



**Muthura Mugambi Ayugi & Njonjo Advocates v Corporate & Pensions
Trust Services Ltd & 2 others (Miscellaneous Application E021 of 2021)
[2022] KEHC 15439 (KLR) (Constitutional and Human Rights) (18 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15439 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
MISCELLANEOUS APPLICATION E021 OF 2021**

**HI ONG'UDI, J
NOVEMBER 18, 2022**

BETWEEN

MUTHURA MUGAMBI AYUGI & NJONJO ADVOCATES ADVOCATE

AND

CORPORATE & PENSIONS TRUST SERVICES LTD CLIENT

AND

KENYA RAILWAYS CORPORATION 1ST INTENDED RESPONDENT

**KENYA RAILWAYS STAFF RETIREMENT BENEFIT SCHEME 2ND
INTENDED RESPONDENT**

RULING

1. The advocate/applicant/respondent herein filed an Advocate-Client Bill of Costs dated 20th July 2021.
2. In response the client/respondent/applicant filed by way of a Chamber Summons dated 30th September 2021. The application was filed pursuant to Order 1 Rules 10 (2), 14 & 25 of the *Civil Procedure Rules*, Section 3A of the *Civil Procedure Act* and all enabling provisions of the law. The client/respondent/applicant, seeks orders that:
 - i. This honourable Court do enjoin Kenya Railways Corporation and the Kenya Railways Staff Retirement Benefits Scheme as respondents in this suit.
 - ii. This honourable Court do strike out the name of the respondent and substitute it with Kenya Railways Corporation and Kenya Railways Staff Retirement Benefits Scheme.
 - iii. The costs of this application be in the course.



The Client/Respondent/Applicant's Case

3. The application was premised on the grounds that:
 - i. This matter is premised on an alleged advocate-client relationship.
 - ii. The respondent herein at all material times relevant to this suit had been engaged by the Kenya Railways Corporation as a corporate trustee for its staff pension scheme being the Kenya Railways Staff Retirement Benefits Scheme.
 - iii. The advocate/applicant/respondent herein was engaged by the respondent in its then capacity as a corporate trustee of the Kenya Railways Staff Retirement Benefits Scheme.
 - iv. The respondent herein is improperly sued in this suit and the applicant's claim solely lies as against the intended 2nd and 3rd respondents.
 - v. The enjoyment of the intended 2nd and 3rd respondents to this suit is necessary for the determination of the real matter in dispute as the client/respondent's contract as the corporate trustee ended on 30th July 2019.
 - vi. No prejudice shall be visited upon the parties if the orders sought are granted.
4. The application was similarly sustained by the respondent's supporting affidavit of even date sworn by Anthony Kilavi, the respondent's Director. The deponent other than reiterating the stated grounds made known that the decision to engage the respondent as a corporate trustee was sanctioned by the Board of the intended 2nd respondent.
5. In view of this he deposed that the respondent had engaged the advocate/applicant/respondent to defend it in its capacity as a Trustee of the intended 3rd respondent. He noted that the subject matter in dispute in the main suit was its appointment as the Corporate trustee of the intended 3rd respondent.
6. It was additionally deposed that the Trust Deed under which the respondent was appointed provided that any expenses incurred in administering the scheme would be paid from the scheme. Considering this, he deposed that its appointment of the advocate/applicant was one such necessary action and so the Bill of Costs should be paid from the scheme by the intended 2nd and 3rd respondents.
7. He deposed that considering this the advocate/applicant/respondent had no valid claim against the client/respondent and so should be struck out from these proceedings. That the orders sought were in the interest of justice.

The Advocate/Applicant's/Respondent's Case

8. The advocate/applicant/respondent in opposing the application filed a replying affidavit dated 8th January 2022 sworn by one of the partners of the firm, Jomo Nyaribo. He deposed that the client had not satisfied the conditions precedent for grant of the orders sought and neither had it demonstrated why the Court should exercise discretion in its favour.
9. For context, he deposed that their relationship with the client/respondent/applicant commenced when their firm received written instructions from the client to represent it in Nairobi High Court Constitutional Petition No. 353 of 2012 (*Tom Kusiinya & 7 Others vs. Kenya Railways Corporation, Corporate & Pensions Trust Services Limited and Retirement Benefits Authority*) which was later consolidated with Nairobi Constitutional Petition No. 159 of 2012 (*Daniel Owuor Oboo vs. the Retirement Benefits Authority* with Petition No. 353 of 2012 as the lead file.



