



Usikimye CBO & 4 others v Chebochok & 4 others; Law Society of Kenya & 9 others (Interested Parties) (Constitutional Petition E006 of 2024) [2025] KEHC 3849 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3849 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CONSTITUTIONAL PETITION E006 OF 2024**

JK SERGON, J

MARCH 27, 2025

IN THE MATTER OF PETITION UNDER ARTICLES 1, 3(A), 10, 19, 20, 21, 22, 23, 26, 27(4), 28, 29 (C), 43 (1)(A), 73, 88(4), 165 (3), 258, OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 22 OF THE TEA ACT, NO. 23 OF 2020 LAWS OF KENYA

AND

IN THE MATTER OF REGULATION 3 AND 11(C), (E) OF THE TEA (TEA FACTORY LIMITED COMPANY ELECTIONS) REGULATIONS, 2021

AND

IN THE MATTER OF SECTION 21, THE PUBLIC OFFICER ETHICS ACT, CAP 183 LAWS OF KENYA

AND

IN THE MATTER OF ELECTION OF MR. JOHN CHEBOCHOK ON 28TH JUNE 2024 AS THE DIRECTOR OF TEGAT/TOROR TEA FACTORY, AINAMOI ZONE

BETWEEN

**USIKIMYE CBO 1ST PETITIONER
WANGU KANJA FOUNDATION (K) REGISTERED 2ND PETITIONER
OXFAM 3RD PETITIONER
THE AFRICAN GENDER AND MEDIA INITIATIVE TRUST (GEM)
REGISTERED TRUSTEES 4TH PETITIONER
FLONE INITIATIVE 5TH PETITIONER**

AND



MR. JOHN CHEBOCHOK 1ST RESPONDENT
TEGAT TEA FACTORY LIMITED 2ND RESPONDENT
KENYA TEA DEVELOPMENT AGENCY 3RD RESPONDENT
TEA BOARD OF KENYA 4TH RESPONDENT
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 5TH
RESPONDENT

AND

LAW SOCIETY OF KENYA INTERESTED PARTY
UTU WETU TRUST INTERESTED PARTY
ASSOCIATION OF GRASSROOT JOURNALISTS KENYA INTERESTED
PARTY
ADVOCATES FOR SOCIAL CHANGE-KENYA INTERESTED PARTY
INDEPENDENT MEDICO-LEGAL UNIT INTERESTED PARTY
KATIBA INSTITUTE INTERESTED PARTY
NATIONAL GENDER AND EQUALITY COMMISSION .. INTERESTED PARTY
KENYA NATIONAL COMMISSION ON HUMAN RIGHTS INTERESTED
PARTY
CENTRE FOR RIGHTS EDUCATION AND AWARENESS
(CREAW) INTERESTED PARTY
KENYA LEGAL AND ETHICAL ISSUES NETWORK ON HIV/
AIDS INTERESTED PARTY

RULING

1. The application coming up for Ruling is the Notice of Motion dated 24th February, 2025 seeking the following orders;
 - i. Spent
 - ii. That the deponents Dickson Kirul Matthews Odera and Willy Mutai on behalf of the 2nd, 3rd, 4th and 5th Respondents be ordered to appear in court for the purpose of cross examination by the parties to the Petition.
 - iii. That such other orders as the court may deem fit.
2. The application is supported by the grounds on the face of it and the supporting affidavit of Njeri Migwi, a co-founder of Usikimye, the applicant herein and the Executive Director of Usikimye CBO, the 1st Petitioner herein and with authority to swear this affidavit on its behalf.
3. She avers that as a Petitioner, she remains concerned that a person who is accused of sexual exploitation and abuse was allowed and cleared to vie for election in a position of power over women who work in tea farms.



