



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 515 OF 2019**

**CARRET PETER MAYOR.....PETITIONER/RESPONDENT**

**VERSUS**

**CO-OPERATIVE BANK OF KENYA.....RESPONDENT/APPLICANT**

**AND**

**SHEKELE COMMUNICATIONS LIMITED.....INTENDED 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Notice of Motion dated 19<sup>th</sup> February 2021 was filed under Section 1A, 1B, 3A of the Civil Procedure Act and Order 1, Rule 10 and Order 51, Rule 1 of the Civil Procedure Rules, 2010 by the respondent. He seeks to have the intended respondent enjoined as the second respondent in this petition.

2. The application is supported by the following grounds:

- a) *The respondent herein entered into a contractual agreement with the intended 2<sup>nd</sup> respondent as its advertising agency.*
- b) *The intended 2<sup>nd</sup> respondent as per the agreement was to indemnify the respondent from the claims arising out of the advertisement executions.*
- c) *The intended 2<sup>nd</sup> respondent consequently entered into an agreement with a casting agency.*
- d) *It is for this reason that the respondent states that the liability for breach of contract lies with the intended 2<sup>nd</sup> respondent and the casting agency. This is because the respondent was never privy to the petitioner's contractual agreement with the said agencies.*
- e) *It is the respondent's desire to be heard before determination of the petition as the verdict on this application will directly affect the outcome of the suit.*

3. In addition, the application is premised on Lucy Muthama's (the respondent's Company Secretary) sworn supporting affidavit dated 18<sup>th</sup> February 2021.

4. She deposes that on top of the cited grounds as per the indemnity clauses in the agreement, the intended 2<sup>nd</sup> respondent wrote a letter of indemnity to the respondent taking responsibility for any actions that might occur thereafter.

5. In light of this it is the respondent's case that the instant matter arises from a contract which the respondent is not party to and as a result of which it had been indemnified against by the intended 2<sup>nd</sup> respondent.

**Petitioner's response.**

6. The petitioner in opposing the application filed his replying affidavit dated 31<sup>st</sup> March 2021. He avers that the intended 2<sup>nd</sup> respondent has no identifiable stake, legal interest and duty in the matter as defined under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. He deposes that the application is a delaying tactic on the part of the applicant as the same was done after the hearing of the petition. That the respondent will not be prejudiced if the intended 2<sup>nd</sup> respondent is not enjoined in the suit.

#### **The Respondent/Applicant's Submissions**

7. The respondent/applicant, through its advocates Miller & Company Advocates filed written submissions dated 28<sup>th</sup> July 2021. He submits that the only issue for determination is whether the intended 2<sup>nd</sup> respondent should be enjoined in the petition. Counsel submits that as per the communications agency agreement between the respondent and the intended 2<sup>nd</sup> respondent, the latter was to be its advertising agency and indemnify it against any claims brought against it with regard to advertising. It is submitted that since the relief flows from the intended 2<sup>nd</sup> respondent, this satisfies the elements of enjoining a party in a suit as held in the case of **Talewa Road Contractors v Kenya National & another [2019] eKLR** which he cited in support.

8. Counsel accordingly submits that the intended 2<sup>nd</sup> respondent should be enjoined as this will enable this Court to effectively and completely adjudicate and settle all the questions set forth in this suit.

#### **The Petitioner/Respondent's Submissions**

9. The firm of Tito & Associates on behalf of the petitioner filed written submissions dated 10<sup>th</sup> August 2021. Counsel submits that the issue for consideration is *whether the intended 2<sup>nd</sup> respondent ought to be enjoined to the petition.*

10. His answer is in the negative, for the reason that the respondent does not fit the definition of respondent under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Counsel in opposing the applicant's argument submits that the instant suit is premised on the question as to whether the respondent infringed upon the petitioner's rights to privacy and dignity. This is due to its commercial gain in use of the petitioner's image in its banking hall. In support reliance was placed on the case of **Shrivling Supermarket Limited v Jimmy Ondicho Nyabuti & 2 others [2018] eKLR** that outlines the test for joinder.

11. Counsel submits that the agreement between the respondent and the intended 2<sup>nd</sup> respondent is not the subject of the petitioner's petition. He argues that whilst the respondent refers to its contract with the intended 2<sup>nd</sup> respondent, the petitioner remains alien to its contents. He relied on the Supreme Court's holding in the case of **Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR**. Counsel notes that in determination of whether a party is to be enjoined, the issues to be determined by the Court should remain to be those presented by the principal parties or as framed by the Court from the pleadings and submissions of the principal parties.

12. It is their case essentially that the petitioner's rights will be prejudiced in entertaining the application as the applicant seeks to have the Court determine its contractual obligations with the intended 2<sup>nd</sup> respondent instead of whether it infringed the petitioner's right. To that end it is submitted that the application is an abuse of the Court process and that the applicant ought to pay the costs of the application.

