



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

REFERENCE NO. E001 OF 2022

**IN THE MATTER OF AN APPLICATION FOR ADVISORY OPINION BY
THE HON. ATTORNEY GENERAL ON BEHALF OF THE NATIONAL
GOVERNMENT UNDER ARTICLE 163(6) OF THE CONSTITUTION OF
KENYA**

-AND-

**IN THE MATTER OF ARTICLES 1 (1), (3), 2(1),(2)(4), (5), (6), 88(4),
(5), 94(1), (2), 136(1), 140(1), (2), 159(1), 160(1), 161(1), 163(3)(a) &
163(7)**

-AND-

**IN THE MATTER OF THE TREATY FOR THE ESTABLISHMENT OF
THE EAST AFRICAN COMMUNITY- ARTICLES 30, 33(1), (2) OF THE
TREATY**

-BY-

THE HON. ATTORNEY GENERAL

(ON BEHALF OF THE NATIONAL GOVERNMENT) APPLICANT

*(Being a request for the admission of Hon. Martha Wangari Karua as a participant
in the reference seeking an Advisory Opinion of the Supreme Court)*

Representation:

Mr. Christopher Marwa
(Office of the Attorney General)

RULING OF THE COURT

[1] NOTING THAT on 14th December, 2022 the Attorney General (applicant) filed an application/reference for an Advisory Opinion before this Court seeking determination of the following:

- a) Whether the decisions by the Supreme Court on Kenyan law may be subject to a merit review by the East African Court of Justice (EACJ) and what would be the legal consequence upon the Government of Kenya and the sovereignty of the people of Kenya, of orders of the EACJ premised on different interpretation of Kenyan law from that held by the Supreme Court(sic); and*
- b) The legal effect of a finding by the EACJ that a national court, including the Supreme Court, did not adhere to legal principles, including natural justice and the rule of law, in a case heard and determined by the national court, including the Supreme Court.*

[2] UPON that application/reference being mentioned on 9th January, 2023 before the Deputy Registrar of the Court for purposes of taking directions for the hearing thereof, learned counsel for the applicant, Mr. Marwa made a proposal/request under Rule 51(1) of the Supreme Court Rules, 2020 urging the Court to consider admitting Hon. Martha Wangari Karua as a participant in the application/reference;

[3] UPON considering that the proposal/request is anchored on the grounds that the application/reference before the Court is made largely as a result of two suits which were filed by Hon. Martha Wangari Karua before the EACJ, that is, Reference No. 20 of 2019- ***Martha Wangari Karua v. The Attorney General of the Republic of Kenya*** and Reference No. 56 of 2022- ***Martha Wangari Karua & Another v. The Attorney General of the Republic of Kenya***; and that her participation is essential;

[4] COGNISANT of the circumscribed parameters under which the Court exercises its jurisdiction in granting an Advisory Opinion as delineated under Article 163(6) of the Constitution in the following terms:

“The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government”

See also ***In the Matter of Kenya National Commission on Human Rights***, Reference No. 1 of 2012; [2014] eKLR. Further, that Rule 51 of the Supreme Court Rules provides in part that –

“51

(1) A person filing a reference may propose that the Court may consider admitting any other person to participate in the reference.

...

(3) A person who has been admitted as a participant shall file and serve written submissions within fourteen (14) days of service of the reference.

(4)The content of the written submissions of an admitted participant shall be in accordance with the directions of the Court...”

[5] APPRECIATING that the manner in which Rule 51(1) of the Supreme Court Rules is crafted leaves the determination of whether a person should be admitted as a participant in an application/reference seeking the Court’s Opinion to the discretion of the Court and is to be determined on a case-by-case basis; and

[6] BEARING IN MIND that the essence of the Court rendering an Opinion is to settle matters of great public importance which may not be suitable for conventional mechanisms of justiciability and/or to unravel a legal uncertainty in such a manner as to promote the rule of law and the public interest. See ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate***, Advisory Opinion No. 2 of 2012; [2012] eKLR. Further, that an Opinion rendered by the Court guides not only the conduct of the organ(s) that sought it, but all governmental or public action thereafter, as pronounced ***In the Matter of Interim Independent Electoral Commission***, Applic No. 2 of 2011; [2011] eKLR.

[7] WE PRONOUNCE as follows:

- i. We reiterate that in determining whether to admit a party to participate in an application/reference seeking an Advisory Opinion, the Court exercises its discretion based on the circumstances of each case.
- ii. However, the Court in exercising its discretion should take into account the following matters, though not exhaustive:
 - a) Whether the person proposed to participate in an application/reference before the Court has an identifiable interest in the subject of the Advisory Opinion;

- b) Whether such a person would be prejudiced should the Court decline to allow their participation in the application/reference and/or whether the person's interest is represented by the person/organ seeking the Advisory Opinion or any other person whose participation has been allowed by the Court;
- c) The contribution, if any, such a person would make towards the Court rendering an Opinion on the subject matter in issue; and
- d) Whether the admission of such a person would transmute the matter into a contest of rights or claims which are ordinarily amenable to be disposed or have been disposed by way of ordinary litigation.
- iii. Based on the foregoing, we are of the view that Hon. Martha Wangari Karua has an interest in the subject of the Advisory Opinion in light of the suits she has filed before the EACJ. In the pertaining circumstances, her participation is essential not only for her to put forth her position but also enable the Court render an Opinion based on appreciation of diverse positions concerning the subject of the application/reference. As this Court appreciated in ***Trusted Society of Human Rights Alliance v. Mumo Matemo & 5 Others***, SC Petition 12 of 2013; [2015] eKLR

“We have a duty to ensure that our decisions enhance the right of access to justice, as well as open up positive lines of development in jurisprudence, to serve the judicial system within the terms of the Constitution.”

[8] CONSEQUENTLY and for the reasons aforesaid we make the following orders:

- a) The applicant's proposal/request made on 9th January, 2023 for the admission of Hon. Martha Wangari Karua as a participant in this reference is hereby granted.***
- b) Hon. Martha Wangari Karua's participation is limited to filing written submissions in response to the reference within 14 days of service of the application/reference. The submissions should be confined to the issues upon which the Court's Opinion is sought.***
- c) The applicant shall be at liberty to file written submissions in rejoinder within 7 days of service of Hon. Martha Wangari Karua's submissions.***
- d) The Hon. Registrar of the Court is hereby directed to serve Hon. Martha Wangari Karua with the application/reference and this ruling herein within 7 days of its delivery.***
- e) There shall be no orders as to costs.***

It is so ordered

DATED and DELIVERED at NAIROBI this 15th day of September, 2023.

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**M. K. KOOME
CHIEF JUSTICE & PRESIDENT OF
THE SUPREME COURT**

.....
P.M. MWILU
DEPUTY CHIEF JUSTICE &
VICE PRESIDENT OF THE
SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA

