



**Wafula v Safaricom Limited & others; Central Bank of Kenya & 2  
others (Intended Respondent) (Constitutional Petition E362 of 2020)  
[2023] KEHC 18306 (KLR) (Constitutional and Human Rights) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18306 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E362 OF 2020**

**AC MRIMA, J**

**MAY 30, 2023**

**BETWEEN**

**MOSES WAFULA ..... PETITIONER**

**AND**

**SAFARICOM LIMITED & OTHERS ..... RESPONDENT**

**AND**

**CENTRAL BANK OF KENYA ..... INTENDED RESPONDENT**

**CABINET SECRETARY, NATIONAL TREASURY AND  
PLANNING ..... INTENDED RESPONDENT**

**COMPETITION AUTHORITY OF KENYA ..... INTENDED RESPONDENT**

**RULING**

1. At the heart of this Petition is a contention regarding financial consumer rights with focus on payment services provided by the 1<sup>st</sup> Respondent herein, Safaricom Limited, in the form of Lipa na M-Pesa Pay Bill Service.
2. *Vide* an application by way of a Notice of Motion dated 3<sup>rd</sup> July, 2021, the Petitioner sought to enjoin the Central Bank of Kenya, the Cabinet Secretary, National Treasury and Planning and the Competition Authority of Kenya as the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents respectively.
3. Save for the 1<sup>st</sup> Respondent, the rest of the parties opposed the application.
4. On the directions of this Court, parties filed their respective written submissions, hence this ruling.



5. This Court has carefully perused the documents in respect of the application filed in this matter. They include extensive and comprehensive written submissions.
6. Given the nature of this matter, this Court will not, at this point, necessarily reproduce verbatim the respective parties' dispositions and submissions. However, the Court shall take the contents thereof into account in the course of this discussion.
7. As stated before, the application seeks to join some parties as Respondents. The Petitioner contended that it inadvertently left out the intended Respondents who are at the heart of the instant dispute. According to the Petitioner, the Central Bank of Kenya and the Cabinet Secretary, National Treasury and Planning are the main regulators of the financial services offered by the 1<sup>st</sup> Respondent whereas the Competition Authority of Kenya is mandated to *inter alia* perform the role of consumer protection.
8. The intended Respondents largely took the converse position that their presence in the matter as Respondents was not necessary.
9. Rule 5 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) provide for the addition, joinder, substitution and striking out of parties in constitutional Petitions. It states as follows: -

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.



10. Rule 5(a) deals with Respondents. It allows a Petitioner to enjoin two or more parties as Respondents and in any case, it is the Court which will determine the question as to which of the Respondent is liable and to what extent.
11. This Court in the High Court at Nairobi Constitutional Petition No. 511 of 2016 *Kirwa arap Bitok & Others vs. Commission of University Education & Others* in allowing the joinder of a party as a Responder reiterated several considerations, including the following: -
  - i. The joinder of a proposed Respondent ought to be necessary for the proper determination of the matters in dispute.
  - ii. There should be no demonstration of bad faith on the part of the Petitioners in seeking the joinder of the proposed Respondent.
  - ii. None of the parties in the Petition ought not to be prejudiced by the joinder of the proposed Respondent.
12. In this matter, there is no doubt that the intended 3<sup>rd</sup> and 4<sup>th</sup> Respondents are indeed the main regulators of the financial services offered by the 1<sup>st</sup> Respondent. That is the reason why, on the grant of some conservatory orders in this matter on 19<sup>th</sup> December, 2022, the Central Bank of Kenya issued a Press Release on the applicability of the new M-Pesa charges effective 1<sup>st</sup> January, 2023. There is further no doubt that the Cabinet Secretary, National Treasury and Planning being at the heart of taxation in the country derives taxes from the impugned M-Pesa services. Such parties, therefore, ought to be at the heart of this Petition.
13. As regards the Competition Authority of Kenya and its role as provided for under Section 9 of the [Competition Act](#), No. 12 of 2010, including its regulatory functions relating to matters on competition and consumer welfare and on the contention that such a body has failed in discharging its duties, then it is definitely of essence that such a party be enjoined as a Respondent.
14. Deriving from the above, it is apparent that the intended Respondents are all necessary parties in this dispute, none of the instant parties will be prejudiced in any way by the joinder and there is no demonstration of bad faith. In fact, the involvement of the said parties remains crucial for the proper and comprehensive determination of the matters at hand.
15. Having said so, and without much ado, given the nature of the dispute before Court, the immense public interest involved (more so that all the intended Respondents are public entities) and for the need to comprehensively deal with all issuers at hand at once, this Court finds that the application for joinder is merited.
16. Consequently, the following orders do hereby issue in respect to the Notice of Motion dated 3<sup>rd</sup> July, 2021: -
  - a. The Central Bank of Kenya, the Cabinet Secretary in-charge of the National Treasury and Planning and the Competition Authority of Kenya are hereby enjoined in these proceedings as the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents respectively.\*\*
  - b. The Petitioner is hereby granted leave to further amend the Amended Petition and to file and serve the Further Amended Petition, or the equivalent pleading as the case may be, within 21 days of this order.
  - c. Costs shall be in cause.

Orders accordingly.



**DELIVERED, DATED AND SIGNED AT KITALE THIS 30<sup>TH</sup> DAY OF MAY, 2023**

**A. C. MRIMA**

**JUDGE**

**Rulng delivered virtually in presence of;**

**Miss. Kihengo for Mrs Sikuku for the Petitioner**

**Miss Detho for Mr. Oraro for 3<sup>rd</sup> Intended Respondent.**

**Miss Leylah Ahmed for Ohaya for 2<sup>nd</sup> Respondent.**

**Regina/Chemutai Court Assistant**

