



**County Assembly of Mandera County v Governor, Mandera County & another  
(Reference 1 of 2018) [2020] KESC 57 (KLR) (Civ) (23 January 2020) (Ruling)**

*County Assembly of Mandera County v Governor, Mandera County & another [2020] eKLR*

Neutral citation: [2020] KESC 57 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA**

**CIVIL**

**REFERENCE 1 OF 2018**

**PM MWILU, DCJ & V-P, MK IBRAHIM, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ**

**JANUARY 23, 2020**

**BETWEEN**

**COUNTY ASSEMBLY OF MANDERA COUNTY ..... APPLICANT**

**AND**

**THE GOVERNOR, MANDERA COUNTY .... 1<sup>ST</sup> PROPOSED INTERESTED  
PARTY**

**COUNTY GOVERNMENT OF MANDERA .... 2<sup>ND</sup> PROPOSED INTERESTED  
PARTY**

**A party yet to be joined in a suit cannot seek substantive orders in the suit.**

*A party yet to be enjoined in a matter lacked the capacity to seek any substantive orders in it.*

Reported by Kakai Toili

*Civil Practice and Procedure – suits – parties to a suit – joinder of parties - where a party sought to be enjoined as an interested party - whether a party yet to be joined in a suit could seek substantive orders in the suit.*

**Brief facts**

The intended interested parties filed the instant application seeking to be enjoined as interested parties in the reference filed by the County Assembly of Mandera County (the applicant) for an advisory opinion. The intended interested parties sought to participate and submit on the following; the procedure for appointment of members of the executive committee; whether there was a *lacunae* in law where a county assembly failed to approve the nominees for a county executive committee and whether the matter could be resolved by the advice of the Attorney General before approaching the court.

The intended interested parties contended that they had a direct and legitimate interest in the petition, the 1<sup>st</sup> intended interested party being the appointing officer of the Members of County Executive Committee for Mandera and the 2<sup>nd</sup> intended interested party being the County Government in respect to whom the



appointees were being appointed. The intended interested parties also filed an application for the dismissal of the reference.

### **Issues**

Whether a party yet to be joined in a suit could seek substantive orders in the suit.

### **Held**

A party yet to be enjoined in a matter such as the instant reference, lacked the capacity to seek any substantive orders in it. The prayer that the reference be dismissed because it was *sub judice* was premature.

*Application partly allowed; no orders as to costs. Prayer seeking dismissal of the reference disallowed for being premature.*

### **Citations**

#### ***East Africa***

1. *Gellow, Simba Hasheen v Governor of the County Government of Mandera and 2 others* Constitutional Petition No 7 of 2018; [2018] eKLR –(Explained)

2. *Muruatetu, Francis Kariuki & another v Republic & 5 others* Petition No 15 & 16 of 2015 (consolidated); [2016] eKLR –(Followed)

4. *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* Petition No 12 of 2013; [2015] eKLR –(Followed)

### **Statutes**

#### ***East Africa***

None Referred

## **RULING**

1. (Being an application by the Intended Interested Parties/Applicants seeking to be enjoined as Interested Parties in the Reference filed by the County Assembly of Mandera County for an advisory opinion under Article 163(6) of the Constitution as well as an application by the Intended Interested Parties/Applicants for the dismissal of the Reference)
2. Upon perusing the Notice of Motion dated 2<sup>nd</sup> August 2018 and lodged on 3<sup>rd</sup> August 2018 by the Governor, Mandera County and the County Government of Mandera, pursuant to the provisions of Section 25 of the Supreme Court Rules, 2012 seeking to be enjoined in the Reference as Interested Parties and also for dismissal of the Reference herein; and
3. Upon reading the Affidavit of Mr. Anzal Rashid Yarrow, the Legal Counsel, County Government of Mandera County, sworn on the 3<sup>rd</sup> August, 2018; and
4. Upon perusing the grounds adduced by the Applicants in support of the orders to be enjoined as Interested Parties wherein the 1<sup>st</sup> and 2<sup>nd</sup> Applicants, the Governor and County Government of Mandera County respectively, seek to participate in the Reference herein and submit to the Court on; (i) the procedure for appointment of Members of the Executive Committee; (ii) whether there is a lacunae in law where a County Assembly fails to approve the nominees for a County Executive Committee; and (iii) whether this is a matter that can be resolved by the advice of the Attorney General before approaching this Court; and
5. Upon considering the arguments made by the Proposed Interested Parties in which it is contended that the Applicants have a direct and legitimate interest in the present petition the 1<sup>st</sup> Proposed Interested Party being the appointing officer of the Members of County Executive Committee for Mandera, and



- the 2<sup>nd</sup> Proposed Interested Party being the County Government in respect to whom the appointees were being appointed; and
6. Upon further perusing the response contained in the Affidavit of Mohamed Adan Khaliff, the Speaker of the County Assembly of Mandera County, sworn on 28<sup>th</sup> September, 2018, in which it is contended that the interest of the Proposed Interested Parties are sufficiently represented in the Reference; that the Attorney General has already offered legal advice on the opinion being sought in this Reference and that Marsabit High Court Petition No. 7 of 2017 pending before that Court does not raise similar issues as those pending before this Reference; and
  7. Upon considering that the 1<sup>st</sup> and 2<sup>nd</sup> Proposed Interested Parties, being the appointing officer of the Members of County Executive Committee and the County Government in respect of whom the appointees were being appointed respectively, will be prejudiced if they are not enjoined and that they have an identifiable stake in the matter in line with the criteria laid down in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others*, Supreme Court Petition No. 12 of 2013, [2015] eKLR and *Francis Kariuki Muruatetu & another v Republic & 5 others*, Supreme Court Petition No. 15 & 16 of 2015 (consolidated), [2016] eKLR; and
  8. Having considered the Application, by a unanimous decision of this Court, we find that the prayer to have the Intended Interested Parties/Applicants enjoined as interested parties is merited and is consequently allowed; and
  9. Further, noting that the Intended Interested Parties/Applicants have also prayed and submitted that the Reference herein ought to be dismissed because it is sub-judice a Marsabit High Court Constitutional Petition No.7 of 2018, *Simba Hasheen Gellow vs The Honourable Governor of the County Government of Mandera and 2 others* and that the Attorney General has already offered legal advice on the opinion being sought in the Reference; and
  10. Noting the response by the County Government of Mandera that Petition No. 7 of 2018 aforesaid does not raise similar issues as are being raised in the Reference and that the Intended Interested Parties/Applicants lack capacity to seek orders of dismissal of the Reference; and
  11. [10] Having considered the said prayer, we unanimously find that a party yet to be enjoined in a matter such as the present Reference, lacks the capacity to seek any substantive orders in it and that the prayer aforesaid is premature, the Prayer for dismissal of the Reference is consequently struck out.
  12. For reasons aforesaid, we now make the following orders under Rule 25 of the Supreme Court Rules, 2012:

**Orders:**

- (a) The Application dated 20<sup>th</sup> August, 2018 and filed on 3<sup>rd</sup> August, 2018 seeking joinder of the Governor, Mandera County and the County Government of Mandera as Interested Parties to the Reference herein be and is hereby allowed only in terms of prayer (i); and
- (b) For the avoidance of doubt, the second prayer seeking dismissal of the Reference herein is hereby disallowed for being premature.
- (c) There shall be no orders as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JANUARY 2020.**

**M. MWILU M. K. IBRAHIM**



**DCJ&VP OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT**

.....

**S. C. WANJALA NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

**I certify that this is a true copy of the original**

**REGISTRAR**

**SUPREME COURT OF KENYA**

