



**Okoti v Communications Authority of Kenya & 3 others; Royal Media Services  
(Citizen TV) & 5 others (Interested Parties) (Constitutional Petition 38 of 2018)  
[2023] KEHC 453 (KLR) (Constitutional and Human Rights) (31 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 453 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION 38 OF 2018**

**AC MRIMA, J  
JANUARY 31, 2023**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... PETITIONER**

**AND**

**COMMUNICATIONS AUTHORITY OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY, INFORMATION, COMMUNICATION &  
TECHNOLOGY ..... 2<sup>ND</sup> RESPONDENT**

**CABINET SECRETARY, INTERIOR & COORDINATION OF NATIONAL  
GOVERNMENT ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**ROYAL MEDIA SERVICES (CITIZEN TV) ..... INTERESTED PARTY**

**NATION MEDIA GROUP (NTV) ..... INTERESTED PARTY**

**THE STANDARD GROUP (KTN) ..... INTERESTED PARTY**

**ARTICLE 19 EAST AFRICA ..... INTERESTED PARTY**

**KATIBA INSTITUTE ..... INTERESTED PARTY**

**KENYA UNION OF JOURNALISTS ..... INTERESTED PARTY**



## RULING

1. This ruling is in respect to an application by way of a notice of motion dated April 30, 2021. The application was filed by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents herein.
2. The application sought the following reliefs: -
  1. .... spent
  2. .... spent
  3. .... spent
  4. That this honorable court be pleased to adopt the consent signed and filed by all the parties to this petition as an order of this honorable court.
3. In support of the application was an affidavit evenly sworn by Dr Ken Nyaundi as well as written submissions.
4. The applicants contended that the parties had negotiated an out of court settlement culminating with a duly signed consent with the effect to have the entire suit compromised as settled. It was posited that all parties had executed the consent and unanimously prayed that the consent be adopted as the order of the court.
5. Justifying that the application would save on the court's precious judicial time by determining the matter to finality, the applicants maintained that the grant of the application would be in the interest of justice and in fulfilment of article 159 of the Constitution.
6. The applicants invoked the provisions of rule 27(1) of the Constitution of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules 2013 (hereinafter referred to as 'the Mutunga Rules') in further support to the application. They also cited several decisions and urged this court to adopt the guiding principles enunciated therein. They maintained that the application was intended to withdraw the Petition in its entirety.
7. The applicants urged that the withdrawal of the petition did not agonize public interest, was not an abuse of the process of the law and was not an exercise in futility. On the contrary, it was lawful. While noting that the 5<sup>th</sup> and 6<sup>th</sup> interested parties failed to execute the consent, the applicants submitted that the consent was not fatal to its adoption as the petitioner had elected to withdraw the petition on his own will.
8. In opposition to the application, the 5<sup>th</sup> and 6<sup>th</sup> interested parties (hereinafter referred to as 'the interested parties') submitted that since not all parties executed the consent, it could not be adopted as an order of this court. They resisted its execution because they maintained that the consent failed to provide appropriate relief that protected the enforcement of the Constitution.
9. The interested parties furthered that the consent order did not reflect the formal result and expression of any agreement arrived at by the parties. They urged that since there was no meeting of the minds, no contract subsisted. Thus, there was no consent order. They cited several authorities in justifying their position.
10. The interested parties urged this court to instead consider the merits of the petition and application accompanied thereto.



11. In determining the application, I will, in the first instance, briefly consider the role and significance of Interested Parties in constitutional petitions.
12. There is no doubt that interested parties play certain roles in petitions. An interested party under the *Black's Law Dictionary*, 9<sup>th</sup> Edition at page 1232 is defined as: "A party who has a recognizable stake (and therefore standing) in the matter".
13. Taking cue from this, rule 2 of the *Mutunga Rules* define an interested party as: -

A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation.
14. In *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* [2017] eKLR, Mativo J (as he then was) explained when an interested party ought to be enjoined in proceedings as follows: -

A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights. In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party the true test lies not so much in an analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established. It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty".
15. The Supreme Court of *Kenya in Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others* [2014] eKLR held that: -
  - (22) In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this court's ruling in the Mumo Matemo case where the court (at paragraphs 14 and 18) held:

[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...
  - (23) Similarly, in the case of *Meme v Republic*, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that: -
    - (i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
    - (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
    - (iii) joinder to prevent a likely course of proliferated litigation.
16. The interested parties in this matter were, therefore, enjoined in these proceedings on the basis of the foregoing legal parameters coupled with the fact that the matter raised serious issues of public interest. Therefore, as parties to the suit, they play the cardinal rule of presenting their case and in so doing, aiding the court to render justice. Such parties become crucial in every part of the proceedings.



17. It is undisputed that the interested parties in this matter did not accede to the consent executed by the rest of the parties. In such circumstances, can the consent be deemed to be binding to all the parties hence adoptable by this court?
18. The generally accepted aphorism on the nature of a consent is that they take the form of a contract. To that end, where parties enter into a consent with intent to having its terms adopted as an order of the court, the parties will be bound by it. Such terms can only be varied upon fulfilment of certain conditions precedent. In this regard, a consent judgment or order, bearing those contractual attributes can only then be set aside on grounds that justify the setting aside of a contract or if certain conditions remain to be fulfilled which are not carried out. [See the Court of Appeal in [\*Flora Wasike v Desmond Wambeolla\*](#) [1980] I KAR].
19. In [\*Hirani v Kassam\*](#) (1952), 19 EACA 131, the Court of Appeal with approval quoted the following passage from [\*Seton on Judgments and Orders\*](#), 7<sup>th</sup> Edition, Vol 1 p 124 as follows: -

Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court..... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.
20. Similarly, the Court of Appeal in [\*Kenya Commercial Bank Ltd v Specialised Engineering Co Ltd\*](#) (1982) KLR P 485 held: -

A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.
21. From the above discussion, it is until when a consent is duly executed by the parties when it becomes a binding contract and when such a contract is adopted by a court, it then becomes an order of the court.
22. The petitioner and the respondents herein urge the court to, nevertheless adopt the alleged consent which is not executed by the interested parties as an order of the court. To this court, the petitioner and the respondents are putting the cart before the horse. They ought to undertake first things first.
23. Until the alleged consent is executed by all the parties in this suit, the disputed consent cannot be adopted by this court as its order. If this court so opts then the inevitable question will be what happens to the interests of the interested parties which this very court was satisfied existed prior to their joinder. What also happens to the aspect of the public interest involved?
24. The application, therefore, and until the consent is duly executed by all the parties to the suit or the interested parties express no objection to its adoption and the court is fully satisfied that its adoption will not prejudice public interest, lacks any legal leg to stand on and is for rejection.
25. Consequently, the following final orders do hereby issue: -
  - a. The notice of motion dated April 30, 2021 is hereby dismissed.
  - b. This matter will be placed before the presiding judge, with notice to the parties, for further directions.



c. Costs of the application shall be in the petition.

Orders accordingly.

**DELIVERED, DATED and SIGNED at KITALE this 31<sup>st</sup> day of January, 2023.**

**A. C. MRIMA**

**JUDGE**

