



**Gerale & another v Kello & 3 others; Mohamed & another (Intended Interested Party) (Petition E018 of 2023) [2024] KEHC 5246 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5246 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
PETITION E018 OF 2023**

**JN ONYIEGO, J  
MAY 17, 2024**

**BETWEEN**

**ADEN MUHUMED GERALE ..... 1<sup>ST</sup> PETITIONER  
NOOR HASSAN FARAH ..... 2<sup>ND</sup> PETITIONER**

**AND**

**MR. HASSAN KELLO, THE PERMANENT SECRETARY IN  
THE STATE DEPARTMENT OF THE ASALS AND REGIONAL  
DEVELOPMENT ..... 1<sup>ST</sup> RESPONDENT  
WILFRED OMARI, PROJECT MANAGER, NATIONAL PROJECT  
IMPLEMENTATION UNIT (NPIU) ..... 2<sup>ND</sup> RESPONDENT  
MOHAMED ABDI FARAH, GARISSA COUNTY PROJECT COORDINATION,  
COUNTY INTEGRATED PROJECT COORDINATOR PROJECT  
IMPLEMENTATION UNIT (CIPU) ..... 3<sup>RD</sup> RESPONDENT  
THE HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**MUHUDIN AHMED MOHAMED ..... INTENDED INTERESTED PARTY  
MOHAMED HARET HUSSEIN ..... INTENDED INTERESTED PARTY**

**RULING**

1. The petitioners as represented by the firm of Mwiti & Partners Advocates LLP brought before this court an application dated 10.01.2024 seeking for orders as enumerated hereunder:
  - i. That the petitioners be allowed to cause amendment of the application and petition both dated 24.11.2023 by replacing FY 2022 -2023 with FY2023-2024 in the pleadings.



- ii. That the 1<sup>st</sup> to 3<sup>rd</sup> respondents' notice of appointment and the replying affidavit dated 28.11.2023 be struck out.
  - iii. That the Honourable Court grants any other reliefs or orders it deems fit.
  - iv. Costs be provided for.
2. The application is supported by the supporting affidavit of Muhudin Ahmed Mohamed sworn on 10.12.2024 wherein it was deponed that the application and petition both dated 24.11.2023 erroneously made reference to the FY2023-2023 community development plans or work plans instead of the FY2023-2024, a regrettable typing and typographical error. That in some instances, the application and petition made reference to FY2023-2024, which was a budgetary year in issue in the petition, a clear indication that there was a mix up when keying in the financial years in the pleadings.
  3. On the issue of striking out the notice of appointment dated 28.11.2023 as filed by the firm of Bashir and Associates Advocates purporting to represent the 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> respondents, the applicant averred that the said law firm drew and filed a replying affidavit sworn on 28.11.2023 contrary to the law.
  4. It was further averred that under article 156(3) (b) and (7), Sections 5,6 and 14 of *Office of the Attorney General Act* of 2012, the national government, its ministries and state departments can only be represented in court by the Attorney General or state counsel under his office. That only the 4<sup>th</sup> respondent can lawfully represent the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents in the suit herein. That the pleadings by the firm of Bashir Advocates, a private law firm could thus not stand the test of legality and therefore ought to be struck out.
  5. Via a replying affidavit sworn on 18.04.2024 by Wilfred Omari, the Project Coordinator of the National Project Implementation Unit, on his behalf and that of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, it was averred that the KDRDIP, is an initiative by the government and supported by the World Bank to improve lives of the refugee hosting communities in the northern part of the country. That the project implementation unit processes funding for the approved projects and thereafter disburses the sums directly to beneficiary communities through the County Integrated Project Implementation Units.
  6. That the project lapsed on 31.12.2023 although there was a six-month extension of the programme issued to enable completion of the pending projects for the FY2023-2024. That all monies that had already been allocated for the FY2023-2024 sub projects which sought to focus on priority areas for the people of Daadab Sub County which include water, health and roads had been disbursed to the beneficiary groups.
  7. It was deposed that, after the release of all the funds to the various community beneficiary groups, no funds were left in the respondents' accounts for the said financial year, 2023-2024. That the projects have been running smoothly and the six-month extension had enabled their successful completion. It was deponed that, the prayers by the petitioners have been overtaken by events hence not capable of being effected. This court was therefore urged to dismiss the suit herein with costs.
  8. The application herein is hinged on the understanding that sometime in the first week of November, 2023 the 1<sup>st</sup> respondent through the 2<sup>nd</sup> respondent released Kes. 274 Million which was the budget for the first phase of the FY 2023 – 2024. It was contended that the money was currently lying in the custody of the 3<sup>rd</sup> respondent's County Integrated Project Implementation Unit (CIPIU) in Garissa. That if the funds that form the subject matter of the present petition that are already in the bank accounts of the 3<sup>rd</sup> respondent in Garissa were to be spent or appropriated without a genuine/ legitimate list of approved sub projects for the FY 2023 -2024, there would be loss and wastage of public