4. She avers that while the election of the 1st respondent was done by the shareholders of the Tegat/Toror Tea Factory, the 2nd, 3rd, 4th and 5th respondents each had specific roles in clearing candidates and facilitating the election.
5. She avers that she had an opportunity to read the affidavits by the 2nd, 3rd, 4th and 5th Respondents and have seen that: a. While they have responded to the Petition, none of these state agencies have addressed the fact that the 1st Respondent was cleared by the said agencies prior to the elections; and b. Each of the affidavits contains issues that have been contested which leads to questions as to the clearance process undertaken by the 2nd, 3rd, 4th and 5th respondents.
6. She avers that the allegations made within the affidavits will require testing by way of cross examination to ascertain the veracity of the claims made therein.
7. She avers that in determining the Petition before the Court, this court will have to consider the roles that the 2nd, 3rd, 4th and 5th respondents played in facilitating the election of the 1st Respondent. It is therefore imperative that the deponents attend court to be questioned on the averments made in their affidavits in this case.
8. She reiterated that the purpose of this application is to have this court direct the following deponents Dickson Kirui, Matthews Odero and Willy Mutai who have sworn affidavits on behalf of the 2nd, 3rd, 4th and 5th respondents be ordered to appear in court for the purpose of cross examination by the parties to the Petition. She avers that no prejudice will be suffered by the Respondents in the event their witnesses are presented to court for cross examination and that it is therefore in the interests of justice that this application be allowed.
9. The 2nd Respondent filed a replying affidavit opposing the instant application sworn by Dickson Kirui the 2nd Respondent's Company Secretary.
10. He avers that it is indeed true directions were previously taken to the effect that this matter be canvassed by way of oral evidence, every party reserves the right to prosecute their case as they deem fit in exercise of the right to a fair hearing as guaranteed under Article 50 of the *Constitution*.
11. He avers that in so far as the Petitioners now seek to have the 2nd to 5th Respondent's witnesses compelled to attend court for cross-examination, even before their case is heard, the application is premature.
12. He avers that while the court is vested with the discretion to direct that a witness is called for cross-examination such discretion is ordinarily exercised where allegations of fraud, perjury, mala fides and bad motive, et al, is alleged, this power is not exercised whimsically but rather only where there are special circumstances that warrant it.
13. He avers that in the instant case, the Petitioners have not laid out the existence of any special circumstance, fraud, bad motive, mala fides or inauthenticity of facts that would necessitate the exercise of the court's discretion in this regard.
14. He avers that Rules 20(4) and (5) of the *Constitution of Kenya(Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* are equally not couched in mandatory terms. As such, the court's power to call for examination of any witness pursuant to this rule, is not absolute but must be justified by laying sufficient basis for calling such a witness.
15. He avers that the prayer sought by the Petitioners is an apparent attempt to launch a fishing expedition aimed at filling gaps in their case and therefore urged this honourable court to dismiss the instant application.



16. The 2nd and 3rd Respondents filed grounds of opposition against the application seeking to cross-examine the deponents of the affidavits filed, on the following grounds:
- i. That the Petitioners application to cross-examine the deponent is legally unsound and misconceived, as it conflicts with the procedural position agreed upon during pretrial, where it was established in the presence of all parties that the 2nd and 3rd Respondents would rely solely on the affidavits filed and call no further witnesses.
 - ii. That based on this understanding, the 2nd and 3rd Respondents did not file witness statements or a bundle of documents, as there was no indication that further examination of their evidence would be required.
 - iii. That the application to cross-examine post the close of pleadings is an abuse of court process and contrary to procedural fairness, having not been raised during the pretrial stage where parties laid out their respective cases and strategies.
 - iv. That the intended cross-examination seeks to complicate the proceedings unnecessarily given that the 2nd & 3rd Respondents case supports the Petitioner's case, offering no contradictory affidavits or evidentiary conflicts that necessitate interrogations through cross-examination.
 - v. That the Petitioners have not demonstrated the required threshold for compelling cross-examination, as outlined in authoritative case law such as *GGR v. HPS* [2012] eKLR, where alleged conflicts or fraudulent conduct must be evident.
 - vi. That it is procedurally improper and legally untenable for the Petitioners to rectify weaknesses in their pleadings by cross-examining Respondents' witnesses, in direct contradiction to the foundational adversarial litigation principle that proof foundations must originate within the presenting party's own evidence.
 - vii. That the discretion to allow cross-examination is intended to clarify genuine ambiguities and not to serve as a surrogate means for the Petitioner to bolster their insufficiently pleaded case against the 2nd & 3rd Respondents post hoc.
 - viii. That in view of the foregoing, the 2nd & 3rd Respondents shall seek the dismissal of the Petitioners Notice of Motion with costs.
17. The 2nd and 3rd Respondents filed a replying affidavit in response to the instant application sworn by Mathews Odera an Advocate of the High Court of Kenya and the Group Company Secretary of the 3rd Respondent herein, conversant with the facts of this case and duly authorized to swear this affidavit hence competent to do so.
18. He avers that the 2nd and 3rd Respondents are private companies wholly owned by small - scale tea farmers and are not state agencies, as has been falsely alleged by the Petitioners and attached copies of the companies' CR12.
19. He avers that he had been informed by the advocates on record for the 2nd and 3rd Respondents that during pre-trial and in the presence of all parties, that it was established that the 2nd and 3rd Respondents would rely on the affidavits filed and would not call any witnesses and that at the time, the Petitioners raised no objection to this approach and further to this that based on this understanding, the 2nd and 3rd Respondents did not file witness statements or a bundle of documents.



