



Gerale & another v Kello, the Permanent Secretary in the State Department of the Asals and Regional Development & 3 others; Mohamed & another (Intended Interested Party) (Petition E018 of 2023) [2024] KEHC 4842 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4842 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
PETITION E018 OF 2023
JN ONYIEGO, J
APRIL 12, 2024**

BETWEEN

ADEN MUHUMED GERALE 1ST PETITIONER

NOOR HASSAN FARAH 2ND PETITIONER

AND

**MR HASSAN KELLO, THE PERMANENT SECRETARY IN
THE STATE DEPARTMENT OF THE ASALS AND REGIONAL
DEVELOPMENT 1ST RESPONDENT**

**WILFRED OMARI, PROJECT MANAGER NATIONAL PROJECT
IMPLEMENTATION UNIT (NPIU) 2ND RESPONDENT**

**MOHAMED ABDI FARAH, GARISSA COUNTY PROJECT COORDINATION,
COUNTY] INTEGRATED PROJECT COORDINATOR PROJECT
IMPLEMENTATION UNIT (CIIPU) 3RD RESPONDENT**

THE HON ATTORNEY GENERAL 4TH RESPONDENT

AND

MUHUDIN AHMED MOHAMED INTENDED INTERESTED PARTY

MOHAMED HARET HUSSEIN INTENDED INTERESTED PARTY

RULING

1. The Petitioner herein moved this Court vide a Petition dated 24th day of November, 2023 seeking;
 - i. A declaration that the 1st to 3rd Respondents did not conduct any and proper public participation in the identification, prioritization and budgeting of the sub-projects under



the Kenya Development Response to Displacement Impacts Project (KDRDIP) initiative for 2022-23.

- ii. A declaration that the 1st to 3rd Respondents have violated Article 35 of the Constitution and the Access to Information Act, 2016 by the failure to release to the public the *bonafide* final list of approved projects including their locations and budgetary allocations.
 - iii. A declaration that the 1st to 3rd Respondents are in breach of Articles 10 and 174 of the Constitution as detailed in the grounds herein.
 - iv. A declaration that the 1st to 3rd Respondents have threatened with breach or violation of Articles 28, 42, 43, 53 and 56 of the Constitution.
 - v. A declaration that 1st to 3rd Respondents breached the Petitioner's right to legitimate expectation by their blatant failure to use established mechanisms for the identification, prioritization, budgeting and implementation of the Kenya Development Response to Displacement Impacts Project (KDRDIP) initiative for 2022-23.
 - vi. An order of Mandamus do issue compelling the 1st to 3rd Respondents compelling them to reestablish proper structures and conduct proper public participation in the identification, prioritization and budgeting of the sub-projects under the Kenya Development Response to Displacement Impacts Project (KDRDIP) initiative for 2022-23.
 - vii. An order directing an independent review of the Annual Work Plan for the FY 2022-23 submitted by the 3rd Respondent to ensure adherence to due process and the Garissa County Steering Committee guidelines before any disbursed funds are appropriated to fund the sub-projects in Dadaab Constituency.
 - viii. A permanent injunction to issue restraining the 1st to 3rd Respondents from appropriating, using, disbursing or releasing of the Kshs.274 million or any other amounts earmarked for the Kenya Development Response to Displacement Impacts Project (KDRDIP) initiative for 2022-23 before proper and adequate public participation is conducted.
 - ix. An order for compensation of violations or threatened violations of rights under prayer (i), (ii), (iii) and (iv) by the 1st to 3rd Respondents.
 - x. Costs of the Petition.
2. Simultaneously, the Petitioner filed a Notice of Motion seeking;
- i. That this application be certified as urgent, service be dispensed with at the first instance and it be heard *ex parte* in the first instance.
 - ii. That pending the inter parties hearing and determination of this application a conservatory order be issued restraining the Respondents, their agents, employees or other persons working under their instructions from releasing, disbursing or authorizing any expenditure of the money held in the accounts of the 3rd Respondent to the Community Project Management Committees (CPMC) for the implementation of the FY 2022-23 community development plans or work plans.
 - iii. That pending the inter parties hearing and determination of this application, a conservatory order be issued restraining the Respondent, their agents, employees or other persons working under their instructions including the Community Project Management Committees (CPMS) from commencing or undertaking any tendering or procurement processes and/or



proceedings relating to the sub-projects in the FY 2022-23 Community development plans or work plans.

