

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
JUDICIAL REVIEW NO. E001 OF 2025
IN THE MATTER OF ARTICLES 6(3), 10(1) (C),
10(2),27,28,43,47,174(E) & (G), 175(A), 176(2) AND ARTICLE
184(1) OF THE CONSTITUTION
AND
IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT
AND
IN THE MATTER OF THE REFUGEES ACT NO. 10 OF 2021 CAP
173
BETWEEN

REPUBLIC.....
.....APPLICANT

VS

PS MINISTRY OF LANDS PUBLIC WORKS HOUSING AND
URBAN DEVELOPMENT (STATE DEPARTMENT HOUSING
AND URBAN DEVELOPMENT.....1ST
RESPONDENT

COUNTY GOVERNMENT OF GARISSA.....2ND
RESPONDENT

WORLD BANK (2ND KUSP - KENYA).....3RD
RESPONDENT

AND

THE ATTORNEY GENERAL1ST
INTERESTED PARTY

THE COUNCIL OF GOVERNORS.....2ND
INTERESTED PARTY

AND

**ABDINASIR MAULID BASHIR.....1ST EX PARTE
APPLICANT**

**MOHAMED ADOW DIIS.....2ND EX PARTE
APPLICANT**

RULING

1. The matter for determination before me is an application dated 04.02.2025 seeking orders as follows:

i. Mandamus directing the 1st, 2nd and 3rd respondents to include Bura Municipality in Fafi constituency - Garissa County in the KUSP 2 Programme under the Window for Hosting Communities and Refugees component similar to Daadab Constituency considering that both have almost similar number of refugees that they host.

ii. A declaration that:

i. The exclusion of Fafi Constituency - Bura Municipality for the KUSP 2 Programme 2 is a violation of article 6(3), 10(1)(c), 10 (2),27,28,43,47,174(e) & (g), 175 (a), 176(2) and article 184 (1) of the constitution.

iii. Costs of the litigation.

2. The application is supported by the facts enumerated on the face thereof and further amplified by the ex parte applicants' statutory statement dated 13.01.2025 averring that; Fafi Constituency, Bura Municipality has been excluded from the

KUSP 2 programme under the Window for Hosting Communities and Refugees component. It was alleged that it was not only unfair but also unreasonable for the 1st, 2nd and 3rd respondents to exclude Fafi constituency from the programme as the same violated various provisions of the constitution *inter alia*; articles 6(3), 10(1)(c), 10(2), 27, 28, 43, 47, 174(e) & (g), 175 (a), 176(2) and article 184 (1) of the constitution hence the whole project is a nullity.

3. In response to the application, the 1st respondent filed grounds of opposition dated 03.03.2025 urging that this Honourable Court lacked jurisdiction to hear and determine the suit herein by dint of the express provisions of Item IV of the impugned KUSP - 2 on grievance redress mechanism. It was further averred that section 9(2) of the Fair Administrative Actions Act limits this Honourable Court's jurisdiction to review an administrative action or decision under the Fair Administrative Action unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. That the application was thus premature, incompetent and an abuse of the court process and as such, the same ought to be dismissed.
4. Mr. Mohamud Mursal, the County Secretary of the County Government of Garissa on behalf of the 2nd respondent filed a replying affidavit sworn on 03.03.2025 deposing that this Honourable Court lacked jurisdiction to hear the matter because the impugned KUSP - 2 expressly provides a

grievance redress mechanism that must be exhausted before approaching the Court.

5. It was further deposed that, section 9(2) of the Fair Administrative Action Act bars a Court from reviewing administrative actions unless all internal mechanisms of appeal or review, and other remedies provided under written law, have first been pursued. That since the applicant had not exhausted these remedies, the suit was premature, incompetent, and improperly before the Court.
6. He further deposed that KUSP - 2 is a series of initiatives aimed at enhancing urban development and the same is built on KUSP - 1 which is a programme funded by the world bank. That the program explicitly makes mention of Kakuma and Daadab as the refugee hosting communities targeted by KUSP - 2 with the aim of elevating the two to a municipality. It was averred that the ex parte applicants sought to challenge a program which the 2nd respondent had no role in its preparation but was only tasked with implementation.
7. It was further stated that the world bank codified the implementation of the programme and the utilization of the grant in the impugned programme's appraisal document unilaterally and therefore, the 2nd respondent's hands were tied. It was deposed that the application was not only frivolous but also an abuse of the court process hence the same ought to be dismissed.