#### **Analysis and Determination**

13. I have considered the application, affidavits, submissions and cited authorities and I find the only issue for determination to be whether the intended 2<sup>nd</sup> respondent ought to be enjoined as a party in the instant petition.

14. The law on joinder of parties for Constitutional petitions is set forth in the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 referred to as the **Mutungu Rules**. This is provided under Rule 5 of the Rules which is also similar to Order 1, Rule 10 of the Civil Procedure Rules, 2010. Rule 5 provides 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 nonjoinder of parties, and the Court may in every proceeding deal with the matter in dispute.*

*(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.

15. In making a determination of who is the appropriate respondent the **Mutunga Rules** provide as follows under Rule 2:

*“respondent” means a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom;*

16. The Court of Appeal in the case of **JMK v MWM & another [2015] eKLR** while speaking to the principle of joinder of a party in a proceeding noted as follows:

*“This Court adopted the same approach in CENTRAL KENYA LTD. V. TRUST BANK & 4 OTHERS, CA NO. 222 OF 1998, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that:*

*“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”*

*We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court...”*

17. The Court of Appeal in the case of **EG v Attorney General; David Kuria Mbote & 10 others (Interested Parties) [2021] eKLR** shedding more light on the application of this principle held as follows:

*“[1] The core of the court’s power to join a party to any proceedings including at the appellate stage, as aptly discussed in Hamisi Yawa & 36,000 others vs. Tsangwa Ngala Chome & 19 others [2018] eKLR, is to bring on board a necessary party for purposes of determining the real issue(s) in dispute. Also, a joinder of a party is not an automatic right, but one which is granted upon exercise of the discretion of the court concerned. Nonetheless, the court exercises such discretion under defined parameters, that is, it must be satisfied that: -*

*a) The intended party has a personal interest or stake in the matter in question; and that interest is clearly identifiable and proximate enough and not merely peripheral.*

*b) The intended party’s presence would enable court to resolve all the matters in the dispute.*

*c) The intended party would suffer prejudice in case of non-joinder.*

*d) The joinder of the intended party will not vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings.”*

18. Other cases I have referred to are: (i) **JMK v MWM & anor [2015] eKLR**, (ii) **Andy Forwarders Service Limited & another vs Price Waterhouse Coopers Limited & another [2017] eKLR**.

19. Although joinder as a party is not an automatic right, a party who is desirous to have a party enjoined in the suit can do so at any time in an ongoing proceeding through an application. The Court will then consider it and in its discretion make a determination on the suitability of such an addition. In making this determination the Court is accordingly guided by the principles set out in the cited authorities.

20. The applicant through its application seeks to have the intended 2<sup>nd</sup> respondent joined in the petition. This he claims is because the use of the petitioner’s image was as a result of its contractual relationship with the said party as its communication and advertising agency. The petitioner on the other hand has maintained that he has never entered into any such contract with any of the applicant’s agencies.

21. The respondent/applicant has availed evidence of an agreement between it and the intended 2<sup>nd</sup> respondent in respect of communication and advertising. It is not denied that the petitioner/respondent’s image has been used in its business. The respondent/applicant would wish to have the intended 2<sup>nd</sup> respondent give some form of explanation on the advert and use of the Petitioner’s image. Its enjoinder will assist this court complete settlement of all questions that may be lingering between the three (3) parties. This is in line with the provisions of the law, the **Mutunga Rules** and the authorities cited.

23. The application may have been made late, but the position is that the proceedings are on going. I find merit in the application which I hereby allow. The intended 2<sup>nd</sup> respondent **Shekele communication Limited** is hereby enjoined as the 2<sup>nd</sup> respondent in these proceedings.

24. The 1<sup>st</sup> respondent shall serve the 2<sup>nd</sup> respondent with the petition immediately.

(i) The 2<sup>nd</sup> respondent to file its response within 14 days.

(ii) The petitioner and 1<sup>st</sup> respondent to serve the 2<sup>nd</sup> respondent with their respective submissions within the next 7 days.

(iii) The 2<sup>nd</sup> respondent to file its submissions within 14 days upon filing its response.

(iv) Leave is granted to the petitioner and 1<sup>st</sup> respondent to file supplementary submissions (if need be) within ten (10) days upon service of the submissions by the 2<sup>nd</sup> respondent.

(v) Mention on 6<sup>th</sup> April, 2022 to confirm compliance and further directions.

**Delivered online, signed and dated this 21<sup>st</sup> day of February, 2022 in open court at Milimani, Nairobi.**

**H. I. ONG'UDI**

**Judge of the High Court**