



REPUBLIC OF KENYA



**Okoti v Otuoma; Athi Limited & another (Interested Parties) (Petition E001 of 2024) [2024] KEHC 1813 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1813 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
PETITION E001 OF 2024  
WM MUSYOKA, J  
FEBRUARY 29, 2024**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... PETITIONER**

**AND**

**HE DR. PAUL NYONGESA OTUOMA, THE GOVERNOR OF BUSIA  
COUNTY ..... RESPONDENT**

**AND**

**ATHI LIMITED ..... INTERESTED PARTY  
THE ETHICS AND ANTI-CORRUPTION COMMISSION .... INTERESTED  
PARTY**

**RULING**

1. I am tasked with determining a Motion, dated 26<sup>th</sup> February 2024. The same seeks joinder of the County Government of Busia as a respondent and 12 groups as interested parties. It is submitted that the County Government of Busia is a necessary party, and so would be the 12 proposed interested parties. The 12 allege that they ran a variety of businesses within Busia town, which were demolished by the County Government of Busia, in an exercise that exposed them to loss and damage. They engaged with officials of the County Government, and they were given certain promises and expectations, but subsequently it emerged that other individuals were being allocated plots, and were beginning to put up stalls on the spaces where theirs had been. The aver that the County Government has been unresponsive to their lamentations.
2. It is proposed that the 12 intended interested parties will bring into the cause facts to show violation of the legitimate expectations of a majority of the people affected; make submissions to show how the illegal allocations of spaces/stalls/kiosks/contracts have led to violence and deaths; assist the court to come up with an informed decision; endeavour to demonstrate how an illegality has been perpetrated



resulting in negative ethnicity; and assist the court in determining the place of the law in the allocation and termination of leases/allotment rights.

3. The Motion is premised on Articles 22(2), 23, 47, 50 and 159 of *the Constitution*, Rules 2, 5(d)(ii) and 7 of *the Constitution* of Kenya (Protection of Rights and Fundamental Rights and Freedoms) Practice and Procedure Rules, and Order 1 rule 10 and Order 51 rule 3 of the *Civil Procedure Rules*.
4. This is constitutional litigation, and the appropriate rules of procedure should be *the Constitution* of Kenya (Protection of Rights and Fundamental Rights and Freedoms) Practice and Procedure Rules. The applicants seek joinder of a respondent and interested parties, and so the relevant provisions are in rules 5 and 7. Rule 5 is limited to joinder of petitioners and respondents. It deals with who may be added joined substituted or struck out as such. Rule 7 is about interested parties, and it provides for their joinder, either on their own application, or by the court suo moto.
5. Rule 5 states:

“5. Addition, joinder, substitution and striking out of parties

The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—

- (a) Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties.
- (b) A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.
- (c) Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.
- (d) 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 just—
  - (i) order that the name of any party improperly joined, be struck out; and
  - (ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.
- (e) Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents.”

