



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Maraga, CJ. & P; Mwilu, DCJ & V-P; Ibrahim, Ojwang, Wanjala, Njoki & Lenaola, SCJJ)

PETITION NO. 1 OF 2017

– BETWEEN–

1. RAILA AMOLO ODINGA

2. STEPHEN KALONZO MUSYOKA.....PETITIONERS

– AND–

1. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

2. THE CHAIRPERSON OF THE INDEPENDENT

ELECTORAL AND BOUNDARIES COMMISSION...RESPONDENTS

3. H.E. UHURU MUIGAI KENYATTA

– AND–

ALUOCH POLO ALUOCHIER.....INTERESTED PARTY-APPLICANT

RULING

A. THE APPLICATION

[1] The applicant seeks joinder in *Raila Amolo Odinga v. Independent Electoral & Boundaries Commission & 2 Others*, Presidential Election Petition No. 1 of 2017, in the capacity of interested party. His Notice of Motion is dated 23rd August 2017, supported by an affidavit of the same date.

[2] He urges that if he is denied joinder, he, as well as other Kenyan citizens, will suffer prejudice, as there is a real risk that the Government due to assume office, would stand in contravention of Articles 1 (1), 3 (2)1(1), 2(2) and 3(1) of the Constitution.

[3] It is the applicant's case that the grounds of his application are different from those presented by the petitioners. He contends that while the grounds of the petitioners' case cover issues of the post-nomination day, voting-day and post- voting-day, as well as vote-counting records, and vote tallying, his grounds are that the 1st and 2nd respondents were not, and are not, eligible for election as President or

Deputy President, in the terms of the provisions of Article 137 (1) (b), as read with Articles 99 (1) (b), 148(1), and Chapter 6 of the Constitution.

[4] The applicant contends that the 3rd respondent is not a 'political party' as defined in Articles 91, 92 and 260 of the Constitution; and hence it did not have the legal capacity to nominate any person for elective office under the Constitution. Consequently, it is contended, the election of the 1st and 2nd respondents as President and Deputy President, is a nullity. The applicant contends that the 3rd respondent has not been holding free and fair elections, and has been acting unconstitutionally.

[5] The applicant asks the Court to determine the following points of law:

- a) possible contravention of section 40 of the former Constitution;
- b) possible contravention of Article 77 (2) of the present Constitution;
- c) possible contravention of section 13 of the Leadership and Integrity Act.

[6] The applicant seeks the following reliefs:

- a) an Order that the 1st and 2nd respondents are not eligible for election as President and Deputy President, pursuant to Article 137(1)(b) as read with Articles 99(1)(b) and 148(1) of the Constitution;
- b) that for purposes of the general elections held on 8 August 2017, the 3rd respondent had no legal capacity to nominate any person as a candidate pursuant to Articles 90, 99, 137, 180 and 193, and that, pursuant to Article 2(4) of the Constitution, the nominations of the 1st and 2nd respondents registered by the IEBC, were invalid;
- c) an Order to invalidate the election of the 1st and 2nd respondents as President-elect and Deputy President-elect respectively;
- d) an Order to conduct a fresh election for President within sixty days of the date of the Court's Order, pursuant to Article 140(3) of the Constitution;
- e) an Order that costs of, and incidental to this application abide the result of the said presidential election petition.

[7] The applicant has not tendered any written submissions. But his application has been contested by the said 1st and 2nd respondents, through the replying affidavit of Moses Kipkoge, and by way of written submissions dated 25th August, 2017. Their essential point is that the applicant has shown no personal stake in the proceedings, such as would provide a basis for joinder.

B. JOINDER OF INTERESTED PARTIES: THE LAW

[8] The applicable law on joinder of interested parties is embodied in Rule 4(2) of the Supreme Court (Presidential Election Petition) Rules, 2017 as read with Rule 25 of the Supreme Court Rules, 2012. Rule 4(2) aforesaid thus provides:

“(2) Where there is no applicable provision in the Act or in these Rules, the procedures set out in the Supreme Court Rules, 2012 in so far as they are not inconsistent with the Act or these Rules, shall apply to an election petition.”

[9] Rule 25 of the Supreme Court Rules, 2012 is headed “*Interventions*”, and provides thus:

“(1) A person **may at any time in any proceedings before the Court** apply for leave to be enjoined as an interested party.

(2) An application under this rule shall include –

(a) a description of the interested party;

(b) any prejudice that the interested party would suffer if the intervention was denied; and

(c) the grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceedings and **the reasons for believing that the submissions will be useful to the Court and different from those of the other parties**” [emphasis supplied].

[10] While the applicant seeks joinder in the suit as it is, his application introduces *new parties*, and excludes some of the current parties. He seeks to be the petitioner; to have Uhuru Muigai Kenyatta as the 1st respondent; William Samoei Ruto as the 2nd respondent; Jubilee Party as the 3rd respondent; Wafula Chebukati as the 4th respondent; and the Independent Electoral and Boundaries Commission as the 5th respondent. The applicant also wants us to delve into issues that featured in the 2013 Presidential election.

[11] The applicant is, in essence, introducing new facts and issues that are not before us. This Court, in ***Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others***, Supreme Court Petition No 12 of 2013, had thus held (para.24):

“A suit in Court is a ‘solemn’ process, “owned” solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.”

[12] When the applicant introduces a *new petition*, with issues not already laid before the Court, he is improperly making claims on a cause that belongs to *other parties*, in the main proceedings. This cannot be allowed. We are also not convinced that the applicant would suffer any prejudice, if his proposed intervention is declined.

[13] We are inclined, in the circumstances, to dismiss the instant application. *We make Orders accordingly.*

DATED and DELIVERED at NAIROBI this 27th day of August, 2017.

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D. K. MARAGA

CHIEF JUSTICE & PRESIDENT

.....
P. M. MWILU

DEPUTY CHIEF JUSTICE &

OF THE SUPREME COURT

VICE-PRESIDENT OF THE SUPREME COURT

.....

.....

M. K. IBRAHIM

J.B. OJWANG

JUSTICE OF THE SUPREME COURT

JUSTICE OF THE SUPREME COURT

.....

.....

S. C. WANJALA

S. N. NDUNGU

JUSTICE OF THE SUPREME COURT

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

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SUPREME COURT OF KENYA.



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