8. Additionally, the deponent on behalf of the 2nd respondent, filed a further affidavit sworn on 16.10.2025 deposing that the suit herein has since been compromised and settled by a consent which was consequently adopted as the order of the court. That the effect of the foregoing, Fafi constituency – Bura Municipality was included in the KUSP – 2 programme under the Window for Hosting Communities and Refugees thus substantively determining the ex parte’s suit herein.
9. That the programme had already been rolled out and funds expended in the implementation of the programme and therefore, the suit herein had been overtaken by events. As such, it was urged that the suit be struck out with costs.
10. The application was canvassed by way of written submissions.
11. The applicants submitted that the main issues for determination are whether the 1st respondent erred in excluding Fafi constituency – Bura Municipality from KUSP – 2 grant; If so, whether there was violation of the constitution and the rights of the Bura – Fafi constituency?
12. It was contended that Bura Municipality in Fafi Constituency was granted municipal status on 20.10.2023 and the said municipality is within Garissa County, one of the three refugees hosting counties. That as such, it satisfied the geographic and demographic inclusion test. It was submitted that Daadab and Fafi constituencies host about 233, 828 and 121,000 refugees respectively hence Bura – Fafi constituency

ought to be included in the KUSP- II and therefore, the action or inaction of the respondents was in violation of the applicants' rights under articles 10,27,28,43,47,174(e) & (g), 175(a),176(2) and 184 of the constitution.

13. It was argued that the exclusion of Bura Municipality from eligibility under KUSP- 2 despite its comparability to Daadab and Kakuma municipalities in context and needs amounted to unjustifiable discrimination and breach of the constitutional rights to equality and fair treatment under article 27 of the constitution. To support the foregoing, reliance was placed on the case of **Law Society of Kenya vs Attorney General & Another Petition no. 4 of 2019 [2019] KESC 16 KLR** where discrimination was defined to entail the unjust or prejudicial treatment of different categories of people in the same circumstances.
14. Finally, the ex parte applicants urged that the exclusion of Bura Municipality from participating and eligibility under the KUSP - 2 constituted a violation of the constitution, the Fair Administrative Action Act and the principles of good governance, equality and non - discrimination. Consequently, this court was urged to allow the application as prayed.
15. On the other hand, the 1st respondent urged that the only issue for determination was whether the consent adopted as an order of court on 27.06.2025 in respect to Garissa HCPT No. E001 of 2025 should be applied to determine this case.

16. That the conditions under which a court may set aside a consent order or judgment are well set out in **Setton on judgments and Orders - (7th Edn), Vol. 1 pg. 124** and further, in the Court of Appeal's case in **Brooke Bond Liebig Ltd vs Mallya [1975] EA 266 at 269** in which it was held that:

'A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties''.

17. That in a similar and related matter being Garissa HCPT No. E001 of 2025, the petitioner therein Abdiwell Noor Aden challenged the 2nd Kenya Support Program - KUSP 2 - on the basis that the residents of Bura Municipality under Garissa County had been excluded as participants and beneficiaries of the program. That the matter was resolved via a consent adopted as an order of the court on 27.06.2025 to the effect that:

a) The name of the project previously known as Daadab Municipality Project under the Second Kenya Urban Support Programme of the World Bank, the subject matter of this Petition, shall henceforth be officially changed to the Daadab/ Hagadera Municipality Project under the same programme, and the project will henceforth be implemented in the newly created Daadab/Hagadera Municipality.

