



**Kirima v Solar Panda Company & another (Constitutional Petition
E002 of 2023) [2023] KEHC 27203 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27203 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CONSTITUTIONAL PETITION E002 OF 2023
EM MURIITHI, J
DECEMBER 19, 2023**

BETWEEN

LAWRENCE M'IMPWI KIRIMA PETITIONER

AND

SOLAR PANDA COMPANY 1ST RESPONDENT

ANDY KEITH 2ND RESPONDENT

RULING

1. These proceedings were instituted vide a Petition dated 7th March, 2023 in which the Petitioner herein seeks several reliefs from this Court for the alleged infringement of his fundamental freedoms and rights to dignity and privacy by the actions of the Respondents. The Petitioner claims that his image/ photograph was used for marketing and/or advertising on the flyers and website of the 1st Respondent without the consent of the Petitioner.
2. The Petitioner avers that he engaged the 2nd Respondent, who is the Chief Executive Officer of the 1st Respondent Company, with a view of understanding why his image was being used for marketing/ advertising by the 1st Respondent without his knowledge. That after raising his concerns with the 2nd Respondent on the use of his image without his consent, the 2nd Respondent acknowledged that the 1st Respondent had been using the Petitioner's image without the consent of the Petitioner, apologized, and in return proposed to compensate the Petitioner with a sum of Kshs. 3,000/=. The Petitioner however avers that the Respondents have never compensated him for using his image even after making follow ups on the same with the 2nd Respondent who allegedly replied stating that they would pull down the image.
3. Both the 1st and 2nd Respondents separately opposed the Petition on various grounds. I will however not delve into the merits of the said petition at this juncture as presently before this Court is the 2nd Respondent's Notice of Motion Application dated 29th May, 2023 seeking that the petition herein as



- against the 2nd Respondent and any of its consequential proceedings be struck out with costs to the 2nd Respondent.
4. The instant application is based on the grounds that the 1st Respondent is a limited liability company duly registered under the Kenyan *Companies Act* while the 2nd Respondent is the Chief Executive Officer of the 1st Respondent Company. That the violations and allegations complained of by the Petitioner are all directed to the 1st Respondent and not the 2nd Respondent. Further, that the 2nd Respondent, being a natural person, neither owns the flyers nor the website of the 1st Respondent which allegedly contains the images/photographs complained of by the Petitioner. That it is therefore essential in the interest of justice and fair hearing that the orders sort herein be issued.
 5. The application is supported by the affidavit sworn by 2nd Respondent on the same 29th May, 2023. The 2nd Respondent deposes that the substratum of the petition involves alleged violations against the 1st Respondent which is a separate and distinct legal entity capable of suing and being sued in its own name for its independent actions. The 2nd Respondent thus faults the Petitioner for suing him in his personal capacity stating that in the event that the 2nd Respondent acted in any way in relation to the matters complained of in the instant petition, which he denies, such actions (if any) would have only arisen as a result of his position as an employee, director, and/or shareholder of the 1st Respondent and not in his personal capacity. The 2nd Respondent thus maintained that he should be struck off as a party in the instant petition.
 6. The 1st Respondent joined the 2nd Respondent in support of the present application vide the Replying affidavit sworn on 2nd October, 2023 by Scott Remborg, the Managing Director of the 1st Respondent Company. Mr. Remborg deposed that the 2nd Respondent is not a necessary party in these proceedings as the Petitioner has not raised any reasonable cause of action against the 2nd Respondent that warrants the lifting of the corporate veil. That in the very unlikely circumstances that the 2nd Respondent was involved in some act that the Petitioner complains of, the 2nd Respondent could only have been involved in such in his capacity as an agent of the 1st Respondent and should therefore not take personal responsibility for such acts.
 7. The Petitioner strongly opposed the application vide the Replying Affidavit which he swore on 13th September, 2013. He deposed that the 2nd Respondent seeks to cushion himself from liability in the guise of the doctrine of corporate veil. That while the Petitioner's image was used on the website of the 1st Respondent, it is the 2nd Respondent who authorized it and was all along aware of the same and even offered the Petitioner Kshs. 3000/= which was never honoured.
 8. The Petitioner thus maintains that there is a plausible cause of action against the 2nd Respondent in these proceedings because he committed the offending acts knowingly and in liaison with the 1st Respondent. Further, that the violations instigated by the 2nd Respondent are separate from those of the 1st Respondent as the 2nd Respondent willfully and neglectfully authorized the continued use of the Petitioner's image without his consent even after acknowledging the violation of the Petitioner's rights. It is therefore the Petitioner's case that the 2nd Respondent should be answerable for aiding the acts committed by the 1st Respondent and that the same warrants the piercing of the corporate veil in the interest of justice.
 9. The application was subsequently canvassed by way of written submissions.



