



Case Number:	Petition 2 of 2017
Date Delivered:	14 Nov 2017
Case Class:	Civil
Court:	Supreme Court of Kenya
Case Action:	Ruling
Judge:	David Kenani Maraga, Jackton Boma Ojwang, Isaac Lenaola, Philomena Mbeti Mwilu, Smokin C Wanjala, Susanna Njoki Ndungu
Citation:	John Harun Mwau v Independent Electoral and Boundaries Commission & 3 others [2017] eKLR
Advocates:	-
Case Summary:	<p><b>Whether the Attorney General's Amicus Brief had addressed points of law that had not been addressed by the parties to the suit</b></p> <p><b>John Harun Mwau v Independent Electoral and Boundaries Commission &amp; 3 others</b></p> <p><b>Petition No. 2 of 2017</b></p> <p><b>Supreme Court of Kenya</b></p> <p><b>Maraga, CJ; Mwilu, DCJ; Ibrahim, Ojwang, Wanjala, Njoki &amp; Lenaola, SCJJ</b></p> <p><b>November 14, 2017</b></p> <p><b>Reported by Robai Nasike Sivikhe</b></p> <p><i>Civil Practise and Procedure- joinder of parties- amicus curiae- application by the Attorney General to be enjoined in a presidential petition as amicus curiae - whether the Attorney General had qualified to be admitted as Amicus Curiae</i></p>

### **Brief Facts**

The Applicant (the Attorney General) lodged an application to be enjoined in the proceedings as *Amicus Curiae*. According to the Applicant, his joinder in the proceedings would enhance the right of access to justice in terms of the qualitative normative content of the political rights as well as open positive lines of development of electoral law jurisprudence with regard to whether nominations of presidential candidates was a procedural requirement in the conduct of fresh presidential election arising under Article 140(3) of the Constitution.

The Applicant contented that the conduct of fresh presidential election arising under Article 140(3) of the Constitution was a matter of great public interest to which joinder of the Attorney General as a defender of the public interest was critical. According to the Applicant, the Presidential electoral disputes normally raised constitutional questions of great public importance revolving around the interpretation and application of constitutional and legal principles and policy to a given disputed issue.

It was contented that having been involved as *amicus curiae* in the *Raila Odinga, 2013* case where the issue of candidates to participate in a fresh presidential election was raised, and having been involved in post-2013 electoral legal reform as affirmed by the Court in the case of *Raila Odinga & Another vs. IEBC & 2 Others*, the Attorney General was in a special position to assist the Court in making a determination on the issue. It was argued that the Applicant had the relevant expertise to assist the Court to make a determination on the pointed issues by placing relevant material and research before the Court.

### **Issues**

- i. Whether the Attorney General had qualified to be admitted as *Amicus Curiae*
- ii. Whether the Attorney General's *Amicus* Brief had addressed points of law that had not been addressed by the parties to the

	<p>suit.</p> <p><b>Held</b></p> <p>1. The Attorney General had not qualified to be admitted as <i>amicus curiae</i> in the proceedings because his Application had not met the threshold laid out in the <i>Mumo Matemu</i> case. In particular:</p> <p>i. The Attorney General's <i>amicus</i> brief had not addressed point(s) of law not already addressed by the parties to the suit so as to introduce only novel aspects of the legal issue in question that aid the development of the law.</p> <p>ii. The <i>amicus</i> brief neither demonstrated that the submissions intended to be advanced will give such assistance to the Court as would otherwise not have been available nor drawn the attention of the Court to relevant matters of law or fact which would otherwise not have been taken into account. The issues advanced in the <i>amicus</i> brief had been extensively covered by the parties to the Petition and no new points of law or legal expertise on the proposed issue of 'nomination' had been advanced by the Attorney General.</p> <p><i>Application dismissed.</i></p>
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Notice of Motion seeking Orders for the Attorney-General to appear as <i>amicus curiae</i> denied
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**THE REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