20. He avers that the intended cross-examination seeks to complicate the proceedings unnecessarily given that the 2nd & 3rd Respondents' case offer no contradictory affidavits or evidentiary conflicts that necessitate interrogations through cross-examination.
21. He avers that contrary to the averments in paragraph 4 of Njeri Migwi's affidavit in support of the Petitioner's Application dated 24th February 2025, the 2nd and 3rd Respondents played no role in the clearance of the 1st Respondent to run for office.
22. He avers that the Election Manual annexed to the replying affidavit of Willy Mutai dated 7th September 2024 on behalf of the 4th Respondent, clearly sets out the entity responsible for clearing all the candidates including the 1st Respondent and therefore that the purported ambiguity that the Petitioners seek to resolve through cross-examination is already addressed therein.
23. He avers that the grounds in the application have failed to establish or specify which averments in the 2nd and 3rd Respondents' affidavits are ambiguous, confusing, or raise factual contestations that necessitate cross-examination and that having failed to precisely identify the alleged ambiguities or conflicts, the Petitioners have not met the threshold under Order 19 Rule 2 of the Civil Procedure Rules for the grant of the orders sought.
24. He avers that the 2nd and 3rd Respondents would suffer prejudice if the orders sought in the Application are granted because of the unnecessary additional costs and expenses they would have to incur.
25. He avers that the 2nd and 3rd respondent being private companies wholly owned by small - scale tea farmers and that said farmers have already been affected by a decision of tea buyers to withhold the purchase of their teas due to the nomination of the 1st Respondent. Any additional costs from this unnecessary application would further prejudice them.
26. He therefore urged this Court to dismiss the Petitioners' Application with costs and allow the parties to prosecute the case in the most efficient way and with the interests of the small-scale farmers in mind.
27. The 4th respondent filed grounds of opposition in response to the instant application seeking to cross-examine the deponents of the affidavits filed, oppose the said application on the following grounds:
 - i. That the Petitioners application to cross-examine the deponent is legally unsound and misconceived, as it conflicts with the procedural position agreed upon during pretrial, where it was established in the presence of all parties that the 4th Respondent would rely solely on the affidavits filed and call no further witnesses.
 - ii. That based on the foregoing agreement the 4th Respondents did not file witness statements or a bundle of documents, as there was no indication that further examination of their evidence would be required.
 - iii. That the application to cross-examine post the close of pleadings is an abuse of court process and contrary to civil procedure rules under Order 16 Rule 1 of the Civil procedure rules as the petitioners are seeking to summon witnesses long after pre-trial of the matter.
 - iv. the intended cross-examination seeks to complicate the proceedings unnecessarily given that the 4th Respondent's case supports the Petitioner's case, offering no contradictory affidavits or evidentiary conflicts that necessitate interrogations through cross-examination.
 - v. That the Petitioners have not demonstrated the required threshold for compelling cross-examination, as outlined in authoritative case law such as GGR v. HPS [2012] eKLR, where alleged conflicts or fraudulent conduct must be evident.