- iv. That pending the hearing and determination of the Petition, a conservatory order be issued restraining the Respondents, their agents, employees or other person working under their instructions from releasing, disbursing or authorizing any expenditure of the money held in the accounts of the 3rd Respondent to the Community Project Management Committees (CPMC) for the implementation of the FY 2022-23 community development plans or work plans.
 - v. That pending the hearing and determination of the Petition a conservatory order be issued restraining the Respondents, their agents, employees or other persons working under their instructions including the Community Project Management Committees (CPMC) from commencing or undertaking any tendering or procurement and/or processes proceedings relating to the sub-projects in the FY 2022-23 community development plans or work plans.
 - vi. That this Honourable Court directs that the Petition herein be heard on a priority basis.
 - vii. That the Honourable Court grants any other reliefs or orders it deems fit.
 - viii. Costs be provided for.
3. When the matter came up for directions, the court on 29th November 2023 granted in the interim conservatory orders pending hearing and determination of the application.
 4. Meanwhile, the intended interested parties herein moved this court vide the application dated November 29, 2023 seeking for the orders as follows:
 - i. Spent.
 - ii. That this Honourable Court be pleased to enjoin the Muhudin Ahmed Mohamed and Mohamed Haret Hussein as interested parties to the suit herein.
 5. The application was supported by the supporting affidavit of Muhudin Ahmed Mohamed sworn on 28.11.2023 wherein it was urged that the intended interested parties are members of the Community Project Management Committees (hereinafter) CPMC, within Daadab Sub County in Garissa County. That the CPMC is constituted of members of a community within the villages in Garissa County and are tasked with identification of needs within their communities and conceptualization and prioritization of projects funded by the Kenya Development Response to Displacement Impacts Project, hereinafter KDRDIP.
 6. It was urged that given that the petitioners have previously successfully sought before this court conservatory orders restraining the respondents from releasing, disbursing or authorizing any expenditure held in the 3rd respondent's account, the same was misleading and therefore, it was not necessary but also fair that the applicants herein being members of the CPMC, be enjoined to shed more light on the case.
 7. As a response, the petitioners filed grounds of opposition dated 08.01.2024 wherein it was urged that the applicants did not identify and prove their membership to any CPMC which are structures established at the village level by the 1st, 2nd and 3rd respondents for the implementation of sub projects, an issue that is not in dispute in the petition. That having brought the application in their individual capacities, the applicants' personal interest was not clearly identified or set out in the application and their joinder would be superfluous since all CPMCs for all the villages in Daadab Constituency form part of the sub project implementation structures of the 1st, 2nd and 3rd respondents.



8. It was deposed that the applicants did not outline nor demonstrate with precision and detail the prejudice they stood to suffer if not enjoined in the suit herein. That the applicants did not set out with specificity and in detail the case they intended to make before the court and how in terms of relevance the case is different from what the petitioner and the respondents will be making before the court.
9. Lastly, the petitioner urged that the applicants having claimed to be part of the CPMC that are essentially involved with the implementation of the sub projects conceptualized and prioritized by the respondents, the same have not been adversely mentioned in the petition and the question of implementation of sub projects is not in issue.
10. The court directed that the application be canvassed by way of written submissions and the parties complied with the same.
11. The intended interested parties via their submissions dated 14.02.2024 urged that they were members of the CPMC within Daadab Sub County. That the CPMC constitutes of members of a community within the villages in Garissa County and are tasked with the identification of needs within the respective communities. It was urged that the conservatory orders issued to restrain the respondents from releasing, disbursing or authorizing any expenditure of the money held in the accounts of the 3rd respondent to the CPMC for the implementation of the sub projects in FY 2022 – 23, directly affect the intended interested parties as members of the CPMC.
12. That they are local representatives of the community and therefore, their intention is to protect the interests of the community. Reliance was placed on the cases of *SKOU Estate Ltd & 5 Others v Agricultural Development Corporation and Another* [2015] eKLR and *EG v Attorney General; David Kuria Mbote & 10 Others (Interested Parties)* [2021] eKLR. In the said cases, the respective courts held that an interested party must demonstrate that it is necessary that he /she be enjoined in the suit so that the court may settle all questions involved in the matter. This court was therefore urged to allow the prayers as sought.
13. On the other hand, the petitioners in their submissions dated 12.02.2024, urged that the intended interested parties failed to demonstrate their membership to any CPMC which are structures established at the village level by the 1st, 2nd and 3rd respondents for the implementation of sub project. It was urged that as a practice, if a project is to be initiated in a particular area, the CPMC for that particular project would be appointed in a village baraza; or a previous one adopted if it involves a second phase of an ongoing sub project. That in the case herein, the particular sub projects that the two intended interested parties wish to join were not identified in the application. And as a consequence of the same, the intended interested parties were estopped from purporting to represent the interest of the community.
14. On whether the duo have any identifiable stake in the proceedings, it was contended that the same had not been identified or set out and therefore, the prayer for joinder would be superfluous since all CPMCs for all the villages in Daadab constituency form part of the sub project implementation. Lastly, it was urged that no good reason was demonstrated to warrant their joinder as interested parties. That the orders herein cannot issue for no ground was laid for the same.
15. I have considered the application, the grounds of opposition and submissions by the rival parties. The only issue for determination is whether the application for joinder is merited.