6. Rule 7 on the other hand provides:

“7. Interested party



- (1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.
  - (2) A court may on its own motion join any interested party to the proceedings before it.”
7. These 2 provisions give to the court a very wide discretion when it comes to joinder of parties, whether principal, such as petitioners and respondents, or secondary, such as interested parties. The power can be exercised by the court on its own motion, or upon application. The court may decide on its own that a certain person or entity is a necessary party, and order joinder of such party. As the court can act suo moto, or on oral application, there would be no necessity of expending time hearing parties on whether a party ought to be joined or not. The court can act based on the material placed before it.
8. Again, joinder of parties is a matter of access to justice, so that any party with a grievance of one sort or the other would be entitled to approach the court, and to be afforded the ease of such an approach. Rule 3(2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Rights and Freedoms) Practice and Procedure Rules states that the overriding objective of the rules is to facilitate access to justice for all persons. Rule 3(4) is also relevant, that exercise of jurisdiction by the court, under the rules, should facilitate the just, expeditious, proportionate and affordable resolution of all cases. I shall bear all that in mind as I determine whether to have the County Government of Busia joined as a respondent, and the 12 as interested parties.
9. Regarding the County Government of Busia, I note that the respondent is the Governor of Busia County, and, therefore, the head of the Executive wing of the County Government of Busia. the activities and programmes that are the subject of these proceedings are of the said Government. The respondent is not named as such in his individual capacity, but as the head of the Government. Ideally, the Government ought to have been named as a necessary party to the constitutional cause, and I believe the Government should be added to these proceedings as a respondent, for it should be answerable, with respect to the issues raised.
10. On the 12 proposed interested parties, the only material on record, exhibited to the supporting affidavit of Stephen Otieno Obala, sworn on 26<sup>th</sup> February 2024, relates to Busia Business Owners Association. The deponent of that affidavit purports to be an official of the said association. The officials of the other 11 organisations or entities sought to be joined, have not sworn affidavits, and no documents have been exhibited relating to their activities, or their association or relationship with the respondent, and the matters in controversy. Indeed, in his affidavit, Stephen Otieno Obala makes no reference whatsoever to these other associations or organisations. I would have no basis to order their joinder to these proceedings. In exercise of the very wide discretion given to me under Rule 7, I will only be inclined to join Busia Business Owners Association as interested party.
11. I have seen the affidavit of Dr. Samuel Wanguba Ouguza, sworn on 26<sup>th</sup> February 2024. He does not seek to be joined in any capacity, and he does not purport to be an official of any of the 12 proposed entities. I fail to understand what the affidavit seeks to achieve, in the context of the application, dated 26<sup>th</sup> February 2024, which it purports to support.
12. So, upon the joinder of the County Government of Busia and Busia Business Owners Association as a 2<sup>nd</sup> respondent and 3<sup>rd</sup> interested party, respectively, what should be their level of participation in these proceedings, and what court papers ought they to file?
13. *The Constitution* of Kenya (Protection of Rights and Fundamental Rights and Freedoms) Practice and Procedure Rules only gives directions on what may be filed by the principal parties, that is to say the



- petitioners and the respondents. The Rules are silent on the nature of pleadings and filings to be done by the other parties, that is the interested parties and amicus curiae, if at all they are allowed to file any.
14. What the petitioner is required to file is detailed in Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Rights and Freedoms) Practice and Procedure Rules. The petitioner files a petition, supported by an affidavit, which may carry annexures. The form of the petition is a matter of detail, which may not be relevant for now. What a respondent should file, in response, is detailed in Rule 15 of the Constitution of Kenya (Protection of Rights and Fundamental Rights and Freedoms) Practice and Procedure Rules. It takes 2 forms, depending on whether the respondent is a State organ or entity, or not. For State organs or entities, they have to file replying affidavits. For non-State organs or agents, there would be liberty to file either a replying affidavit, or a statement setting out the grounds relied upon to oppose the petition. The County Government of Busia is a State entity, it should file a replying affidavit, in terms of Rule 15(1) of the Constitution of Kenya (Protection of Rights and Fundamental Rights and Freedoms) Practice and Freedoms Rules.
  15. As what an interested party should file is not provided for in the Constitution of Kenya (Protection of Rights and Fundamental Rights and Freedoms) Practice and Procedure Rules, it would mean that the interested party is not a principal party to the constitutional cause. his role should be peripheral, and so it should not file any responses to the petition. Its role should be to complement either of the principal parties, and it can only do so by way of presenting a case in the form of legal arguments, articulated in submissions, whether written or oral.
  16. The final orders are, therefore, as follows:
    - a. that I hereby order joinder of the County Government of Busia as the 2<sup>nd</sup> respondent, and Busia Business Owners Association as the 3<sup>rd</sup> interested party;
    - b. that the 2<sup>nd</sup> respondent shall file a replying affidavit in response to the petition, in terms of Rule 15(a) of the Constitution of Kenya (Protection of Rights and Fundamental Rights and Freedoms) Practice and Procedure Rules;
    - c. that the participation of the 3<sup>rd</sup> interested party shall be limited to making submissions to the petition, and to any interlocutory process; and
    - d. that the petitioner shall effect amendments to his petition, in line with Rule 5(e) the Constitution of Kenya (Protection of Rights and Fundamental Rights and Freedoms) Practice and Procedure Rules, as a consequence of the addition and joinder orders made herein.
  17. It is so ordered.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 29<sup>TH</sup> FEBRUARY 2024**

**W. MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Okoiti, the petitioner, in person.

Mr. Omboko and Mr. Wambura, instructed by the County-Attorney, for the respondent.

Mr. Omeri, instructed by Omeri & Associates, Advocates for the proposed 12 interested parties.