10. He deponed that the intended 3rd respondent was not a party in the main suit. Moreover, that the petitioners in the main suit had sought specific interim reliefs against the client/respondent. He deposed that it was apparent that the client/respondent sought to protect its own financial interests contrary to its allegations otherwise.
11. It was deposed that the firm executing the client's instructions drafted a replying affidavit in response to the petition and successfully defended the petition on behalf of the client until the end when the suit was dismissed. The Judgment pronounced on 13th November 2013 directed that each party was to bear its own costs. He averred that as a direct result of the Judgment, the client was able to fully take up its appointment as Corporate Trustee of the Scheme.
12. He further deposed that throughout the period of the suit the firm never received instructions from either of the intended respondents. Similarly, invoices for work done by the firm were addressed to the client/respondent/applicant and not to the intended respondents. He averred that there was no advocate-client relationship between their firm and the intended respondents and so no taxation for fees can be sustained as against them. All the same, he noted that there is no provision in law that allows a respondent to enjoin other respondents to the suit. This is unless the client/respondent files a cross petition which it has not done in this case.
13. He additionally deposed that the firm was not privy to the contractual Agreement between the respondent and the intended 2nd respondent and so could not enforce its terms. Moreover it was deposed that the application was time barred by virtue of the provisions of Section 50(1) of the Advocates Act which sets a period of 6 months for one to file an application under the Section. The bill of costs was delivered to the client/respondent/applicant on 26th November 2013, and the client filed the present application ten years later without seeking either leave of Court to file it out of time or filing an application for extension of time.
14. Counsel noted that if the application was allowed it would be prejudicial to their firm as the fees for the work done remain unpaid by the client/respondent/applicant. He added that the firm has engaged the client/respondent/applicant for years with a view of settling the due fees and despite there being an express acknowledgement of indebtedness, the claim has never been settled to date necessitating the present proceedings.

The Intended Parties Responses

15. The intended 2nd respondent in response to the client/respondent's/applicant application filed its replying affidavit dated 11th November 2021 and further a preliminary objection dated 21st February 2022. The replying affidavit was sworn by Stanley Gitari the intended 2nd respondent's Ag. Corporation Secretary who deposed that, the Corporation is a distinct and separate entity from the intended 3rd respondent and being the sponsor of the Scheme does not imply vicarious liability on the Corporation.
16. With regard to this matter he deponed that the decision to engage the client/respondent/applicant as the Corporate Trustee for the Scheme was through a Board Resolution dated 3rd August, 2012. This was effective only to the extent of appointing the applicant as the Corporate Trustee of the Scheme and did not in any way expressly or impliedly provide that the Corporation would assume responsibility and liability that accrues to the applicant with respect to the Agreement for provision of Corporate Trustee Services.
17. He averred that subject to the Agreement dated 5th July, 2012 between the client/respondent/applicant and the Corporation for provision of corporate trustee services to the Scheme, the Corporation (under