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

**PETITION NO. 2 OF 2017**

**IN THE MATTER OF ARTICLES 2,3,10,38,82,88,136,137,138,140 AND 163 OF THE CONSTITUTION  
OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF ELECTIONS ACT NO.24 OF 2011**

**AND**

**IN THE MATTER OF SPECIAL GAZETTE NOTICE NO. 8751, VOL. CXIX-NO. 130 OF 5<sup>TH</sup>  
SEPTEMBER, 2017, SPECIAL GAZETTE NOTICE NO. 9800 OF 2017, VOL CXIX-NO 145 OF 29<sup>TH</sup>  
SEPTEMBER, 2017, SPECIAL GAZETTE NOTICE NO. 10152, VOL CXIX –NO 153 OF 13<sup>TH</sup>  
OCTOBER, 2017, SPECIAL GAZETTE NOTICE NO. 10562 VOL.XXIX-NO 160 OF 24<sup>TH</sup> OCTOBER,  
2017, AND SPECIAL GAZETTE NOTICE NO. 10808, VOL CXIX-NO.164 OF 30<sup>TH</sup> OCTOBER, 2017**

**AND**

**IN THE MATTER OF THE CHALLENGE OF VALIDITY OF THE ELECTION OF THE PRESIDENT-  
ELECT**

**AND**

**IN THE MATTER OF THE SUPREME COURT ACT**

**AND**

**IN THE MATTER OF THE SUPREME COURT (PRESIDENTIAL ELECTION PETITION)**

**BETWEEN**

**HON. JOHN HARUN MWAU.....PETITIONER**

**AND**

**THE INDEPENDENT ELECTORAL**

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

**WAFULA WANYONYI CHEBUKATI.....2<sup>ND</sup> RESPONDENT**

**H.E UHURU KENYATTA.....3<sup>RD</sup> RESPONDENT**

AND

ATTORNEY GENERAL.....AMICUS CURIAE

**RULING**

*(Being an application under Articles 156(5) & (6), 140 of the Constitution; Section 6(2)(a) of the Office of the Attorney General Act; Section 24(1) of the Supreme Court Act, 2012; Rules 23, 54(1)(a), (2) of the Supreme Court Rules, 2012 and Rule 17 (1) & (2) of the Supreme Court (Presidential Election Petition) Rules, 2017).*

1. **UPON** perusing the Application dated **13<sup>th</sup> November, 2017** and filed on even date by the Hon. Attorney General to be enjoined in these proceedings as *amicus curiae* on the grounds that:

(i) The Applicant has a Constitutional and Statutory obligation to promote, protect and uphold the rule of law and defend the public interest and in particular:

a. Authorised under Article 156(5) of the Constitution and Section 6(2)(a) to appear with leave of the Court as a friend of the Court in any Civil Proceedings to which the Government is not a party.

b. Obligated under Article 156(6) of the Constitution to promote, protect and uphold the rule of law and defend the public interest.

(ii) The Hon. Attorney General has been admitted as *amicus curiae* in all the previous presidential election petitions before this Court in appreciation of his statutory and constitutional mandate.

(iii) The Office of Attorney General has been involved in post 2013 electoral legal reform processes under Article 81 of the Constitution which puts it in a special position to assist the Court to make a determination on the issues raised in the Petition.

(iv) The instant Petition raises complex and significant constitutional and legal questions regarding whether the nomination of presidential candidates is a mandatory procedural requirement in the conduct of fresh presidential election under Article 140(3) of the Constitution.

(v) The Hon. Attorney General in the case of ***Raila Odinga & Others vs. IEBC & Others***; Supreme Court Petition No. 5 of 2013 (the ***Raila Odinga***, 2013 case) raised the issue of candidates to participate in a fresh presidential election arising under Article 140(3) of the Constitution, which issue is live in this Petition and the Attorney General has special insights on the issue.

2. Further, in the Affidavit in support of the Application sworn on 13<sup>th</sup> November, 2017, the Attorney General avers that throughout his tenure, he has exercised the necessary impartiality and independence as demanded by the Constitution and the law throughout the electoral process leading to the conduct of the fresh presidential election.

