the Supreme Court's authority.

Brief facts

Two applications were made before the court both seeking admission to the status of *amicus curiae* by the Attorney-General and the Law Society of Kenya (LSK) in a presidential election petition. The Attorney-General submitted that the importance of presidential election, based on the terms of the Constitution of Kenya, 2010 (Constitution) justified the participation of his office as protector of the public interest, in the capacity of *amicus curiae*. The Attorney-General submitted that his office had no partisan interest in the matter.

While not doubting that the Attorney-General would remain non-partisan as *amicus*, the petitioners submitted that as the case was essentially evidentiary and not concerned with the interpretation of the Constitution, there was no special contribution which the Attorney-General could make, in the capacity sought. The petitioners further urged that the Government needed not participate in the petition proceedings as *amicus*, since its role was like that of a respondent, via the agency of the Independent Electoral and Boundaries Commission (IEBC).

Issues

Whether allowing the Attorney General to participate in a presidential election petition as an *amicus* would be prejudicial to the scope of the Supreme Court's authority.

Held

1. The State Law Office, the chief officer of which was the Attorney-General, was the custodian of the legal instruments of the Executive branch, and the recognised advisor of the State in matters of public interest. That office was the main player in the performance of the Executive's role *vis-a-vis* the operationalization of the Constitution of Kenya, 2010 (Constitution). The Constitution expressly provided that, in certain instances, the Attorney-General could obtain the court's permission to appear as *amicus*. The court, which was the custodian of rules of validity, propriety and fair play under the Constitution and the law, remained in charge, in regulating such precise role as the Attorney-General could play if admitted as *amicus curiae*.



2. It would be improper to exclude the Attorney-General from the role of *amicus* in the proceedings and admitting the Attorney-General to such a role would not present a condition prejudicial to either the scope of the court's authority, or the best interests of the parties to the several petitions. The position of the LSK was entirely different.
3. The submissions of the counsel in favour of admitting LSK to the status of *amicus* were by no means the most powerful. The effect of counsel's submission was that since, by section 4 of the Law Society of Kenya Act, LSK was mandated to assist the Government in matters related to law-making, that was a typical case in which LSK deserved to be admitted to the status of *amicus curiae*. However, the argument to the contrary was more powerful.

Attorney-General admitted to the status of amicus curiae in the petitions before the court; application by the LSK for admission to the status of amicus curiae dismissed.

Citations

Cases

None referred to

Statutes

Kenya

1. Constitution of Kenya, 2010 article 166 — (Interpreted)
2. Law Society of Kenya Act, 2014 (Act No 21 of 2014) section 4 — (Interpreted)

Advocates

Mr Oraro and Ms Kilonzo for the petitioners

Mr Regeru, Mr Abdullahi, Mr Ngatia, Mr Rebello and Mr Kigen for the respondents

RULING

1. Two applications were made before this court earlier in the day, both seeking admission to the status of *amicus curiae*. The first was by the Attorney-General, while the second was by the Law Society of Kenya (LSK).
2. The learned Attorney-General submitted that the importance of presidential election, based on the terms of the [Constitution of Kenya, 2010](#) justified the participation of his office as protector of the public interest, in the capacity of *amicus curiae*. The Attorney-General submitted that his office had no partisan interest in the matter, and would in any case limit itself to such role as the court can do no more than highlight legal questions, and in this way provide guidance to the court.
3. Most of the several counsel in the petitions – Mr Regeru, Mr Abdullahi, Mr Ngatia, Mr Rebello, Mr Kigen – supported the Attorney-General's application. However, learned counsel for the petitioners, Mr Oraro and Ms Kilonzo opposed the application.
4. While not doubting that the Attorney-General would remain non-partisan as *amicus*, Ms Kilonzo submitted that as the case was essentially evidentiary and not concerned with the interpretation of the [Constitution](#), there was no special contribution which the Attorney-General could make, in the capacity sought. Counsel urged that the Government needed not participate in the petition proceedings as *amicus*, since its role was like that of a respondent, via the agency of the Independent Electoral and Boundaries Commission (IEBC).
5. Learned counsel, Mr Oraro submitted that if the Attorney-General was seeking admission to *amicus curiae* status by virtue of article 166 of the [Constitution](#), then the application is inappropriate, since the proceedings are of a sui generis kind and are not civil proceedings.



6. Counsel urged further that by current statute law, the Attorney-General has an advisory role in the transfer of power from one state officer to another – and it is precisely this function which is contested in the petitions.
7. After considering the several lines of submission by counsel, we have taken note of certain governing scenarios which lead us to a final decision. Firstly, the state law office, the chief officer of which is the Attorney-General, is the custodian of the legal instruments of the executive branch, and the recognised advisor of the state in matters of public interest. Secondly, and interlinked with the foregoing point, the said office is the main player in the performance of the Executive’s role *vis-a-vis* the operationalization of the Constitution. Thirdly, the Constitution expressly provides that, in certain instances, the Attorney-General may obtain the court’s permission to appear as *amicus*. Fourthly, the court, which is the custodian of rules of validity, propriety and fair play under the Constitution and the law, remains in charge, in regulating such precise role as the Attorney-General may play if admitted as *amicus curiae*.
8. These considerations have led this court to the conclusion that it would be improper to exclude the Attorney-General from the role of *amicus* in these proceedings; and that admitting the Attorney-General to such a role will not present a condition prejudicial to either the scope of the court’s authority, or the best interests of the parties to the several petitions.
9. We find the position of the Law Society of Kenya (LSK) to be entirely different.
The submissions of learned counsel AB Shah, in favour of admitting LSK to the status of *amicus* were by no means the most powerful. But our position has been conditioned more by the common direction and focus of the submissions made by learned counsel.
10. The effect of Mr Shah’s submission is that since, by s 4 of the Law Society of Kenya Act LSK is mandated to assist the Government in matters related to law-making, this is a typical case in which LSK deserves to be admitted to the status of *amicus curiae*.
11. But the argument to the contrary is more powerful. Learned counsel, Mr Regeru submitted that an affidavit in aid of one of the petitions, sworn by the vice-chairperson of LSK, left little doubt that LSK had taken a partisan position; and this same point has featured in the submissions by other counsel as well. LSK’s application is opposed by learned counsel, Ms Kilonzo, who perceives the applicant’s role as partisan; Mr Oraro, for the same reason; Mr Kamau Karori, for the same reason; Mr Rebello, for the same reason; Mr Ngatia, for the same reason; Mr Kigen, for the same reason.
12. The court’s position is now expressed in the following orders:
 - (a) The Attorney-General is admitted to the status of *amicus curiae* in the petitions before the court.
 - (b) The application by the Law Society of Kenya for admission to the status of *amicus curiae* is disallowed.
 - (c) Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MARCH, 2013.

W.M. MUTUNGA

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CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

P.K. TUNOI



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JUSTICE OF THE SUPREME COURT
M.K. IBRAHIM

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JUSTICE OF THE SUPREME COURT
J.B. OJWANG

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JUSTICE OF THE SUPREME COURT
S.C. WANJALA

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JUSTICE OF THE SUPREME COURT
N.S. NDUNGU

.....
JUSTICE OF THE SUPREME COURT
I certify that this is a true Copy of the original
REGISTRAR SUPREME COURT OF KENYA

