



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION NO. 23 OF 2017

JAPTHET MUROKO..... 1ST PETITIONER

ZACHEUS OKOTH OLIECH2ND PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION ('IEBC)1ST RESPONDENT

JOSEPH MELE EROO,

RETURNING OFFICER NAIROBI COUNTY2ND RESPONDENT

KIOKO MIKE SONKO MBUVI GIDEON.....3RD RESPONDENT

DR. EVANS KIDERO...APPLICANT/INTENDED INTERESTED PARTY

RULING

1. On 8th August 2017, the general elections were conducted countrywide for the six elective positions of the President, Senator, Member of Parliament, Women Representative, Governor and Member of County Assembly. The applicant presented his candidature alongside other six contestants for the position of governor of Nairobi City County. Following the elections, the 3rd Respondent Kioko Mike Sonko Mbuvi Gideon was declared by the 2nd Respondent as the winner in the gubernatorial election for Nairobi City County, while the applicant Dr. Evans Kidero was ranked second. The 3rd respondent was consequently gazetted as the elected governor for Nairobi City County.

2. A petition was subsequently filed in this court on 8th September challenging the declaration of the 3rd respondent as the validly elected governor for Nairobi City County. The petition was filed in the names of Japhet Muroko and Zacheus Okoth Oliech, the 1st and 2nd petitioners respectively, described in the petition as citizens of Kenya and registered voters in Nairobi City County.

3. The applicant filed this Notice of Motion dated 29th September 2017, under a Certificate of urgency under **Articles 22, 23, 38, 47, 50, 140 and 159** of the Constitution, **sections 1A, 1B and 1C** of the Civil Procedure Act, **Order 51** of the Civil Procedure Rules and **Rule 15** of the Election (Parliamentary and County) Petition Rules, 2017. The applicant prays that he be joined as an interested party to this petition. The application is supported by the Affidavit of the applicant, sworn on 29th September 2017. When the

matter was first mentioned on 2nd October 2017, this court certified the application urgent and directed that parties be served, and to await further directions on the hearing of the application to be given during the pre-trial conference.

4. The applicant claims that he has a direct and legitimate interest in this petition having been a contender in the impugned gubernatorial elections for Nairobi City County held on 8th August 2017. He states that if allowed to join, he will present additional concrete evidence pointing towards expansive irregularities and malpractices concerning the election that would enable the court make a fair and just determination of the petition. In particular, the applicant seeks to adduce evidence showing various alleged violations in the electoral laws and processes, including calling of several agents who witnessed the alleged malpractices and irregularities. Further, that the applicant's participation is relevant and different from other parties herein, for the reason that being an active player in the electoral process, he has gathered crucial information that has a direct bearing on the proceedings and outcome of this petition. The applicant pleads that if not joined, he will suffer prejudice as he will be denied an opportunity to legally challenge the disputed election where he was a contestant. He prays that he be joined into the petition instead of filing a separate petition.

5. The petitioners supported the application by the Replying Affidavit of the 1st petitioner sworn on 6th October 2017 and filed on 9th October 2017 stating that the applicant having been a candidate in the elections, has a direct legitimate interest in the and will provide additional concrete evidence including evidence from several of his agents to enable the court make a just determination of the petition.

6. The application was opposed. The 1st and 2nd respondents relied on the Replying Affidavit of the 2nd Respondent sworn and filed on 11th October 2017. Their position is that the Constitution, the Elections Act and the Election (Parliamentary and County Elections) Petition Rules, 2017 do not provide for interested parties in an election petition, while the Civil Procedure Act and the Rules thereunder are inapplicable. The application is therefore misconceived and an abuse of the court process. The respondents' state that the applicant was not stopped from filing his own petition within the prescribed timelines, if he had wished to advance his own grounds for challenging the election. In their view, the application is essentially a petition through the backdoor that should be disallowed as it would also defeat responses by bringing in fresh evidence in support of allegations in the petition.