- clause 4.l(d) of the said Agreement) only guaranteed to indemnify the client/respondent/applicant against all claims and costs incurred against them as a result of the Corporation's breach of or omission in respect of the said Agreement.
18. He deposed therefore that this Court in its pronouncement in *Tom Kusienya & 11 others v Kenya Railways Corporation & 2 others* [2013]eKLR did not find the Corporation liable for any breach or omission with respect to the said Agreement to warrant indemnification from the Corporation. Even so, it was noted that the client/respondent/applicant had not demonstrated how the claims against it in the main petition were expressly or impliedly as a result of the Corporation's breach or omission with respect to the Agreement for Provision of Corporate Trustee Services.
 19. He deposed that in the main suit the client/respondent/applicant was sued as an independent contractor without its involvement and not as an agent of the Corporation. As such the Corporation was not liable for any contracts it entered into with 3rd parties in its own capacity as an independent contractor. Likewise he deposed that, the Corporation never instructed the advocate/applicant/respondent to act on its behalf and hence the advocate - client relationship between them was non-existent. He deposed in closing that the applicant's claim was one under contract and so time barred given that the cause of action is more than seven years old.
 20. The 2nd intended respondent's preliminary objection was based on the grounds that:
 - i. This Court lacks the requisite jurisdiction to hear and determine the application by virtue of Section 87 of the *Kenya Railways Corporation Act* (Cap. 397) Laws of Kenya.
 - ii. This Court lacks the requisite jurisdiction to hear and determine the application by virtue of Section 50 of the *Advocates Act* (Cap 16) laws of Kenya.
 - iii. The proceedings as filed are defective and the orders sought by the applicant against the intended respondents do not lie in law by virtue of Order 1 Rule 15 of the *Civil Procedure Rules* Cap 21 laws of Kenya on claims against a third party and the same constitute an abuse of the due process of this Honourable Court.
 - iv. The application is misconceived, vexatious and an abuse of the due process of this Honourable Court and should be struck out with costs awarded to the intended respondents.

The intended 3rd respondent's case

21. In reply to the application the intended 3rd respondent filed a replying affidavit dated 11th November 2021 sworn by Isaac Savali Sila, the 3rd respondent's Chief Executive Officer. He deposed that during the proceedings the advocate/applicant/respondent herein was engaged by the Corporation for the provision of Corporate Trustee Services on behalf of the Scheme as an independent contractor in which capacity it provided its services for a fee calculated in accordance with the Agreement dated 5th July, 2012.
22. As such he stated that the client/respondent was sued in Constitutional Petition Number 353 of 2012 in its own right as an independent contractor and not as an agent of the Scheme, to defend its own interest when its appointment as corporate trustee was challenged. He stressed that the suit was not in the interests of the Scheme or pensioners. He averred that the intended 3rd respondent was as a result not liable for the legal costs accrued by the applicant to defend its own commercial interests.
23. He deposed that the Court in its judgment pronounced that each party would bear its costs. He noted similarly that the intended 3rd respondent had never instructed the advocate/applicant herein and so an advocate-client relationship does not exist. He averred in conclusion that the applicant's claim if



any against the Scheme was a claim under contract which is time barred given that the cause of action, is over seven years old.