funds meant for socio economic and environmental needs of the local refugee hosting communities. It was urged that without proper and adequate public participation and involvement of the communities in the identification of projects that serve their needs, there was a likelihood that the public funds disbursed to the 3<sup>rd</sup> respondent would be expended on non-urgent and non-existent sub projects.

9. The court directed that the application be canvassed by way of written submissions where only the respondent complied with the said directions.
10. The applicants however made oral submissions wherein they reiterated the content of their application thus urging this court to grant the prayers sought.
11. The 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> respondents in their submissions dated 18.04.2024 framed the issue for determination as to whether the suit herein had been overtaken by events. That the project had been operational since its implementation in the year 2017 and the initiative saw tremendous development in the three refugee hosting communities who are its beneficiaries. That the project was to run for a term of five years which lapsed on 31.12.2023 but a six-month extension was issued to enable completion of the pending projects.
12. That funds were deposited in the accounts so as to enable smooth running of the projects. That the same were utilized for the approved projects which underwent the laid out procedures as had been the norm. The respondents asserted that the prayers sought herein had been overtaken by events and therefore, the court should find the suit herein moot. Reliance to that end was placed on the case of *National Conservancy Forum vs attorney General* [2013] eKLR where it was held that courts will not engage in determination of a matter for academic reasons but that there must be a real controversy or dispute before it in order for it to exercise jurisdiction. In the end, this court was urged to dismiss the application herein with costs to the respondents.
13. I have considered the application, the replying affidavit and submissions by the respondents. The issues for determination are; whether the applicant has met the threshold for amendment of a petition and; whether the firm of Bashir is properly on record as appearing for the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents.
14. The general power to amend pleadings can be drawn from Section 100 of the *Civil Procedure Act* which provides that parties to a suit have a right to amend their pleadings at any stage of the proceedings. Nevertheless, there is a caveat that, that right is not absolute, for it is dependent upon the discretion of the court. However, this discretion should be exercised judiciously and in line with the criteria set out under Order 8 Rule 3 of the *Civil Procedure Rules*.
15. Order 8 Rule 5 of the *Civil Procedure Rules* provides as follows: -

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”
16. The court has the power to amend pleadings which power can be exercised at any stage of the proceedings before judgment. In that regard, I seek guidance from *Bullen and Leake & Jacob's Precedents of Pleading*, 12<sup>th</sup> Edition, which provides as follows concerning amendment of pleadings:

“...power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the



proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action...”

17. The crux of the matter herein is to correct the financial year to read 2023-2024 in place of 2022-2023 which was said to have been erroneously quoted owing to what was described as a typographical error. I do not find any prejudice that the respondents are likely to suffer by merely allowing such an amendment. To effectually and conveniently determine the issues in controversy, it will be just that the petition be amended to reflect the correct financial year.
18. The respondent apart from stating that the suit had been overtaken by events, no evidence was presented before this court to support the same. Further, the respondents did not demonstrate any prejudice they were likely to suffer if the prayer herein were to be allowed. Indeed, it is a constitutional imperative that no party should be condemned unheard.
19. On the issue of legal representation of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent by Bashir advocates, I do not find it unusual. Government departments have the right to engage a private law firm if in the circumstances of the case it is found necessary. It is not a new thing in legal practice. It should not concern the petitioners. They do not suffer any prejudice by the said respondents being represented by a private law firm.
20. In view of the above holding, it is my finding that the application herein is merited hence allowed as prayed with orders that;
  - i. The amended petition be filed and served within three days.
  - ii. Upon service, the respondents to file their response if any within five days.
  - iii. Costs in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17<sup>TH</sup> DAY OF MAY 2024**

**J. N. ONYIEGO**

**JUDGE**