7. The 3rd respondent also opposed the application, relying on his Replying Affidavit sworn and filed on 11th October 2017. It is the 3rd respondent's case that the applicant has not met the set criteria to qualify him to be joined as an interested party. Furthermore, the applicant admitted that he could have himself challenged the election, thus the application amounts to a belated attempt to file a petition he ought to have filed. The 3rd respondent challenges the applicant's failure to indicate any reason of his failure to join the petitioners, nor make the application earlier. He urges the court to strike out paragraphs 9 to 16 for offending the applicable law on affidavits. According to the 3rd respondent, the Election Petition Rules, 2017 do not recognise the place of an interested party in election petitions, as they only identify petitioners and respondents thus the application is incompetent. Further, admission of a person as an interested party is done in the exercise of the discretionary power of the court, and the applicant has not laid sufficient grounds for seeking to bring about a new challenge to his election well over 52 days after declaration of the results, and has not explained his failure to commence a petition within the prescribed 28 days. Having been a contestant in the election, the applicant has not demonstrated why he could not avail within the prescribed period, the evidence he purports to now present. The 3rd respondent states that the applicant has not demonstrated that he has a clearly identifiable and proximate interest, and would not suffer any prejudice since he failed to lodge his own substantive petition. The applicant also failed to particularize the case he intends to make before the court and its relevance to the petition. According to the 3rd respondent, the provisions of law cited by the applicant do not support the nature of the application being made.

8. Parties filed written submissions which were highlighted on 13th November 2017 when the application was heard. Counsel for the applicant submitted the applicant had satisfied the criteria for admission as an

interested party, having participated in the elections as a candidate, adding that the applicant would be prejudiced by the non-joinder since any decision reached by the court would affect him. The applicant relies on the decisions of the Supreme Court in ***Petition No 37 & 49 of 2017 Kenya Medical Laboratory Technicians & Technologists Board & 6 Others v AG & 4 Others [2017] eKLR Francis Kariuki Muruatetu & Another v. Republic & 5 others [2016] e KLR and Petition No 1 of 2017 Raila Odinga & Another v IEBC & 2 Others*** . Counsel for the petitioners supported the applicant's views adding that this court has jurisdiction to make an order for joinder of an interested party.

9. Opposing the application, counsel for the respondents reiterated that the law does not allow a person to be joined as an interested party, while the Civil Procedure Act and Rules cited by the applicant were not applicable to election petitions. This had been set out in ***Muiya v Nyagah & 2 Others [2008] 2 KLR (EP) 493, Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others Petition No. 12 of 20174 and Ferdinand Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 Others Civil Appeal No. 324 of 2013***. It was submitted that the applicant had in fact not cited the basis for invoking jurisdiction of the court. Counsel also urged that decisions of the Supreme Court were distinguishable since the Supreme Court (Presidential Election Petition) Rules allow for application of the Supreme Court Rules 2012 while the Election Petition Rules, 2017 do not provide for application of the Civil Procedure Rules. Counsel also urged that allowing the application would be unlawfully enabling the applicant to file a petition out of time and contrary to the Rules, on admission of affidavits.

10. Counsel for the 3rd respondent urged the court to find that the real motive of the applicant as read from his own affidavit was to challenge the election out of time, yet the court is bound by strict timelines. He further urged an interested party should not be permitted to introduce own evidence to litigate substantive arguments outside the original petition. Furthermore, an interested party has not the capacity to join other witnesses to adduce evidence that should be adduced by a substantive petitioner. The applicant was faulted for failing to demonstrate why he did not lodge a petition or seek joinder immediately. Allowing the application will cause further delay, yet the applicant is the one who failed to exploit an opportunity to file his petition only to now seek to abuse the process to be joined belatedly. Counsel relied on the cases of ***Isaac Aluoch Polo Aluochier v IEBC 2013 eKLR and Charles Ongondo Were [2013] eKLR***.

11. The main issue for determination is whether the applicant should be joined to this petition as an interest party. To determine this question, I must first address the issue raised by the respondents in opposing the application. According to the respondents, there is no place for an interested party in an election petition under the law. To advance this argument and in response to the applicant's submission that the court should be guided by the Supreme Court's decisions, the respondents distinguished the Rules from the Supreme Court (Presidential Election Petition) Rules which make provision for invocation of the Supreme Court Rules for joinder of an interested party. It is the respondents' view that the petitioner(s) and respondent(s) are the only recognized parties in an election petition.

