



Mursal & another v Ministry of Interior & Coordination of National Government & 3 others; Aress & 2 others (Intended Interested Party) (Petition E022 of 2023) [2024] KEHC 5411 (KLR) (3 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5411 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
PETITION E022 OF 2023**

JN ONYIEGO, J

MAY 3, 2024

BETWEEN

ISSACK MOHAMED MURSAL 1ST PETITIONER

HUSSEIN SULTAN FARAH 2ND PETITIONER

AND

MINISTRY OF INTERIOR & COORDINATION OF NATIONAL GOVERNMENT 1ST RESPONDENT

COUNTY COMMISSIONER, GARISSA COUNTY 2ND RESPONDENT

DEPUTY COUNTY COMMISSIONER, GARISSA TOWNSHIP 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

AND

JIBRIL YARROW ARESS INTENDED INTERESTED PARTY

MOHAMED ADEN OMAR INTENDED INTERESTED PARTY

HASSAN OMAR IBRAHIM INTENDED INTERESTED PARTY

RULING

1. *Vide* a petition dated 19th December 2023, filed pursuant to Articles 3(1),10,22,23,27,35,165, and 258(1) of the constitution, the petitioners herein sought for the following reliefs;



1. A declaration be and is hereby made that the gazette and establishment of Sankuri subcounty is unconstitutional, illegal, null and void for non-compliance with Article 10 of the constitution and for want of public participation.
 2. A declaration be and is hereby made that the establishment of Shimbirey or any other administrative unit as the Sankuri sub-county headquarters is unconstitutional, illegal, null and void for non-compliance with Article 10 of the constitution and for want of public participation
 3. Judicial Review order of *Certiorari* be and is hereby issued bringing into this court and removing for purposes of quashing the establishment of Sankuri sub-county in gazette notice 2969 Vol. CXXIV- No.48.
 4. Judicial Review order of *Certiorari* be and is hereby issued bringing into this court and removing for purposes of quashing the establishment of Shimbirey or any other administrative unit as the Sankuri sub-county headquarters.
 5. An order of mandamus does issue compelling the Respondents to undertake an effective public participation exercise for the residents of Sankuri and Saka Divisions before any administrative unit affecting them is established.
 6. An order of mandamus does issue compelling the Respondents to undertake an effective public participation exercise for the residents of Sankuri sub-county in establishing a suitable location for the sub-county headquarters.
 7. A declaration be and is hereby made that the Petitioners' rights under article 27, 35 and 47 were violated by the Respondents.
 8. Cost of this petition be provided for.
 9. Any other reliefs this Honourable may deem fit to grant.
2. Contemporaneously filed with the petition is a notice of motion of even date seeking conservatory orders pending the hearing and determination of the application interpartes and subsequently pending the hearing and determination of the petition. The court having certified the application urgent, it directed the same to be served upon the respondents who despite service failed to respond thus compelling the court to issue exparte conservatory orders pending the hearing and determination of the petition.
 3. The basis of the petition herein is essentially a dispute challenging the creation of Sankuri Sub-county within Garissa sub-county by merging Saka and Sankuri divisions and whose headquarters is proposed to be at Shimbirey. That by the ministry of interior gazetting the proposed new subcounty, without consulting the affected residents, it acted unconstitutionally for lack of public participation.
 4. Meanwhile, parties describing themselves as the intended interested parties through the Firm of Ibrahim, Issack & Company moved this court via an application dated 21.03.2024 seeking the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. That the applicants herein being interested parties in the matter herein be allowed to join these proceedings.



