



**Osman & 164 others v Northern Rangelands Trust & 8 others (Petition  
006 of 2021) [2024] KEELC 6554 (KLR) (8 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6554 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
PETITION 006 OF 2021  
OA ANGOTE, CK YANO & CK NZILI, JJ  
OCTOBER 8, 2024**

**BETWEEN**

**ABDIRAHMAN OSMAN & 164 OTHERS & 164 OTHERS ..... PETITIONER**

**AND**

**NORTHERN RANGELANDS TRUST ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF ISIOLO ..... 2<sup>ND</sup> RESPONDENT**

**ABDI JARSO ..... 3<sup>RD</sup> RESPONDENT**

**GOLICHA JARSO ..... 4<sup>TH</sup> RESPONDENT**

**HALKANO GOLLO ..... 5<sup>TH</sup> RESPONDENT**

**GOLLO FUGICHA ..... 6<sup>TH</sup> RESPONDENT**

**KENYA WILDLIFE SERVICE ..... 7<sup>TH</sup> RESPONDENT**

**MINISTRY OF LANDS AND PHYSICAL PLANNING ..... 8<sup>TH</sup> RESPONDENT**

**COUNTY COMMISSIONER ISIOLO ..... 9<sup>TH</sup> RESPONDENT**

**RULING**

1. The court by an application dated 31.7.2024 is asked by Hajj Abdullahi, the chairperson of Borana Council of Elders under Articles 60 (1) (a), 159 2(c) of *the Constitution* to suspend the delivery of the judgment and refer the entire petition for an out of court negotiation, spearheaded by the Borana Council of Elders on such terms and within such time as the court may allow and direct. The reasons are contained on the face of the application and in a supporting affidavit of Hajj sworn on 31.7.2024.
2. The applicant who is not a party to this petition has not sought to be joined. He averred that the Barana Council of Elders Association was registered on 8.9.2010, as per the attached certificate marked



HAG 1 and that its mandate as per the constitution attached as HAG (2) is to; promote and advance Borana cultural heritage, preserve peaceful coexistence, mediate conflicts and misunderstanding by using traditional and alternative dispute or conflict resolution mechanisms; develop policies, encourage and promote sustainable environmental use as well as to develop and implement policies for the protection of Borana community land, and spearhead any negotiations by the Borana community and Borana allies in matters of common interests for the community.

3. He avers that he is aware of this petition that has been pending and was due for judgment. He, further avers that there is simmering tension, hostility and anxiety in the community as the judgment may have far-reaching ramifications on the community. He states that the community elders are apprehensive that matters may escalate further and cause instability hence the need to seek to intervene and assist the court resolve the matter before the judgment is delivered. Further, the deponent disposes that in the past elders have successfully intervened in similar cases and assisted courts in resolving similar community land disputes, including one recently in Korbesia location. Similarly, he avers that the Borana Council of Elders has been instrumental in implementing the judiciary's Alternative Justice System (AJS) policy in Isiolo County.
4. Again, the deponent avers that elders have made initial attempts to settle the dispute as the judgment is awaited and these initiatives have shown good prospects, hence; he was confident but very respectfully optimistic that the elders will assist the court and the parties arrive at an amicable settlement of the issue in dispute, if the court allows the application and gives them the opportunity.
5. Similarly, the applicant avers that such outcomes of hostility or likely causes of instability were not in the community's best interest and ought to be prevented as envisioned in Articles 40, 60 and 159 of the Constitution. He avers that unless given a chance, the application will be overtaken by events and rendered nugatory. He further avers that the out-of-court negotiations will assist in the fair trial and just determination of the questions arising from the court's determination in the petition, including public participation, otherwise, no party will suffer any prejudice if the application is allowed. Lastly, he avers that the application does not seek to pre-empt or obstruct the cause of justice and was not an abuse of the court process.
6. When this matter came up for hearing on 23.9.2024 it was adjourned till the following day for the non-appearance of the applicant. During the hearing, learned counsel for the petitioners, Mr. Makaka termed the application as irregularly filed by a non-party to the petition without leave to come on record or be joined to it. Further, that it is brought too late in the day and by a party who does not profess expertise in the matter with the capacity to replace the able bench seized of the matter.
7. Learned counsel Mr. Ogola for the 1<sup>st</sup> – 6<sup>th</sup> respondents submitted that he was not opposed to the application which in his view was a positive initiative for community cohesion. Learned counsel, however, conceded that Alternative Dispute Resolution cannot be forced on the throat of non-willing parties. The learned state council, for the Honorable Attorney General and the County Commissioner, associated himself with the grounds of opposition filed by the petitioner dated 21.9.2024 and the submissions by Mr. Mukaka; that the court had gone very far in the matter and there was no evidence on the alleged tension or possible escalation of hostility as the delivery of the judgment was being awaited.
8. In a rejoinder, Mr. Ogola regretted the absence of the applicant before court for the second time. He termed the application as filed a layman. Nevertheless, the learned counsel submitted that under the Constitution of Kenya (Protection of Right and Fundamental freedoms) Practice and Procedure Rules (2013) (Mutunga Rules) the court has wide powers to admit an interested party, such as the applicant. According to Mr. Ogola, the applicant was not seeking to adduce more evidence or to reopen the



