



REPUBLIC OF KENYA

Supreme Court of Kenya

Petition 3, 4 & 5 of 2013

MOSES KIARIE KURIA1ST PETITIONER

DENIS NJUE ITUMBI2ND PETITIONER

FLORENCE JEMATIAH SERGON3RD PETITIONER

VERSUS

AHMED ISSACK HASSAN2ND RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION1ST RESPONDENT

PETITION NO.4 OF 2013

GLADWELL WATHONI OTIENO1ST PETITIONER

ZAHID RAJAN2ND PETITIONER

VERSUS

AHMED ISSACK HASSAN2ND RESPONDENT

UHURU KENYATTA3RD RESPONDENT

WILLIAM SAMOEI RUTO4TH RESPONDENT

PETITION NO. 5 OF 2013

RAILA ODINGAPETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION1ST RESPONDENT

AHMED ISSACK HASSAN2ND RESPONDENT

UHURU KENYATTA3RD RESPONDENT

WILLIAM SAMOEI RUTO4TH RESPONDENT

RULING

[1] Two applications were made before this Court earlier in the day, both seeking admission to the status of *amicus curiae*. The first was by the Attorney-General, while the second was by the Law

Society of Kenya (LSK).

[2] The learned Attorney-General submitted that the importance of Presidential election, based on the terms of the Constitution of Kenya, 2010 justified the participation of his office as protector of the public interest, in the capacity of **amicus curiae**. The Attorney-General submitted that his office had no partisan interest in the matter, and would in any case limit itself to such role as the Court do no more than highlight legal questions, and in this way provide guidance to the Court.

[3] Most of the several counsel in the Petitions – Mr. Regeru, Mr. Abdullahi, Mr. Ngatia, Mr. Rebello, Mr. Kigen – supported the Attorney-General's application. However, learned counsel for the petitioners, Mr. Oraro and Ms. Kilonzo opposed the application.

[3] While not doubting that the Attorney-General would remain non-partisan as **amicus**, Ms. Kilonzo submitted that as the case was essentially evidentiary and not concerned with the interpretation of the Constitution, there was no special contribution which the Attorney-General could make, in the capacity sought. Counsel urged that the Government needed not participate in the Petition proceedings as **amicus**, since its role was like that of a respondent, via the agency of the Independent Electoral and Boundaries Commission (IEBC).

[4] Learned counsel, Mr. Oraro submitted that if the Attorney-General was seeking admission to **amicus curiae** status by virtue of Article 166 of the Constitution, then the application is inappropriate, since the proceedings are of a *sui generis* kind and are not civil proceedings.

[5] Counsel urged further that by current statute law, the Attorney-General has an advisory role in the transfer of power from one State Officer to another – and it is precisely this function which is contested in the Petitions.

[6] After considering the several lines of submission by counsel, we have taken note of certain governing scenarios which lead us to a final decision. Firstly, the State Law Office, the chief officer of which is the Attorney-General, is the custodian of the legal instruments of the Executive Branch, and the recognised advisor of the State in matters of public interest. Secondly, and interlinked with the foregoing point, the said office is the main player in the performance of the Executive's role *vis-a-vis* the operationalization of the Constitution. Thirdly, the Constitution expressly provides that, in certain instances, the Attorney-General may obtain the Court's permission to appear as **amicus**. Fourthly, the Court, which is the custodian of rules of validity, propriety and fair play under the Constitution and the law, remains in charge, in regulating such precise role as the Attorney-General may play if admitted as **amicus curiae**.

[7] These considerations have led this Court to the conclusion that it would be improper to exclude the Attorney-General from the role of **amicus** in these proceedings; and that admitting the Attorney-General to such a role will not present a condition prejudicial to either the scope of the Court's authority, or the best interests of the parties to the several petitions.

[8] We find the position of the Law Society of Kenya (LSK) to be entirely different.

The submissions of learned counsel A.B. Shah, in favour of admitting LSK to the status of **amicus** were by no means the most powerful. But our position has been conditioned more by the common direction and focus of the submissions made by learned counsel.

[9] The effect of Mr. Shah's submission is that since, by s.4 of the Law Society of Kenya Act LSK is

mandated to assist the Government in matters related to law-making, this is a typical case in which LSK deserves to be admitted to the status of **amicus curiae**.

[10] But the argument to the contrary is more powerful. Learned counsel, Mr. Regeru submitted that an affidavit in aid of one of the Petitions, sworn by the Vice-Chairperson of LSK, left little doubt that LSK had taken a partisan position; and this same point has featured in the submissions by other counsel as well. LSK's application is opposed by learned counsel, Ms. Kilonzo, who perceives the applicant's role as partisan; Mr. Oraro, for the same reason; Mr. Kamau Karori, for the same reason; Mr. Rebello, for the same reason; Mr. Ngatia, for the same reason; Mr. Kigen, for the same reason.

[11] The Court's position is now expressed in the following Orders:

(a) The Attorney-General is admitted to the status of **amicus curiae** in the Petitions before the Court.

(b) The application by the Law Society of Kenya for admission to the status of **amicus curiae** is disallowed.

(c) **Orders accordingly.**

DATED and DELIVERED at NAIROBI this 25th day of March, 2013.

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W.M. MUTUNGA

P.K. TUNOI

CHIEF JUSTICE & PRESIDENT

JUSTICE OF THE SUPREME COURT

OF THE SUPREME COURT

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M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....
J.B. OJWANG

JUSTICE OF THE SUPREME COURT

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S.C. WANJALA

JUSTICE OF THE SUPREME COURT

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N.S. NDUNGU

JUSTICE OF THE SUPREME COURT

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SUPREME COURT OF KENYA



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