



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**ELECTION PETITION NO. 1 OF 2017**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE ELECTIONS ACT 2012**

**AND**

**IN THE MATTER OF: THE ELECTIONS (GENERAL) REGULATIONS, 2016**

**AND**

**IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)  
PETITIONS RULES, 2016)**

**AND**

**IN THE MATTER OF: THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT,  
2011.**

**AND**

**IN THE MATTER OF: THE ELECTION OF GOVERNOR NYAMIRA COUNTY**

**BETWEEN**

**WALTER ENOCK NYAMBATI ..... PETITIONER**

**AND**

**1. THE INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**2. DAVID KIPRONO TOWETT ..... 2<sup>ND</sup> RESPONDENT**

**3. JOHN OBIERO NYAGARAMA ..... 3<sup>RD</sup> RESPONDENT**

AND

1. HON. KENNEDY MONG'ARE

OKONGO ..... 1<sup>ST</sup> INTENDED INTERESTED PARTY

2. HON. DR. JAMES ONDICHO GESAMI ..... 2<sup>ND</sup> INTENDED INTERESTED PARTY

**(Being Applications for joinder as Interested Party Under Order 51 (1) of Civil Procedure Rule, Article 50 (1) and 159 (2) (a) and (e) of the Constitution of Kenya 2010.)**

**RULING:**

1. The 1<sup>st</sup> Intended Interested party Hon. Kennedy Mong'are Okongo and the 2<sup>nd</sup> Intended Interested Party Hon. Dr. James Ondicho Gesami through Notice of Motion dated 18<sup>th</sup> September 2017 and 22<sup>nd</sup> September 2017 pursuant to **Order 51 (1) of the Civil Procedure Rules 2010, Article 50 (1) and 159 (2) (a) and (e) of the Constitution of Kenya 2010**, each of the Applicant seeks to be granted leave to be enjoined as an Interested Party in this petition and upon leave being granted each of the Intended Interested Party be at Liberty to file any necessary response and/or documents in this petition and lastly costs be provided for.

2. At the hearing of the applications, Mr. Ochioma, Learned Advocate, for the 1<sup>st</sup> Intended Interested Party and Mr. Kaburi, Learned Advocate, for the 2<sup>nd</sup> Intended Interested Party, agreed to have the two applications urged simultaneously, to which the Counsel for the Petitioner Mr. Nyaencha, Learned Advocate, Mr. Mamboleo for the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents, appearing jointly with Mr. Nyamweya, Learned Advocate, Mr. Nyachiro, Learned Advocate, for the 3<sup>rd</sup> Respondent jointly with Mr. Orina; Mr. Rioba and Mr. Munywa holding brief for Mr. Lingunya, Learned Advocates, had no objection to the applications being heard together.

3. I have perused the two separate applications by the intended interested parties and I have found word for word, the applications are similar save for the part related to the intended interested party's names and the Counsel who had drawn the applications. I find in the Interest of Justice and on saving on time, no party would be prejudiced in hearing the two applications together and as one application. The two applications are accordingly consolidated and shall be heard together as one application.

4. Both Advocates for the 1<sup>st</sup> and the 2<sup>nd</sup> Intended Interested parties were brief in their submissions. Mr. Ochioma, Learned Advocate, for the 1<sup>st</sup> Intended Interested Party, Hon. Kennedy Mong'are Okong'o, urged the grounds on the face of the application, which the 1<sup>st</sup> Intended Interested Party relies on and further relied on the supporting affidavit and urged this court to allow the application.

5. Mr. Kaburi, learned Advocate, for the 2<sup>nd</sup> Intended Interested Party, Hon. Dr. James Ondicho Gesami, relied on the grounds on the face of the application and the supportive affidavit, urging that the Applicant was a contestant in the 8<sup>th</sup> August 2017 election in Nyamira Gubernatorial seat, that he was in the 3<sup>rd</sup> position in the election, that he feels he would be directly or indirectly affected by the outcome of this petition, since he was a candidate and urged if the application is allowed, the Applicant be allowed to file necessary papers or documents on the Petition.