- b) The boundary review exercise has been undertaken in accordance with sections 12 & 56 of the Physical Planning Act (2019), Sections 5,9, 12(1) and 12(2) of the Urban Areas and Cities Act (2011 - amended 2019) and sections 5,48,49 and 107 - 110 of the county governments Act in order to create new boundaries for the municipality in order to reflect an all-inclusive framework.**
- c) An order in regard to the composition of the Municipality Board of Daadab/Hagadera Municipality shall be reconstituted to include 2 members from Hagadera/Alinjukur within 3 weeks from the date of adoption of the consent order.**
- d) An order in regard to funding and other project resources, a population pro-rata sharing formula be developed for the Daadab and Hagadera regions taking into account the latest official National Census statistics and the Department of Refugee Services database.**
- e) An order on the formal issuance and gazette of Daadab/Hagadera Municipality Charter pursuant to Urban Areas and Cities Act within 3 weeks of adoption.**
- f) An order that the respondents not to apply any money disbursed from the funding agency to their respective accounts prior to the issuance of Daadab/Hagadera Municipality Charter.**

18. It was argued that based on the forgoing, there has been no circumstance warranting the varying or rescinding the consent order issued previously and therefore, the suit herein is undeserving of the orders sought.
19. The 2nd respondents urged that the gravamen of the applicants' suit is that this Honourable Court be pleased to direct the 1st, 2nd and 3rd respondents to include Fafi constituency - Bura Municipality in Garissa County in the KUSP 2 program under the Window for Hosting Communities and Refugees. That soon after the filing of this suit, a petition, HCCHRPET/E001/2025 Abdiweli Noor Aden and Siyat Ali Noor 7 Another vs state Law Office and Ministry of Lands and Physical Planning was filed raising similar grievances. That parties to the said petition subsequently entered a consent compromising the said petition which consent was subsequently adopted by the court as an order of the court on 27.06.2025.
20. It was counsel's submission that the suit herein has thus been rendered moot as the petition fully addressed and resolved the ex-parte applicants' grievances. That the principle of mootness is anchored on the fact that courts exercise jurisdiction on live controversies and will decline to adjudicate matters where intervening events render judicial intervention futile or unnecessary. To that end, reliance was placed on the case of **Katiba Institute vs Parliament of the Republic of Kenya & Another [2025] KEHC 4609 (KLR) cited with approval in the case of Okiya Omtata Okiiti & 2 Others vs Attorney**

General & 4 Others [2020] KECA 589 (KLR) where the court of appeal cited the Black's Law Dictionary and explained as follows:

“In Black’s Law Dictionary, 8th Edition, a ‘moot case’ is defined as a ‘matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights.’ And as a verb, as meaning ‘to render a question as of no practical significance’.

21. While relying on the consent adopted, this court was urged that the present suit has since become moot as the same has been overtaken by the events of 27.06.2025. It was contended that the said consent order was equally served on the ex parte applicants and unless actuated by ulterior motive, the order took care of all their concerns. That noting that the said order has not been set aside, discharged, varied or appealed against, the same remains valid. To that end, this court was urged to dismiss the application herein with costs.

22. I have considered the application herein, response by both parties and rival submissions. Issues for determination are; whether the suit herein is moot and therefore ought to be dismissed and; whether the doctrine of exhaustion of remedy of alternative dispute resolution applies.

23. Being a first Appeal, the court is guided by principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123** where the court held that:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

24. In determining whether the suit herein is moot, a comparison of the prayers herein and that of HCCHRPET/E001/2025 Abdiweli Noor Aden and Siyat Ali Noor 7 Another vs State Law Office and Ministry of Lands and Physical Planning is necessary. The 2nd respondent equally submitted that the alleged consent order was served upon the ex parte applicants and therefore, their grievances were equally taken care of. In as much as the respondents submitted to the fact that the suit herein is moot, the ex parte applicants steered clear of the issue.

25. The ex parte applicants sought for prayers as already listed above while HCCHRPET/E001/2025 Abdiweli Noor Aden and Siyat Ali Noor 7 Another vs state Law Office and Ministry of Lands and Physical Planning sought for the following prayers:

i. A declaration that the respondents discriminated against the residents of Bura

Municipality by excluding them from benefiting from the KUSP - 2.