- matter. Learned counsel submitted that the court has several devices to rely upon and the request by the applicant should not be an open cheque.
9. Additionally, counsel submitted that his clients had no reason to suspect that the applicant was a busybody and or was out to subject any party to any prejudice should the application be allowed.
  10. Mr. Mokaka for the petitioners urged the court to find that the petition had been brought under Articles 22 and 23 of *the Constitution*, seeking remedies that were inherently judicial in nature. Learned counsel submitted that the petitioners had initially attempted ADR which failed and to allow the application at this stage was tantamount to preempting the court's judgment particularly where the applicant was alleging a non-existent tension or hostility.
  11. Further, learned counsel urged the court to find that the petitioners who have prosecuted their petition to almost completion and shall be prejudiced by such a referral at to ADR or Traditional Dispute Resolution Mechanisms at this stage.
  12. There is no dispute that this petition has been pending before the court since 2021. It was certified as raising substantive questions of law following which there was an empanelment of a 3-Judge bench to hear it. The bench was formally constituted by the Honorable Deputy Chief Justice and Vice President of the Supreme Court on 20.12.2023. The bench eventually heard the petition on 24.1.2024, 7.2.2024, 12.3.2024 and 18.4.2024. The matter is now pending for the delivery of the judgment.
  13. The applicant has not sought leave to be joined, either as a respondent, interested party or an amicus curiae. The applicant on behalf of the Borana Council of Elders seeks to be allowed to take up the petition and amicably attempt an out-of-court negotiation which it says it has attempted to do and there are chances of it bearing fruits. Nevertheless, the applicant has not disclosed who among the parties it has engaged before making of the application. Further, the applicant states that it is coming in as a champion of AJS in Isiolo County. The applicant admits that it has been aware of the pending petition since 2021. No explanation has been given while the applicant is coming in too late in the day if at all it has been aware of the petition. The issues before the court are constitutional questions seeking for answers from *the Constitution* and not a statute or customary law. See *Mutanga Tea & Coffee Company Ltd vs Shikira Limited & Municipal Council of Mombasa* (2015) KECA (469) KLR. The special expertise and the capacity to handle issues before this court cutting across not only the locals but also involving the 2<sup>nd</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents, who may not by law subject themselves to a panel constituted by a sectarian group, has not been addressed by the applicant.
  14. Whereas Article 159 of *the Constitution* provides that the court shall encourage ADR and (TDRM) there are exceptions especially where it is not in the public interest and the forum for referral of such dispute may not be efficacious or capable of granting the reliefs sought. See Holding in Indian Supreme Court in *Ashok Kumar Pandey vs State of West Bengal Writ Petition 199 of 2003* as cited in *Luka vs Narok Bursaries Management Board & 6 others: Narok County Assembly (IP) 2024 KEHC 2523 KLR*, *Kamilinchui & 5 others vs Kimbui & another 2024 KEELC 53 (KLR)* and *Franklin Kithinji & 3 others vs Pharis Nyaga Murithi* (2012) KECA 127.
  15. ADR and TDRM's are consensual in nature. The petitioners have opposed the application terming it as brought too late in the day and by an entity that is not a party to the petition. The petitioners submit that they would be prejudiced if the referral were to happen. The applicant failed to attend court and ventilate its application and perhaps address the concerns of the respondents and the court. A third party may not without basis, just walk into a court and ask to replace the constitutional role of a court, simply because it feels that it is most suited to diffuse tension or give a more acceptable verdict as opposed to a court of law. Public policy demands that parties seeking to participate in ADR and TDRM's define their capacity and move the court at the earliest opportunity possible.



16. Judicial resources have been expended in this matter so far and so have the respective parties, whose judgment should not be unduly delayed and or suspended indefinitely. See *Asanyo & 3 others vs Attorney General* (2018) KESC 15 KLR.

17. The upshot is, we find the application lacking merits. It is dismissed with no order as to costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 8<sup>TH</sup> DAY OF OCTOBER, 2024**

In presence of

C.A: Kananu

Makaka for the petitioner

Ogola for the 1<sup>st</sup> – 6<sup>th</sup> respondent

Salim Mohamad for the 2<sup>nd</sup> respondent

**HON. O. ANGOTE**

**JUDGE**

**HON. C.K YANO**

**JUDGE**

**HON. C.K NZILI**

**JUDGE**