Submissions

The Client/ Respondent/Applicant's Submissions

24. The client/respondent/applicant herein in support of its application filed written submissions through the firm of Millimo, Muthomi & Company Advocates dated 25th April 2022 and further submissions dated 19th July 2022. Counsel identified the issues for determination as:
 - i. Whether the applicant is responsible to settle the advocates' Bill of Cost;
 - ii. Whether the applicant is a client for purposes of taxation; and
 - iii. Whether a respondent can enjoin a respondent to a suit.
25. To begin with, Counsel submitted that the intended 3rd respondent is a Retirement Benefit Scheme established for the benefit of the Kenya Railways Corporation's staff where the intended 2nd respondent was its sponsor. This Scheme is governed by the Trust Deed and Rules, 2006. Pursuant to Rule 13, through a board resolution in the meeting held on 18th June 2012 by the Corporation, the Corporation appointed the client/respondent/applicant herein as the sole Corporate Trustee of the scheme.
26. Following the appointment, the client/respondent/applicant entered into an agreement with the Corporation dated 5th July, 2012 for the provision of Corporate Trustee Services to the Kenya Staff Retirement Benefits Scheme. With reference to this case, one of the obligations of the Corporation under Clause 4.1 (d) was to indemnify the client/respondent/applicant from all actions in performance of its duties under the agreement which according to the applicant included the legal costs incurred in Constitutional Petition No. 353 of 2012.
27. On the first issue Counsel submitted that the client/respondent/applicant was appointed by the Corporation as a Corporate Trustee of the Scheme and as such was sued in its capacity as a Corporate Trustee of the Scheme in the main petition. He noted that Rule 10 of the Trust Deed and Rules provides that all expenses incurred for administering the scheme is to be paid from the Scheme. Moreover that Rule 20 of the Trust deed provides protection to the Trustees from liability from any acts done in the course of their duties.
28. Counsel argued that the Bill of Costs filed by the advocate/applicant/respondent was for services rendered to the client/respondent by virtue of its appointment by the Corporation as the corporate Trustees of the Scheme and so ought to be indemnified as per Clause 4.1(d) of the Agreement. In support, he cited the case of *Martin Kirima Baitbambu v Jeremiah Miriti* [2017]eKLR where the Court held that a guarantor has the right to call a principal debtor at any time before the discharge of the guarantee.
29. On the second issue, Counsel submitted that by virtue of the appointment as the corporate trustees, there existed a principal/ agent relationship between the client/Respondent/applicant and the Scheme and anything done by the trustees was to the benefit of the Scheme including defending of the parent suit. In support he relied on the case of *City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & another* (2016) eKLR where it was noted that an agent cannot be sued where there is a disclosed principal.
30. On the third issue, Counsel submitted that according to Order 1 Rule 10 (2) of the *Civil Procedure Rules* 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 to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, 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 which formed the basis for the guiding principles set out in the case of *Joseph Njau Kingori v Robert Maina Chege & 3 others* (2002) eKLR to enjoin a party. Similar reliance was placed on the case of *Phillip Kibuba Nzioka v Chief Land Registrar & 2 others; Reuben Kavithi Kyungu (Suing as the Administrator of the Estate of Daniel Kyungu Muasya (Intended Respondent/Applicant))* (2020) eKLR. According to Counsel the intended respondents are the necessary parties.

31. On the issue of the application being time barred by virtue of Section 50 of the *Advocates Act*, Counsel submitted that this Section was not applicable to the proceedings as the client/respondent/applicant is not liable since the proceedings are misdirected at it.
32. In the further submissions that addressed the 2nd respondent's preliminary objection, Counsel submitted that the same lacked merit. This is since the suit is premised on an application to enjoin the intended 2nd and 3rd respondents which became apparent after they were served with the Bill of Costs. In view of this Counsel noted that the argument that it had been more than 12 months was misplaced.
33. Counsel further argued that Section 87 of the said *Act* was an impediment to access to justice and a violation of Article 48 of the Constitution. In support reliance was placed on the Court of Appeal case of *Joseph Nyamamba & 4 others vs Kenya Railways Corporation* [2015] eKLR which cited with approval the case of *Kenya Bus Services Limited and another vs Minister of Transport & 2 others* [2012] eKLR where it was held that by incorporating the right to access to justice, the Constitution requires us to look beyond the dry letter of the law. The right to access to justice is a reaction to and a protection against legal formalism and dogmatism. Similar reliance was placed on the case of *Anthony Ngure Murugu v Kenya Railways Corporation* [2022] eKLR.

The Advocate/Applicant/Respondent's Submissions** _____

34. The advocate/applicant/respondent filed written submissions dated 7th June 2022 and identified the issues for determination as follows:
 - i. Whether the client/respondent was a client of the advocate with respect to Nairobi High Court Constitutional Petition No. 353 of 2012 (*Tom Kusienya & 7 Others vs. Kenya Railways Corporation, Corporate & Pensions Trust Services Limited and Retirement Benefits Authority*);and
 - ii. Whether the intended respondents are necessary parties to the taxation proceedings.
35. On the first issue, Counsel answered in the affirmative for a number of reasons. First he relied on annexure "JN1" of Jomo Nyaribo's replying affidavit whose contents were a true copy of the letter of instruction by the client dated the 22nd August 2012. Further that the main suit was consolidated with Nairobi Constitutional Petition No. 159 of 2012 (*Daniel Owuor Obop vs. the Retirement Benefits Authority*) where the intended 3rd respondent was not a party. Likewise he observed that the petitioners in the main suit specifically sought orders to declare null and void the appointment of the client/respondent as the corporate trustee of the Scheme. The advocate accordingly pursued the suit on the client's behalf until its successful end.