16. Rule 2 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 defines an interested party as:
- “A person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may be directly involved in the litigation”.
17. Order 7 Rule 9 of the *Civil Procedure Rule* states that;
- “The court may even on its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit”.
18. The above notwithstanding, joinder of parties is provided for under Order 1 Rule 10(2) of the *Civil Procedure Rules* as follows: -
- “(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
19. The threshold for joinder was set out in the case of *Francis Kariuki Muruatetu & Another vs Republic & 5 others* in Petition 15 as consolidated with 16 of 2013 (2016) eKLR where the court held that the applicant must move the court by way of a formal application. That enjoinder is not as of right, but is at the discretion of the court hence, sufficient grounds must be laid before the court, on the basis of the following elements:
- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
 - ii. 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.
 - iii. 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 other parties will be making before the Court.
20. Therefore, joinder of parties is permitted by law and can be done at any stage of the proceedings; However, joinder of parties may be refused where such joinder will lead to practical problems of handling the existing cause of action together with the one of the parties being joined as necessary or will occasion unnecessary delay or costs on the parties in the suit.
21. Further, Joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to, or totally different from existing cause of action or relief. The determining factor in



joinder of parties is that common question of fact or law which would arise between the existing and the intended parties. This is the test that was applied by F. Gikonyo J. in the case of *Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited* and another in which, the court was of the view that, to determine the real issues in dispute among all the parties, the intended respondents must be enjoined.

22. In my view, in deciding an application for joinder, the court must exercise a liberal approach so as not to shut out a genuine litigant who is effectively interested or is bound by the outcome of the suit. However, the court must guard against a frivolous or vexatious litigant whose sole motivation is to complicate and confuse issues that are before court for determination.
23. In the case of *Judicial Service Commission v The Speaker of the National Assembly & Another* Petition No. 518 of 2013 the court had this to say:

“the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2012, defines an interested party as “a person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation”...He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the Court to make a determination favourable to his stake in the proceedings...
24. In determining whether the applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party, the true test lies not so much in an analysis of what the constituents of the applicant’s rights are, but rather in what would be the result on the subject matter of the action if those rights could be established.
25. In the instant case, the intended interested parties urged that the petitioners have previously successfully sought before this court conservatory orders restraining the respondents from releasing, disbursing or authorizing any expenditure held in the 3rd respondent’s account which was misleading and therefore, it was not only necessary but also fair that the applicants herein being members of the CPMC, be enjoined to shed more light on the case.
26. It is worth noting that no evidence was produced before the court by the applicants to support their claim as being members of CPMC nor was their evidence of statement of the members of the community urging that indeed, the intended interested parties represented them. To say the least, they are in a frolic of their own if not busy bodies. In the same breadth, the allegation that they were capable of helping this court reach an informed determination is far-fetched as this court is possessed of the ability to determine issues before it on its own merits. In any event, there is nothing useful to bring on board which the respondents cannot effectively present to the court.
27. To say the least, they did not demonstrate any legal or identifiable interest in the subject matter nor entitled right to participate in the proceedings herein.
28. In my view, their presence and participation in these proceedings is not necessary hence uncalled for with the effect of wasting time and increasing the cost of litigation. For that reason, I dismiss the application herein with costs to the petitioners.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 12TH DAY OF APRIL 2024.

JOHN N. ONYIEGO
JUDGE