12. The **Black's Law Dictionary** defines an interested party at page 1232 as *a party who has a recognizable stake (and therefore standing) in a matter. Under Rule 2 of the Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules 2013 'an interested party means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.'*

13. It is notable that the **Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules** apply to all proceedings made under Article 22 of the Constitution, and are aimed at facilitating access to justice for all persons as required under Article 48 of the Constitution. Article 22 provides for the right to a person to institute court proceedings claiming that a right of fundamental freedom in the Bill of rights has been denied, violated or infringed or is threatened. In the case of ***Francis Kariuki Muruatetu & another v Republic & 5 Others***, the Supreme Court held that **Article 22** of the Constitution is not an avenue for admission of interested parties in the following terms: :

[46] Clearly, this Article cannot be a basis for admission of an interested party to any existing proceedings, where such a party has not shown a personal stake/interest in the matter, and only

seeks to champion the public interest. The said article allows a party acting on behalf of another, or of the public, to 'commence or institute' a matter before a Court of law. Article 22 is not a formula for the admission of interested parties to any and all Court proceedings.

14. It is true, as submitted by counsel for the respondents that, the Supreme Court Rules, 2012 under **Rule 25** provides for joinder of interested parties at any time in the proceedings with the leave of the court. While the Supreme Court (Presidential Election Petition) Rules, 2017, do not expressly provide for participation of interested parties, **Rule 4** allows for the application of the Supreme Court Rules, 2012 where there is no applicable provision in the Election Petition Rules. It is on this premise the Supreme Court has invoked jurisdiction to determine applications for admission of interested parties in the various cases that were cited by the applicant and parties herein.

15. So, are interested parties strangers to an election petition under the Rules as submitted by the respondents as to render this court without jurisdiction to entertain an application of this nature? The Elections Act and Rules applicable to this petition do not have a concurrent provision that allows application of other Rules.

16. It was submitted that the court should be guided by the Constitution and the Elections Act in the determination of the issue. This court was urged to find that it is bound by decisions of the Supreme Court on similar issues. Further, it was urged to invoke its powers under the Elections Act and the Rules, especially Section 80 (1) (d) and (3) to fairly adjudicate an election petition before it and to summon or give directions on witnesses appearing before it including on any evidence. Counsel for the applicant also urged that the court has wide powers under the Rules to make a determination on questions of fair hearing, adding that the Rules did not prescribe the nature of applications that the court can deal with. He added that even at this stage, the court can deal with the question of additional evidence and direct further affidavits, thus the application was competent for the court to determine.

17. Section 80 in this regard provides as follows:

(1) (d) An election court may, in the exercise of its jurisdiction, decide all matters that come before it without undue regard to technicalities.

(3) Interlocutory matters in connection with a petition challenging results of presidential, parliamentary or county elections shall be heard and determined by an election court.

18. I am alive to the fact that the application has been brought under the provisions of the Constitution, the Elections Act and Rules as well as the Civil Procedure Act and Rules. In particular, Sections **1A, 1B** and **1C** of the Civil Procedure Act, and **Order 51** of the Civil Procedure Rules have been cited. To this, there is no more voice to add, other than to restate the well-settled observations that election petitions are *sui generis* and are guided by the specialized regime of law. As such, the Civil Procedure Rules are not applicable unless expressly provided for. This position has been affirmed over time. This court in **Election Petition No. 11 of 1998 Samuel Kamau Macharia & Electoral Commission of Kenya & 3 others** upheld that position citing **Election Peition No. 1 of 1998 - Stephen Kimani Gakenia v. Francis Mwangi Kimani and 2 others** where the court stated as follows,

“This court has remarked that the Civil Procedure Rules, or any other law for the matter, cannot be brought in Election Petitions to supplement the Act and the Rules From the setup of the election petition legal regime right from the Constitution, to the Act and the Election Petition Rules, this court is of the view that the C.P.A and C.P.R are excluded. The only place where the rules of Civil Procedure may apply is on the witness affidavits. Witnesses give affidavit evidence in election petitions. The process is clearly set out and rule 18 (7) provides:

“7. The provision of Order XVIII of the Civil Procedure Rules and Oaths and Statutory declarations Act shall apply to affidavits under the rule.”

The current Rules at Rule 12 (14) provide

“the Oaths and Statutory Declaration Act (Cap 15) and Order 19 of the Civil Procedure Rules, 2010 (L.N. No. 151/2010 shall apply to affidavits under these Rules.”

In the ***Murathe v Macharia [2008] 2KLR (EP) 244*** which has been cited in subsequent decisions to date, it was observed;

“Election petitions are governed by a special self-contained regime and the civil procedure rules were inapplicable except where expressly stated. Moreover, Order 49 rule 3A of the Civil Procedure Rules was a piece of subsidiary legislation promulgated by the Rules Committee for the purposes of the Civil Procedure Act and under the rules of statutory interpretation, they could not override the express provisions of an Act of Parliament.”