- ii. A declaration that the Bura Municipality is an urban hosting refugees and therefore a proper beneficiary of funding under the window for Host and Refugees component of the KUSP -2.**
- iii. An order directing the respondents to include Bura Municipality as one of the urban areas to participate and benefit from the window for Host and Refugees component of the KUSP -2.**
- iv. Costs of this petition.**

26. The petition was founded on the fact that International Development Association (IDA) was engaged in financing the second Kenya Urban Support Program - KUSP - 2. That the program has three components: component 1, Urban Development national policies, capacity building and Program management aimed at supporting implementation at the national level by directly financing activities that contribute towards the delivery of the programme outcomes; component 2, Sub national Urban Development Capacity Building and Investments which finances urban infrastructure and service delivery and institutional and capacity development; and component 3, a window for host communities and Refugees, Urban Institutional Development and Investments aimed at strengthening institutions and improve access to infrastructure services in refugee and host community and the surrounding areas.

27. That Garissa and Turkana Counties were identified as beneficiaries under the program as host counties for refugees in Kenya. According to the petition, Garissa County refugees are hosted in two municipalities namely: Daadab and Bura. That Daadab refugee complex comprises of Dagahley and Ifo while Bura Municipality hosts the Hagadera refugee camp. Additionally, that the KUSP - 2 specifically recognized Daadab Municipality within Garissa County as a beneficiary within component 3 but left out Bura Municipality where Hagadera within Fafi constituency, the largest refugee populated camp is situated.
28. From the facts and similarly, the prayers in the respective suits, one thing that stands out is the 'exclusion of Bura Municipality from the eligibility under KUSP - 2 despite its comparability to Daadab and Kakuma Municipalities in hosting refugees.
29. In determining the question that the suit herein is moot as alleged by the respondents, I would seek guidance from the finding of the Supreme Court in Petition No. 13 of 2020 as consolidated with Petition No. 18 (E019) of 2020 where the court stated as follows:

[69] The Black's Law Dictionary, 9th edition defines a "moot case" as "a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights", and as a verb, as meaning "to render a question as of no practical significance". Mootness of

a matter therefore arises where a live controversy no longer exists between parties to a suit and the decision of the court, in such instance, would have no practical effect. The doctrine of mootness enquires whether events subsequent to the filing of a suit would have eliminated the controversy between the parties. This therefore begs the question, did the completion of the construction of the SGR make the issues raised by the parties to be beyond the reach of the court or is there still a live controversy?

30. Similarly, the **Constitutional Court of South Africa in AAA Investments (Proprietary) Limited vs Micro Finance Regulatory Council and Another (CCT51/05) [2006] ZACC 9** held that:

‘In deciding whether an issue is moot, what needs to be brought into the equation is whether deciding the matter is in the interests of justice...’

31. In the instant case, the ex parte applicants urged that it was not only unfair but also unreasonable for the 1st, 2nd and 3rd respondents to exclude Fafi constituency from the programme as the same violated various provisions of the constitution. That noting that articles 6(3), 10(1)(c), 10 (2),27,28,43,47,174(e) & (g), 175 (a), 176(2) and article 184 (1) of the constitution having been violated, the whole project is thus a nullity. On the other hand, the respondents urged that the matter was moot as the

same was addressed by the consent by the parties which was later adopted as the order of the court.

32. A perusal of the suit herein and HCCHRPET/E001/2025 Abdiweli Noor Aden and Siyat Ali Noor 7 Another vs state Law Office and Ministry of Lands and Physical Planning reveal one common denominator. They all desire to have Bura Municipality included as a hosting community and consequently be afforded benefits under KUSP - 2. A further perusal of the consent by the parties which on 27.06.2025 was adopted by this court clearly illustrates that the said grievance was cured.

33. Consequently, what is being challenged before this Court no longer exists as the same is already settled. This suit is therefore obsolete hence a waste of precious judicial time as the same offends the doctrine of mootness. To that extent I do not see the need to consider the other issues.

34. Having held that the suit is moot, I am persuaded to hold that the application has no legs to stand on its own. Consequently, the application is dismissed for lack of Merit. Noting that this is public interest litigation, I make no orders as to costs.

Dated, signed and delivered virtually this 30th day of January 2026

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J. N. ONYIEGO
JUDGE