3. Upon reading the amicus brief and upon considering the written submissions in support of the Application, the Applicant contends that:

(i) His joinder in these proceedings will enhance the right of access to justice in terms of the qualitative normative content of the political rights as well as open positive lines of development of electoral law jurisprudence with regard to whether nominations of presidential candidates is a procedural requirement in the conduct of fresh presidential election arising under Article 140(3) of the Constitution.

(ii) The conduct of fresh presidential election arising under Article 140(3) of the Constitution is a matter of great public interest to which joinder of the Attorney General as a defender of the public interest is critical as enunciated in the case of **Trusted Society for human Rights Alliance vs. Mumo Matemu & 5 Others** (2015) eKLR (the **Mumo Matemu** case).

(iii) Presidential electoral disputes normally raise constitutional questions of great public importance revolving around the interpretation and application of constitutional and legal principles and policy to a given disputed issue. He referred to the case of *Peters vs. Attorney General* (2002)3 LRC 32 C.A Trinidad and Tobago at 101 to buttress this submission.

(iv) Having been involved as *amicus curiae* in the **Raila Odinga, 2013** case where the issue of candidates to participate in a fresh presidential election was raised, and having been involved in post-2013 electoral legal reform as affirmed by this Court in the case of **Raila Odinga & Another vs. IEBC & 2 Others** [2017] eKLR, the Attorney General is in a special position to assist the Court in making a determination on this issue.

(v) The Hon. Attorney General has the relevant expertise to assist the Court to make a determination on the pointed issues by placing relevant material and research before the Court.

4. Having considered the application, by a unanimous decision of the Court, we find that the Hon. Attorney General does not qualify to be admitted as **amicus curiae** in these proceedings because his Application does not meet the threshold laid out in the **Mumo Matemu** case. In particular:

i. The Attorney General's *amicus* brief does not address point(s) of law not already addressed by the parties to the suit so as to introduce only novel aspects of the legal issue in question that aid the development of the law. The Attorney General only points to the decision of the High Court in the case of **Ekuru Aukot vs Independent Electoral and Boundaries Commission & 3 Others** [2017] eKLR. He then submits that the IEBC was constitutionally bound to follow that decision, being a decision in rem, in conducting the fresh presidential election.

ii. The *amicus* brief neither demonstrates that the submissions intended to be advanced will give such assistance to the Court as would otherwise not have been available nor draws the attention of the Court to relevant matters of law or fact which would otherwise not have been taken into account. The issues advanced in the *amicus* brief have been extensively covered by the parties to the Petition and no new points of law or legal expertise on the proposed issue of 'nomination' has been advanced by the Hon. Attorney General.

5. Consequently, we hereby make the following orders under Rule 54 of the Supreme Court Rules as read with Rule 4(2) of the Supreme Court (Presidential Election Petition) Rules 2017:

(i) The Notice of Motion dated 13<sup>th</sup> November, 2017 seeking Orders that this Court grants leave for the honourable Attorney-General to appear as *amicus curiae* in these proceedings is hereby denied.

(ii) No Order as to costs.

**ORDERS ACCORDINGLY**

**DATED and DELIVERED at NAIROBI this 14<sup>th</sup> Day of November, 2017.**

.....  
**D. K. MARAGA**

**CHIEF JUSTICE & PRESIDENT  
SUPREME COURT**

**COURT**

.....  
**J.B OJWANG**

**JUSTICE OF THE SUPREME COURT  
COURT**

.....  
**N.S NDUNGU**

**JUSTICE OF THE SUPREME COURT  
COURT**

.....  
**P. M. MWILU**

**DEPUTY CHIEF JUSTICE & OF THE**

**VICE-PRESIDENT OF THE SUPREME**

.....  
**S.C WANJALA**

**JUSTICE OF THE SUPREME**

.....  
**I. LENAOLA**

**JUSTICE OF THE SUPREME**

**I certify that this is a true copy**

**of the original**

**REGISTRAR**

**SUPREME COURT OF KENYA.**



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