

IN THE REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
PRESIDENTIAL ELECTION PETITION NO. 1 OF 2017

BETWEEN

RAILA AMOLO ODINGA.....1ST PETITIONER
STEPHEN KALONZO MUSYOKA..... 2ND PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION1ST
RESPONDENT

THE CHAIRPERSON OF INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION2ND
RESPONDENT

H.E. UHURU MUIGAI KENYATTA3RD RESPONDENT

AND

EKURU AUKOT.....APPLICANT/INTERESTED PARTY

WRITTEN SUBMISSIONS

(In opposition to the Notice of Motion application dated 21st of August 2017)

1. These submissions are in response to the Notice of Motion application dated 21st of August 2017 filed by the intended interested party, Ekuru Aukot who avers at paragraph 1 of his Affidavit to be the party leader of Thirdway Alliance. He further avers that he was a presidential candidate in the General Election that was held on 8th August 2017.
2. In response thereto, the 3rd Respondent has filed a Replying Affidavit sworn by Davis Kimutai Chirchir, the Chief Agent for Jubilee Party.
3. From the onset, the said Application is an abuse of the court process, the same is frivolous and vexatious.
4. It is worthy to note that there is no provision for an Interested Party under the Supreme Court (Presidential Election Petition) Rules, 2017. The regulating provisions in respect of ‘interveners is provided for under Rule 25 of the Supreme Court Rules, 2012. It provides inter alia that in an application under this rule, the said application should include (a) the description of the interested party; (b) **any prejudice that the interested party would suffer if the intervention was denied** and (c) the grounds upon which he relies on.
5. Therefore in order for the intended interested party to be enjoined in these proceedings, he must meet this threshold. We humbly submit that the

Applicant must establish before this Honourable Court that he has a stake in the proceedings and that he will be affected by any decision rendered by this Honourable Court.

6. We further submit that the proposed interested party fails to meet this threshold for the following reasons:
 - a. The only ground upon which the Proposed Intended Interested Party wishes to be enjoined in this Presidential Petition is on the ground that he was a presidential candidate for the General Election held on 8th August 2017. This is not a basis upon which an Interested Party can rely on to be enjoined.
 - b. On 10th August 2017, a day before the declaration of the results for the Presidential Election, the proposed interested party conceded defeat and categorically proceeded to congratulate the 3rd Respondent herein on his early lead. I produce the video capturing the statement made by the Applicant whereby he truly and openly conceded to the outcome of the Presidential Election. In conceding defeat, he made the following statements and or observations,

“While we were fairly impressed with the systems IEBC had put in place there was a general consensus amongst Jubilee, NASA and our party Thirdway Alliance that there is this transmission system in the Kenya Integrated management system did not perform to expectation as earlier anticipated. The Vetting Electoral Management System did not perform to expectation as earlier anticipated. The unavailability and delay of forms 34A in the transmission of the Presidential election results remains worrying. John Kerry the lead observer from the Carter Centre told my agent last evening that no election can be 100% perfect **but it is evident that IEBC did put good measures to ensure the election process was smooth. The distribution of voting materials, the actual organization and the polling centres and the voting process was indeed exceptional**

... Based on our sampling of the forms 34A that are currently in the system, I am only talking about what has been availed to us in the system, we observe that there are no material issues that has come to our attention that would significantly change the outcome of this presidential results.”

- c. As confirmed by the Applicant, he garnered the petty number of 27,400 votes equivalent to only 0.18042825% of the votes cast in the Presidential elections.

- d. That as a losing candidate, he publicly yielded defeat and cannot therefore purport to state that he will suffer prejudice or that he will be directly affected by the outcome of the petition if he is not enjoined as a party in these proceedings.
7. As rightly stated in the case of **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others, Supreme Court Petition No. 12 of 2013**, the court stated as follows:

“...Consequently, an interested party is one who has a stake in the proceedings, though he or she was not a 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...”

8. The case of **Francis Kariuki Murutetu & another v Republic & 5 others (2016) eKLR** addressed similar issued concerning an interested party.
9. The said case defines an intervener and an interested party as per the Black’s law dictionary. In doing so, they state as follows as paragraph 14:

“Black’s Law Dictionary, 9th Edition, defines “intervener” as one “who voluntarily enters a pending lawsuit because of a personal stake in it.”

“A party who has a recognizable stake (and therefore standing) in a matter”

10. The Supreme Court in this case rightly stated that ‘**enjoinder is not as of right**’ and proceeded to law out the basis upon which the Court should consider when an application for joinder as an interested party is considered. They include the following:

- a. **The personal interest or stake that a party has in the matter must be set out in the application. The interested must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.**
- b. **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.**

- c. **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 a replication of what the others parties will be making before the Court.**

11. The Court further states that **“an interested party may not frame its own issues, or introduce new issues for determination by the Court.”**

12. We humbly submit that the above applications should be dismissed with costs as the Applicant fails to meet the threshold to warrant him the orders sought.

DATED at Nairobi this 25th day August of 2017

**OGETTO OTACHI & COMPANY
ADVOCATES FOR THE 3RD RESPONDENT**

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LODGED in the Registry at Nairobi on the _____ day _____ of 2017.

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REGISTRAR