19. That said, should a party seeking to join proceedings as an interested party be shut out completely? The court is clothed with power to promote the interests of justice, and it is on this premise that this court gives audience to the applicant herein. However, admission of a person as an interested party is not a matter of right. Even where the law provides the basis for such an application, the court admits a party in exercise of its judicial discretion. It is for this reason that certain prerequisites have to be met. This is not in contention and the law is well settled on the principles applicable for admission of a person as an interested party. They are relevant to the question at hand. In ***Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others, Supreme Court Petition No. 12 of 2013, [2015] eKLR*** the court addressed itself thus:

“[18] Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

20. The above principle was restated in the case of ***Francis Kariuki Muruatetu & Another v Republic & 5 Others Petition No. 15 & 16 of 2016 [2016] eKLR***, where the Supreme Court set out the principles applicable in considering the question of whether a person qualifies to be joined as an interested party as follows:

[37] From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

- i. One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:
- ii. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- iii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- iv. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.

21. The applicant’s main basis for seeking to be joined to these proceedings is that he has a personal stake in the petition, having participated in the elections as a candidate and would be prejudiced by the non-joinder, since any decision reached by the court will affect him and that his submissions are not a

replica of other parties. He urged that he would be prejudiced if not joined as any order by the court will affect him, since a determination will be made regarding a process in which he was a direct participant.

22. This court was urged to follow the Supreme Court's decisions in ***Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 3 Others*** [2017] eKLR (applications by Ekuru Aukot and Michael Wainaina.) The court proceeded to join Mr. Aukot and Wainaina both as interested parties, reasoning that they were presidential candidates in the general elections which was an identifiable stake and would be directly affected by the outcome of the present presidential election petition. The fact of the applicant having been a candidate in the election that is subject of these proceedings is not in dispute. This fact brings the applicant within the definition of an interested party. However, the fact of being a candidate alone is not an automatic card for the applicant to be so joined, since admission of an interested party is not a right but a matter or the discretion of the court. It must be considered at in light of the other prerequisites that an applicant must meet to so participate.

23. This court has examined the applicant's grounds in support for his application for admission as an interested party. The applicant's case is also supported by Affidavit and the attached exhibits. The respondents urged the court to observe that the applicant is seeking to file a petition outside the timelines, disguised in the application to be joined to the petition, essentially bringing a fresh petition through the backdoor. Counsel for the applicant countered this submission, denying that the application was not intended to expand the petition, adding that the court has powers to deal with the question of additional evidence and direct further affidavits.

Article 87 (2) of the Constitution provides as follows,

“Petitions concerning an election other than a presidential election shall be filed within 28 days after the declaration of election results by the Independent Electoral And Boundaries Commission.”

Where constitutional and statutory provisions have prescribed specific time lines for performing any act, I am of the view that any person wishing to join such proceedings should do so within the appointed time.

24. On prejudice, the applicant stated that if not joined, he will have been denied his rights under Articles 47 and 50 of the Constitution. This ground fails for the reason that the applicant had every opportunity to institute proceedings and challenge the election in accordance with provisions of the law. Failure on his part to exercise a right under law should not be visited on the respondents or this court which, in admitting an interested party is in exercise of its discretion. Indeed, the applicant pleaded at paragraph 19 of his affidavit ***“that unless the court allows the application herein as prayed and joined as an interested party, I will suffer prejudice as I will have been denied an opportunity to legally challenge the disputed Nairobi City County Gubernatorial elections where I was a contestant.”*** He also prayed to be joined into the petition instead of filing a separate petition. This does not qualify as prejudice since an opportunity to file a petition was available to any person who intended to challenge the subject elections, and failure to do so cannot be cured in the nature of being joined as an interested party.

It is not lost to this court that justice looks at both sides and just as the applicant is concerned about any prejudice on his part, the respondents are also entitled to the protection of law. Having filed their replies to the petition it would be prejudicial for the respondents to be required to make any rejoinder to the application such as the one presented by the applicant.

25. The principles to be followed in consideration of an application of this nature have not been abrogated from. Joinder of an interested parties in the Supreme Court is distinguishable from the present case as reasoned above.