6. Mr. Nyaencha, Learned Advocate, for the Petitioner supported the application, urging he believes the Applicants would add value to the ends of justice and as this is a discretionary remedy, which the court can grant after consideration of all the circumstances surrounding the application and the petition. He

urged the court to ask itself what value the intended interested parties would add to the petition and whether court would have shut out the party who was seeking Justice" What prejudice would the party suffer" He urged the two Applicants were candidates and not fringe candidates. That the Petitioner supports the Applications.

7. Mr. Nyamweya and Mr. Mamboleo, Learned Advocates, for the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents, strenuously opposed the two applications. Mr. Nyamweya, Learned Advocate, urged that the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents, are opposed to the twin applications, relying on their grounds of opposition. He urged the twin applications are similar word by word, save for the parties and the drawer of the applications and that in itself is an abuse of the Court process; that the applicants having been candidates in the election in dispute, they had the opportunity to file their own petitions, if indeed they wanted to challenge the election, as indicated in their respective applications, that joining them as Interested Party is tantamount to filing an election petition outside the prescribed timelines, that would also side stop the requirements for paying filing fees for filing petition, that no demonstration has been established that they wish to ventilate any right in the proceedings as their applications are bare and discloses no justification.

8. Mr. Mamboleo, learned Advocate, also appearing for the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents, on his part, urged that for the Applications to succeed the Applicants have to show the Court what prejudice they would suffer, if they are not enjoined, in any way, that has not been demonstrated from the applications and the affidavits, that no ground or submission have been advanced, which are relevant to the petition, so that the Court and all parties are aware in advance. The 1<sup>st</sup> and the 2<sup>nd</sup> Respondent surged they are unable to make or tell or know the submissions the intended Interested Parties intend to make in this petition and urged the applications are purely opportunistic.

9. Mr. Orina and Nyanchiro, Learned Advocates, for the 3<sup>rd</sup> Respondent opposed the applications. Mr. Orina, Learned Advocate, relied on the response dated 4.10.2017 and list of authorities dated 5.10.2017. He associated himself fully with the submissions of the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents' Counsel. He urged the joinder of a party in this matter is not a matter of right but a matter of discretion, that applicants must demonstrate to the Court the substratum of the interest they intend to articulate in the proceedings and how their interest will be redressed and how the Applicants are prejudiced, if not enjoined, that the applications have not brought forth any issues which they intend to articulate in the proceedings and which will not be covered by the Parties in the Petition. He further attacked the affidavits in support, urging they seemed to have been sworn earlier than the applications or before the application had been drawn.

10. Mr. Nyanchiro, Learned Advocates, on his part urged the affidavit for the 1<sup>st</sup> Intended Interested Party had been sworn on 14.9.2017 whereas the application is dated 18.9.2017, hence the affidavit was supporting a non-existing application. He urged the 1<sup>st</sup> Intended Interested Party has not demonstrated through evidence, the petition will have direct effect on him and the allegation alone that the petition will have direct effect on them are insufficient as evidence has got to be given. He urged the affidavit in the court file is undated hence it is defective.

11. I have very carefully perused the applications, affidavits in support, the grounds of opposition and Replying Affidavits, the Counsel rival submissions, authorities in support and the issue for consideration arising thereto can be summed up as follows:-

***“(a)Whether the Applicants have demonstrated they are Interested Party or can be recognized as Interested Parties”.***

***(b)Whether the Applicants have satisfied the criteria for being enjoined in this petition as***

***Interested Parties".***

12. In **Trusted Society of Human Rights Alliance v. Mumo Matemo & 5 Others (2014) eKLR** Supreme Court stated as follows:-