- iv. That the replying affidavit sworn by Jibril Yarrow Arress on 21.03.2024 be deemed as duly filed upon payment of the requisite filing fees.
- v. That the costs of this application be provided for.
5. However, for unexplained reasons, the same intended interested parties filed a similar application dated 26.03.24 seeking similar prayers a move I find to border on abuse of the court process and accordingly, I do strike it out suo moto.
6. The application dated 21-03-24 is grounded on the fact that the petitioners initiated the present suit seeking interalia; order quashing the establishment of Sankuri Sub County and the establishment of Shimbirey as the headquarters of Sankuri Sub County a move they are opposed to. That the intended interested parties who are residents of Sankuri Sub County will be affected should the orders sought by the petitioners be granted.
7. It was averred that the intended interested parties are actively involved in community engagement and activities within the proposed Sankuri Sub County and would provide this court with pertinent information on its establishment and location of its headquarters.
8. Annexed to the application is a supporting affidavit sworn on 21.03.2024 by Jibril Yarrow Arress on his behalf and that of the 2nd and 3rd applicants, the intended interested parties herein. He deposed that he is a community elder residing in Abdisamit location, Sankuri division within Sankuri Sub County in Garissa County, while the 2nd intended interested party and 3rd intended interested party reside in Shimbirey and Sankuri location respectively. That he actively participates in community activities and public engagements within his location and the larger Sankuri area.
9. He deposed that he was part of the team that advocated for the formation of Sankuri Sub county in order to bring important government services closer to the residents of Saka and Sankuri divisions. He further averred that their efforts bore fruits when Sankuri Sub County was established on 17.03.2022 vide gazete notice No. Vol. CXXIV – No. 48. He deposed that having read the petition and notice dated 19.12.2023, it was clear that the effect of granting the orders would be to stop the operationalisation of national government services in Sankuri Sub County.
10. That as residents of Sankuri, they will be affected by the decision of this court as they are not parties to this suit hence the need for them to be enjoined. He stated that a reading of the petition reveals that the petitioners represent Saka Division hence the need to have the voice of Sankuri Division enjoined in this matter. That the course of justice require that all affected groups be heard before a decision is rendered in a suit. Additionally, that the petitioners shall not be prejudiced if the application for joinder is allowed.
11. The petitioners opposed the application via a replying affidavit sworn on 03.04.2024 by Issack Mohamed Mursal. It was deposed that the application for joinder did not meet the threshold as provided for by the law. The 1st petitioner stated that the applicants failed to identify the interested parties and in particular, the 2nd and 3rd applicants who did not swear an affidavit to support the said application. Further, the applicants did not identify the stake they have in the matter or the prejudice they stand to suffer if the application was to be disallowed.
12. It was deposed that no orders had been sought against the intended interested parties in their individual capacities and therefore the outcome of the suit herein is not likely to affect them in any way. That the applicants are just busy bodies and therefore, the court should dismiss the application as the same is devoid of any merit.



13. The court directed that the application be canvassed by way of written submissions but none of the parties complied. However, parties adopted the content of their respective affidavits in support and reply to the application. I have considered the application herein and the response thereof; The only issue which germinates for determination is whether the application herein has met the threshold for joinder of a party to proceedings.
14. Order 1 rule 1 of the *Civil Procedure Rules* provides as hereunder:

All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.
15. Order 1 Rule 10(2) of the *said Rules* provides that:

“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.”
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. It is trite that the power to grant or not to grant an application for joinder is discretionary and not a matter of course; In *Civicon Limited vs Kivuwatt Limited and 2 Others* [2015] eKLR the court observed as follows:

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”
18. Similarly, in the case 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 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.
19. The threshold for joinder was further 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. The intended interested parties herein basically, claimed that they are elders and therefore understands the clan issues in the area and why the proposed Sub-county and its headquarters should not be disturbed. As I said earlier, the main contention is lack of public participation. The respondents are the



right people to prove that there was sufficient consultation hence public participation. The explanation does not require the interested parties to intervene. That aspect can adequately be taken care of by the respondents hence there is no need to have multiple parties expressing the same position.

25. Further, I do not see the necessity to add more parties to repeat what the parties already on board will tell the court. It will amount to unnecessary delay and costs. 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. Their absence in these proceedings will not prejudice the outcome of the suit nor will they suffer any harm as the issues in controversy are purely constitutional in nature hence no valuable input would be required from them.
26. 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 no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 3RD DAY OF MAY, 2024.

JOHN N. ONYIEGO

JUDGE