26. Furthermore, the court should consider the nature and scope of the intended participation by the intended interested party. The applicant states that he seeks to advance additional evidence. Even when admitted, there are parameters of a party's participation. This is because, an interested party who is admitted to the proceedings is embedded to already existing pleadings and proceedings. His joinder is not meant to subsume the place of the parties who are the primary players in the proceedings. In the case of

Francis Muruatetu (supra) the court underlined this fact in the following words:

[41] Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

27. The court was invited to consider that even in an election petition, the court can allow admission of further evidence and calling of witnesses. The applicant has stated in his application that he intends to present additional evidence that will enable the court reach a just determination of the issues before the court. In particular, the applicant seeks to adduce evidence showing various alleged violations in the electoral laws and processes, including calling of several agents on malpractices and irregularities concerning the subject elections. It is true that the court has power to allow admission of further evidence and particulars under Rule 15. However, that must be done in context and scope. Where the additional evidence would have the effect of amending a petition, it ought to be made within the period of 28 days under Section 76 of the Elections Act. Introduction of the additional evidence would not be allowed where it would undermine the overriding objective of ensuring timely resolution of electoral disputes including occasioning prejudice to the parties.

28. Even when allowed to participate, it is upon the court to determine how involved an interested party should be in the proceedings, him being not a litigant. I share the sentiments of the court in the case of **Joseph Leboo & 2 Others v Director Kenya Forest Services & Another E & L Case No. 273 of 2013 (2013) eKLR**. Even though not expressed in the context of an election petition, the reasoning of the court in this case bears relevance to considerations the court has to make in admitting a party, as it stated:

But there is no question that an interested party is not the actual litigant; as I have stated before, he is neither plaintiff nor defendant. If he wants actual remedies, then he ought to be enjoined as a party or he ought to file his own suit.

Since there are no defined rules as to how involved in the litigation an interested party can be, I think it falls upon the discretion of the court to define the parameters of involvement of the interested party. This will of course depend on the circumstances of each case. The involvement can be by leave sought by the interested party or as granted by the court in its discretion, even without leave being actively sought. The court has a duty to guide the involvement of the interested party in every step so that the interested party does not now end up being a litigant, for which different rules must apply.

29. Participation of an interested party should not amount to introduction of new causes of action altogether. In the **Muruatetu case**, referred to above, the court thus stated:

[42] Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.

[43]..... Any interested party or amicus curiae who signals that he or she intends to steer the Court towards a consideration of those 'new issues' cannot, therefore, be allowed.

30. Would the applicant's admission amount to expanding the scope of the petition presently filed in court? In his Supporting Affidavit, the applicant avers that there were various electoral malpractices and

irregularities. He complains that there were irregularities in various polling stations These were particularized as follows; 62 sampled Form 37As not signed by party agents representing 25,462 votes; 211 of the sampled Form 37As not signed by presiding officers representing 90,090 votes ; 12 of the sampled Forms had different dates of signing indicated by the presiding officers, deputy presiding officers and party agents representing 5,725 votes ; 247 Form 37As had more than one anomaly representing 94,777 votes ; 243 of the sampled forms total tally not indicated but included in the final tally affecting 92,864; 291 of the sampled Forms 37A not stamped representing 138,772 votes, and that all 15 Form 37B had anomalies when checked for security features, appropriate handing over and received format. The particular polling stations are listed in the applicant's affidavit. When considered against the petition as filed, the applicant has introduced new issues and evidence that if allowed, would impact on the petition and require the respondents to make further responses well outside the time prescribed in law.

31. Under **Rule 8**, an election petition should among others state the grounds on which the petition is presented. Similarly under **Rule 12**, an affidavit in support of a petition should set out facts and grounds relied on in the petition. The applicant has also admitted that he intends to call additional evidence including witnesses to support the allegations to challenge the election in question, this goes outside what the petition sets out and allowing the application would prejudice the overriding objective which this court is enjoined to uphold.

There is a clear and unequivocal presentation by the applicant that in the event his application is allowed, he shall take the position of a petitioner. There is a studious silence why he did not take the opportunity provided by law to file a petition within the timelines set by the law. He lost that chance and in my considered view, the present application is an ingenious attempt to advance a cause whose doors have been shut. To allow the application will amount to amending the law and the discretion of the court cannot come to his aid.

The application is misconceived and lacking in merit. It cannot be allowed without resultant injustice to the respondents. Taking into consideration all the material before me, the irresistible conclusion is that the application must fail and is accordingly dismissed with costs to the respondents to be agreed and if not, to be taxed by a taxing master.

Dated, signed and delivered at Nairobi this 16th Day of November, 2017.

A. MBOGHOLI MSAGHA

JUDGE