***“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.”***

13. In **H.E. Raila Amolo Odinga & Another v. IEBC & 3 Others (2017) eKLR** the Supreme Court held thus:-

***“While interpreting this provision in the Muruatetu case, this Court laid out clear guidelines on instances when a person may be enjoined to proceedings before it as an interested party. At paragraph 37, the Court held:***

***..... 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:-***

***i) 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.***

***ii) 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.***

***iii) 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 as replication of what the other parties will be making before the Court. [Emphasis is added]”***

14. In the instant applications, the Intended Interested Parties in their respective applications, sought to be enjoined in this petition on the grounds that each one of them was a contestant for the gubernatorial seat of Nyamira County in the August 8<sup>th</sup> Elections, that they challenge the outcome of the elections and declaration of the 1<sup>st</sup> Respondent as the elected governor by the 3<sup>rd</sup> Respondent, that the orders sought in the petition have a direct effect on the Interested parties, since they were contestants in the Election subject of the petition, consequently they have a right to be heard and to defend their position in the petition, that the Interested parties garnered votes from the majority of the stations and were shocked by the outcome of the Polls and the eventual declaration of the 1<sup>st</sup> Respondent as the winner and that in the interest of fairness and justice the applicants seek their applications be allowed.

15. At the hearing of the Applications, this Court noted the affidavit in support of the 1<sup>st</sup> Intended Interested Party application was not dated and still remains so. **Section 5 of the Oaths and statutory Declaration Act** provides:

***“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is***

***taken or made.***”

The jurat or attestation clause of the affidavit by the 1<sup>st</sup> Intended Interested Party do not bear the date and month it was sworn contrary to **Section 5 of the Oaths and Statutory Declaration Act**. Consequently the Application by the 1<sup>st</sup> Intended Interested Party lacks supporting affidavit as required by law. In the case of **Bayplan Credit Limited v. Gesa Building & Civil Company & 20thers (2015) eKLR** the Court addressed the question of undated replying affidavit and held thus:-

***“For the reason that the said Replying Affidavit did not comply with the statutory and mandatory provisions of the law, the Court will not have regard to the same. The Court therefore considered the Defendants’ Grounds of Objection only.”***

16. Similarly in **Talewa Road Contractors Ltd v. Kenya National Highways Authority (2014) eKLR**, Court had on record an undated affidavit and held thus:-

***“For the reason that the said supporting affidavit did not comply with the statutory and mandatory provisions of the law, the Court hereby expunges and strikes out the said Supporting Affidavit of John Kihonge Wainaina. The Plaintiff’s Notice of Motion application stands automatically dismissed as it has no limb to stand on. The effect of this striking out of the said Supporting Affidavit is that all the exhibits attached to the said Notice of Motion application are also hereby struck out.”***

17. In view of the fact, that the 1<sup>st</sup> Intended Interested Party’s affidavit failed to comply with the mandatory statutory provisions of the law, the same is expunged and struck out, thus the 1<sup>st</sup> intended Interested Party’s Notice of Motion shall stand atomically dismissed for want of supportive affidavit.

18. On the Notice of Motion of the 2<sup>nd</sup> Intended Interested Party, the grounds on the face of the application and contents of the affidavit are similar to that of the 1<sup>st</sup> Intended Interested Party. I have very carefully considered the grounds set out for the Intended Interested Party to be joined as an interested party and followed the guidelines set out by the Supreme Court, especially in **H.E. Raila Amolo Odinga v. IEBC & 3 Others [2017] eKLR**, as to when a person may be enjoined to the proceedings before the court, as an Interested Party. The fact that the Applicants were candidates for the Gubernatorial seat subject of this petition, is not automatic, they be enjoined as Interested Parties as enjoinment is not a right but is granted at the discretion of the court, and which discretion should be exercised judiciously on sufficient grounds being laid down before the Court. In the instant case, the Intended Interested Parties stated their intention is to challenge the outcome of the Elections and declaration of the 1<sup>st</sup> Respondent as the duly elected governor by the 3<sup>rd</sup> Respondent. In this Petition, the 1<sup>st</sup> Respondent is IEBC and the 3<sup>rd</sup> Respondent is the governor. The election Results, the Applicants intend to challenge is not before this Court in this petition. I am saying so, because the Applicants averments are that the 1<sup>st</sup> Respondent, IEBC was declared the governor of Nyamira County by the 3<sup>rd</sup> Respondent, that is what the Applicants want to challenge. The 1<sup>st</sup> Respondent was neither declared the governor of Nyamira County by the 3<sup>rd</sup> Respondent nor is it the governor of Nyamira County, and the Petition before the Court is challenging the declaration of the 3<sup>rd</sup> Respondent as the governor of Nyamira County by the 1<sup>st</sup> Respondent. This Petition is different from the one the Applicants are seeking to be enjoined, as per their applications and if enjoined in the present petition, they would cause confusion in this petition and cause unnecessary delay in determination of the same

