



REPUBLIC OF KENYA



**Okoti v Otuoma; Athi Limited & another (Interested Parties) (Petition
E001 of 2024) [2024] KEHC 1969 (KLR) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 1969 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
PETITION E001 OF 2024
WM MUSYOKA, J
MARCH 1, 2024**

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

AND

**HE DR. PAUL NYONGESA OTUOMA, THE GOVERNOR OF BUSIA
COUNTY RESPONDENT**

AND

**ATHI LIMITED INTERESTED PARTY
THE ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED
PARTY**

RULING

1. I am tasked with determining a Motion, dated 28th February 2024. The same seeks joinder of Abdikadir Hassan Hussein and Fatuma Bille as interested parties. It is submitted that the County Government of Busia had authorised them to put up kiosks and other temporary structures, and they had been paying rents and rates to the County Government, yet the said structures are now being brought down in a manner that violated their rights. It is averred that no notices were given, and that the kiosks owners had been assured by the County Government that they would be given first priority at the time of reallocation of the shop spaces, yet, although the exercise of reallocation is ongoing, the applicants were not benefitting.
2. The Motion is premised on sections 1, 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, Cap 21, Laws of Kenya, and Order 51 rules 1, 4, 6 and 10 of the *Civil Procedure Rules*.
3. This is constitutional litigation, and the appropriate rules of procedure should be the Constitution of Kenya (Protection of Rights and Fundamental Rights and Freedoms) Practice and Procedure Rules, and not the *Civil Procedure Act* and its *Rules*. The applicants seek joinder as interested parties, and so



the relevant provisions are in Rule 7, which is about interested parties, and it provides for their joinder, either on their own application, or by the court *suo moto*. Rule 7 provides:

“7. Interested party

- (1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.
- (2) A court may on its own motion join any interested party to the proceedings before it.”

4. The provision gives to the court a very wide discretion when it comes to joinder of parties, whether principal, such as petitioners and respondents, or secondary, such as interested parties. The power can be exercised by the court on its own motion, or upon application. The court may decide on its own that a certain person or entity is a necessary party, and order joinder of such party. As the court can act *suo moto*, or on oral application, there would be no necessity of expending time hearing parties on whether a party ought to be joined or not. The court can act based on the material placed before it.
5. Again, joinder of parties is a matter of access to justice, so that any party with a grievance of one sort or the other would be entitled to approach the court, and to be afforded the ease of such an approach. Rule 3(2) of the [*Constitution of Kenya \(Protection of Rights and Fundamental Rights and Freedoms\) Practice and Procedure Rules*](#) states that the overriding objective of the rules is to facilitate access to justice for all persons. Rule 3(4) is also relevant, that exercise of jurisdiction by the court, under the rules, should facilitate the just, expeditious, proportionate and affordable resolution of all cases. I shall bear all that in mind as I determine whether to have the applicants herein joined as interested parties.
6. The affidavit in support of the Motion is Abdikadir Hassan Hussein, and he brings the motion on his own behalf and that of his wife. He has given a narration about how the County Government allowed them to construct kiosks, and they had been paying rates and rents, but those structures are now being demolished. He avers to promises having been made to effect that they would have first priority in reallocation of the spaces or shops after the re-development. He says that nothing is forthcoming so far, despite his several visits to the offices of the County Government.
7. The petition herein principally seeks declarations relating to access to information, on the issues that the applicants raise. Abdikadir Hassan Hussein avers to have been visiting the County Government of Busia for answers, but to no avail. I believe that there is some convergence between the petitioner and the applicants, with respect to the information that is being sought.
8. So, upon the joinder of the applicants as interested parties, what should be their level of participation in these proceedings, and what court papers ought they to file?
9. The [*Constitution of Kenya \(Protection of Rights and Fundamental Rights and Freedoms\) Practice and Procedure Rules*](#) only gives directions on what may be filed by the principal parties, that is to say the petitioners and the respondents. The Rules are silent on the nature of pleadings and filings to be done by the other parties, that is the interested parties and *amicus curiae*, if at all they are allowed to file any.
10. What the petitioner is required to file is detailed in Rule 10 of the [*Constitution of Kenya \(Protection of Rights and Fundamental Rights and Freedoms\) Practice and Procedure Rules*](#). The petitioner files a petition, supported by an affidavit, which may carry annexures. The form of the petition is a matter of detail, which may not be relevant for now. What a respondent should file, in response, is detailed in Rule 15 of the [*Constitution of Kenya \(Protection of Rights and Fundamental Rights and Freedoms\) Practice and Procedure Rules*](#). It takes 2 forms, depending on whether the respondent is a State organ or entity, or not. For State organs or entities, they have to file replying affidavits. For non-State organs or



agents, there would be liberty to file either a replying affidavit, or a statement setting out the grounds relied upon to oppose the petition. The County Government of Busia is a State entity, it should file a replying affidavit, in terms of Rule 15(1) of the *Constitution of Kenya (Protection of Rights and Fundamental Rights and Freedoms) Practice and Freedoms Rules*.

11. As what an interested party should file is not provided for in the *Constitution of Kenya (Protection of Rights and Fundamental Rights and Freedoms) Practice and Procedure Rules*, it would mean that the interested party is not a principal party to the constitutional cause. his role should be peripheral, and so it should not file any responses to the petition. Its role should be to complement either of the principal parties, and it can only do so by way of presenting a case in the form of legal arguments, articulated in submissions, whether written or oral.
12. The final orders are, therefore, as follows:
 - a. that I hereby order joinder of the applicants herein as 4th and 5th interested parties;
 - b. that the participation of the 4th and 5th interested parties shall be limited to making submissions to the petition, and to any interlocutory process; and
 - c. that the petitioner shall effect amendments to his petition, in line with Rule 5(e) the *Constitution of Kenya (Protection of Rights and Fundamental Rights and Freedoms) Practice and Procedure Rules*, as a consequence of the addition and joinder orders made herein.
13. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 1ST MARCH 2024

W. MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Okoiti, the petitioner, in person.

Mr. Omboko and Mr. Wambura, instructed by the County-Attorney, for the respondent.

Mr. Ashioya instructed by Ashioya & Company, Advocates for the proposed interested parties.