The Submissions

10. It was the 2nd Respondent's submission that the 2nd Respondent was improperly joined in these proceedings as all accusations by the Petitioner of violations of his rights have been leveled against the 1st Respondent. That there is no cause of action against the 2nd Respondent as the 1st Respondent is corporate entity capable of suing and being sued in its own name. That therefore, there is a mis-joinder of parties warranting the striking off the 2nd Respondent from these proceedings. The 2nd Respondent relied on the cases of *H. W. Ndegwa & Another v. David Onzere* [2007] eKLR and *Kwame Kariuki & Another v. Hassconsult Limited & 2 Others* [2014] eKLR to support his submissions.
11. In support of the application, it was submitted on behalf of the 1st Respondent that the 2nd Respondent has been wrongly joined in these proceedings as there is no cause of action against the 2nd Respondent. That any action alleged to have been done by the 2nd Respondent was done by the 2nd respondent on behalf of the 1st Respondent Company in his official acting capacity. That the acts alleged against the 1st Respondent do not warrant the lifting of any corporate veil and as such, this application should be allowed with costs so that the dispute can proceed against the actual disputants to the exclusion of the 2nd Respondents.
12. On behalf of the Petitioner, it was submitted that the 2nd Respondent is relevant to these proceedings. That since it is the 2nd Respondent who acknowledged that his company, the Respondent, was using the Petitioner's image without his consent and even proposed to compensate the Petitioner with Kshs. 3,000/=, it would be prejudicial to the Petitioner's case if the 2nd Respondent is struck out of these proceedings. To buttress his submissions, relied on the case of *National Social Security Fund Board of Trustee v. Ankhan Holding Limited & 2 Others* [2006] eKLR as well as the case of *Multichoice Kenya Limited v. Mainkam Limited & Another* [2013] eKLR. The Petitioner thus urged this Court to dismiss the 2nd Respondent's instant application with costs.

Issues for Determination

13. I have carefully considered the 2nd Respondent's Notice of Motion Application dated 29th May, 2023, the grounds on which the application is premised on, and the affidavits in support and opposition to the application. I have also considered the rival submissions by the parties herein as well as the authorities cited. The main issues that arise for determination by this Court are:
 - i. Whether 2nd Respondent should be struck out of these proceedings;
 - ii. Who should bear the costs of this application?

Analysis and Determination

14. This application is expressed to have been brought under the provisions of Rules 3 and 5(1)(i) of the *Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice and Procedure Rules*, 2013; Sections 1A, 1B and 3A of the *Civil Procedure Act*, Articles 47, 48, and 50 of the *Constitution* and all other enabling provisions of the law.
15. The Petitioner sued both the 1st and 2nd Respondents on the basis of the alleged violation of the Petitioner's constitutional rights to right and dignity. The 2nd Respondent contends that the suit against him should be struck out on the basis that there is no reasonable cause of action that the Respondent has raised against him.



16. In this regard, Order 1 Rule 10 (2) of the *Civil Procedure Rules* (2010) provides that:-

“The court may at any stage of the proceedings, either upon or without the application of either part, 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 defendants, 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.”

17. It is therefore clear from the above provision that the Court may on its own motion or on Application of any party to the proceedings order the striking out a party who the Court finds was improperly joined.

18. In this case, it is not in dispute that the 2nd Respondent is the Chief Executive Officer of the 1st Respondent Company. For this reason, the 2nd Respondent thus contends that he should not be held liable for the alleged violations of the Petitioner’s rights by the 1st Respondent.

19. On the other hand, the Petitioner claims that after discovering that his image was being used by the 1st Respondent to advertise and market its products without the Petitioner’s consent, he engaged the 2nd Respondent who responded to the Petitioner’s concerns on behalf of the 1st Respondent. The Petitioner further alleges that it is the 2nd Respondent who acknowledged violations of the Petitioner’s rights on behalf of the 1st Respondent and that as such, the 2nd Respondent should be held liable for his own actions of continuing to use the Petitioner’s image even after becoming aware of the Petitioner’s concerns. The Petitioner thus maintains that the 2nd Respondent has been sued in his individual capacity and not as an agent employee and/ or of the 1st Respondent Company.

20. In this regard, para 90 of *Halsbury’s Laws of England* 4th Edition Volume 7 (1) observes:

“90. Piercing the corporate veil.

Notwithstanding the effect of a company’s incorporation, in some cases the court will ‘pierce the corporate veil’ in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company.”[Emphasis added]

21. Having considered the prevailing circumstances in this case, and given the contention that the 2nd Respondent acknowledged the use of Petitioner’s image without his consent and that he allegedly gave a proposal of Kshs. 3000/= in the hope of curing the said violation of his rights, it would appear to the court the 2nd Respondent was the main actor behind the veil of the 1st Respondent Company.

22. The Petitioner has disclosed his bone of contention between him and the 2nd Respondent in his individual capacity and has therefore established his cause of action against him. As such, the presence and participation of the 2nd Respondent in these proceedings is not only relevant but also necessary for the just determination of the real matter in dispute and will also enable this Court effectually and completely adjudicate upon and settle all questions in controversy between the parties.



23. Whereas the participation of the 2nd Respondent in these proceedings may increase his costs on an individual capacity, the same can be adequately cured by an award of costs. However, striking out the 2nd Respondent from these proceedings at this stage would prejudice the Petitioner's case and hinder the Court from determining the real issues in controversy.

Orders

24. Accordingly, for the reasons given above, the court finds that the application by the 2nd Respondent has no merit and it is declined.

25. Costs in the Cause.

Order accordingly.

DATED AND DELIVERED ON THIS 19TH DAY OF DECEMBER, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mwendwa for the Petitioner.

Mr. Kimaita for the Respondent.