Further the Intended Interested Parties, as candidates in the election held on 8<sup>th</sup> August 2017, if they were aggrieved by the Election Results, they should by virtue of **Article 87 (2) of the Constitution of Kenya 2010**, have filed their Election Petitions within the prescribed period of 28 days. Now by these

applications they intend to beat the timelines by seeking to be enjoined in this petition as joint Petitioners through the back door. The Election Disputes Resolution timelines prescribed under the **Constitution** and the **Elections Act No. 24 of 2011** relating to filing of a petition or amending a petition after 28 days as per **Article 87 (2) of the Constitution** cannot be extended and are inflexible.

19. The Intended Interested Parties have not demonstrated or disclosed the personal interest or stake that they have in this matter, which they ought to have set out in their respective applications. The interest that is required to be set out, before a party is enjoined, is required to be identifiable and proximate enough. The value to be added by enjoining them as interested parties must be demonstrated in advance and they must have stated the prejudice to be suffered by their non-rejoinder. The intended interested parties, have failed to clearly and specifically demonstrate the prejudice they would suffer if not enjoined, to the satisfaction of this court. They have also failed to set out their case and/or submissions that they intend to make before the Court and the relevance of their case or submissions, nor did they demonstrate their submissions are not replication of what the other parties in the petition will be making before the Court. I need to add, that joining an Interested party in an election petition need to be handled with a lot of caution, in view of the timelines set out by the constitution in determining the election petition and in ensuring that there is no compromise in administering justice to all parties and the court should ask itself what value (*if any*) would be added by enjoining an interested party and more so when a party has not complied with parameters set out by the Supreme Court in its various decisions as regards enjoining Interested Party in an election petition.

**20. Having carefully considered the intended interested parties applications and for reasons I have stated herein above, I find no merits in the intended interested parties Applications dated 18<sup>th</sup> September 2017 and 22<sup>nd</sup> September 2017. I accordingly dismiss the twin applications with costs to the 1<sup>st</sup>, the 2<sup>nd</sup> and the 3<sup>rd</sup> Respondents against the Intended Interested Parties. I decline to grant costs to the petitioner as he was not opposed to the applications by the intended interested parties.**

**DATED AND SIGNED AT NYAMIRA THIS 30<sup>TH</sup> DAY OF OCTOBER, 2017.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN THE OPEN COURT**

**IN THE PRESENCE OF:**

**C.A.**

**1. Karlbean Mobisa**

**2. Nancy Moga**

**Mr. Ochioma for: the 1<sup>ST</sup> Intended Interested Party**

**Mr. Kaburi for: the 2<sup>nd</sup> Intended Interested Party**

**Mr. Nyaenchafor: the Petitioner**

**Mr. Mamboleo jointly**

**with Mr. Nyamweya for: the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents**

**Mr. Nyanchiro jointly with Mr. Orina, Mr. Rioba, and**

**Mr. Munywa holding brief for Mr. Ligunya for: the 3<sup>rd</sup> Respondent.**

**J. A. MAKAU**

**JUDGE**



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