- vi. That the petitioner's application is founded on a misconception that the 2nd, 3rd, 4th and 5th respondents swore contradicting affidavits and completely ignoring the fact that these parties are different entities. That notice to cross-examine is specific to a witness who has given two contradicting positions in the same or many affidavits which is totally not the case in these proceedings.
 - vii. That it is procedurally improper and legally untenable for the Petitioners to rectify weaknesses in their pleadings by cross-examining Respondents' witnesses, in direct contradiction to the foundational adversarial litigation principle that proof foundations must originate within the presenting party's own evidence.
 - viii. That the discretion to allow cross-examination is intended to clarify genuine ambiguities and not to serve as a surrogate means for the Petitioner to bolster their insufficiently pleaded case against the 4th Respondent.
 - ix. That in view of the foregoing, the 4th Respondents shall seek the dismissal of the Petitioners Notice of Motion with costs.
28. This Court having considered the application and the response filed, the sole issue for determination is whether the following deponents Dickson Kirul Matthews Odero and Willy Mutai on behalf of the 2nd, 3rd, 4th and 5th Respondents should be ordered to appear in court for the purpose of cross examination by the parties to the Petition. On one part, the petitioner is adamant that in order to determine the Petition before the Court, this court will have to consider the roles that the 2nd, 3rd, 4th and 5th respondents played in facilitating the election of the 1st Respondent and it is therefore imperative that the deponents attend court to be questioned on the averments made in their affidavits in this case. On the other part, the respondents conceded that whereas the court is vested with the discretion to direct that a witness is called for cross-examination such discretion is ordinarily exercised where allegations of fraud, perjury, mala fides and bad motive, et al, is alleged, this power is not exercised whimsically but rather only where there are special circumstances that warrant it. The respondents contended that in the instant case, the Petitioners have not laid out the existence of any special circumstance, fraud, bad motive, mala fides or inauthenticity of facts that would necessitate the exercise of the court's discretion in this regard. The respondent also contended that the instant application to cross-examine post the close of pleadings is an abuse of court process and contrary to procedural fairness, having not been raised during the pretrial stage where parties laid out their respective cases and strategies.
29. I have considered the arguments put forward by the parties and I find that the application to cross examine the aforementioned deponents post the close of pleadings is an abuse of court process and contrary to civil procedure rules under Order 16 Rule 1 of the [Civil procedure rules](#) as the petitioners are seeking to summon witness long after pre-trial of the matter. Order 16 Rule 1 provides thus; "At any time before the trial conference under order 11, the parties may obtain on application to the Court or to such officer as it appoints in this behalf summonses to persons whose attendance is required either to give evidence or produce documents." Additionally, the petitioner has not laid a proper basis to summon the deponents for cross examination and has also failed to establish or specify which averments in the 2nd, 3rd, 4th and 5th Respondents' affidavits are ambiguous, confusing, or raise factual contestations that necessitate cross-examination and that having failed to precisely identify the alleged ambiguities or conflicts, the Petitioners have not met the threshold under Order 19 Rule 2 of the [Civil Procedure Rules](#) for the grant of the orders sought. Order 19 Rule 1 of the [Civil Procedure Rules](#) provides that: "(1) Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing. On



such conditions as the court thinks reasonable; Provided that, where it appears to the court that either party bona fides desires the production of a witness for cross-examination and that such witness can be produced an order shall not be made authorizing the evidence of such witnesses to be given by affidavit.

30. In Civil Case No 196 of 2015, The *Law Society of Kenya vs Faith Waigwa and 8 Others* where the court was called upon to consider an application for cross examination of averments of the defendants in their respective affidavits. This court set out the rationale of cross examination as follows; “I have taken time to set out the rival arguments put forward by learned counsels on behalf of their respective clients. The main question this court has been urged to consider is whether or not to grant the applications of the Plaintiff and the Interested Party. The duo have sought for leave to cross - examine named Defendants over the averments they each made in certain paragraphs of their respective affidavits. Let me once more restate the rationale of cross-examination of witnesses. First, it is a mechanism which is used to bring out desirable facts to modify or clarify or to establish the cross-examiner’s case. In other words, cross-examination is meant to extract the qualifying facts or circumstances left out by a witness in a testimony given in examination in chief. Secondly, the exercise of cross-examination is intended to impeach the credit worthiness of a witness. In cross-examination a witness may be asked questions tending for example to expose the errors, contradictions, omissions and improbabilities. In the process, the veracity of a witness’s averments is tested. Thirdly, the exercise of cross-examination in some cases gives the court an early chance to get the glimpse of what to expect during the substantive hearing. This may assist the court in making the necessary directions at the pre-trial conferences envisaged under Order 11 of the *Civil Procedure Rules*. However, the process of cross-examination should not be used to convert the hearing of an interlocutory application into a mini or full trial of the suit. It is a difficult balancing act which the court has to live with for a long time. It is also a process which is sparingly used because it may lead to a considerable delay in concluding an otherwise straightforward dispute...”
31. The upshot is that the petitioners’ application dated 25th February, 2025 lacks in merit, I hereby dismiss it with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT KERICHO THIS 27TH DAY
of March, 2024.**

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

No Appearance for Petitioner

Ligami holding brief for Willy for 2nd Respondent

Yegon for 5th Interested Party