36. Counsel stated that besides the above and throughout the suit in respect of payments and invoices the same were addressed to the client. In a nutshell as deposed in their replying affidavit the client/respondent/Applicant was for all intents and purposes in law their client.
37. Counsel submitted in the negative on the second issue. This is because the nature of the proceedings herein are advocate-client taxation proceedings between an advocate and a client. He asserted that neither of the two proposed respondents were clients of the advocate and that there was no legal basis for the argument. He noted that the client in its affidavit did not deny instructing the advocate who entered appearance on its behalf. The rest of the submissions reiterate the averments in the replying affidavit.

The intended 2nd Respondent's Submissions

38. The firm of Prof. Albert Mumma & Company Advocates on behalf of the 2nd intended respondent filed written submissions dated 12th May 2022 where Counsel noted the issues for determination to be:
 - i. Whether the claim contravenes Section 87 of the *Kenya Railways Corporation Act*, Cap. 397; and
 - ii. Whether the applicant has laid basis for joinder of the Corporation.
39. Counsel asserted that the client/respondent/applicant had relied on the Agreement for provision of Corporate Trustee services to the 3rd intended respondent dated 5th July 2012 which contract ended on the 30th July 2019 as the basis for joinder of the intended 2nd respondent to the suit. Counsel submitted that this Court lacked jurisdiction to hear and determine the application since it was filed 2 years and 2 months after the contract had ended contrary to Section 87 of the *Kenya Railways Corporation Act*. According to Counsel the client/respondent ought to have filed the matter within the stipulated time to engage the 2nd intended respondent so the application did not lie in law.
40. In support reliance was placed on the Court of Appeal case of *Joel Kiprono Langat V Kenya Posts & Telecommunication Corporation* [2000] eKLR where the Court while dealing with a similar issue of notice and limitation period in the *Kenya Posts and Telecommunications Corporation Act* (Cap 411) which is similar to Section 87 of the *Kenya Railways Corporation Act* struck out the suit holding that it is plainly obvious from this section that appointment, discipline and dismissal of staff is an act done by KPTC in pursuance of execution of the *Act* within the meaning of Section 109 thereof. It must follow from this that if the appellant wished to contest his dismissal by KPTC he had to institute proceedings within the time frame fixed under Section 109 of the *Act*. He did not serve a notice of intention to commence action on the Managing Director nor did he institute the action within twelve months from the date of his dismissal. Similar reliance was placed on the case of *Mary Wahito & another v Kenya Posts & Telecommunications Corporation & another* [1997] eKLR; and *Pauline Cherono Kones & another v Kenya Civil Aviation Authority* [2016] eKLR.
41. It was submitted that owing to the aforementioned Agreement dated 5th July 2012 the applicant claimed that the 3rd Intended respondent ought to pay for costs of the advocate. Counsel noted that the cause of action that led to the costs arose on 15th August 2012 when Constitutional and Human Rights Petition No 353 of 2012 was lodged in Court and client/respondent retained the advocate vide a letter dated 22nd August 2012. In view of these arguments Counsel argued that the claim was defective and so should be dismissed with costs.
42. On the second point, Counsel submitted that the 2nd intended respondent's presence in the matter was not necessary to enable this Court adjudicate upon and settle the matter. This is because Schedule 6



(B) of the [Advocates Remuneration Order](#) provides that advocate-clients costs is a matter between an advocate and the client. Counsel noted that in the main suit the client/respondent/applicant was sued in its individual capacity as a company incorporated under the [Companies Act](#) and the Corporation was sued distinctly and separately as a statutory corporation established under the [Kenya Railways Corporation Act](#) as appreciated by Lady Justice Mumbi Ngugi in the matter.

43. This detail was also supported by the fact that the client/respondent/applicant retained and instructed the advocate vide its letter dated 22nd August 2012. Similarly in its replying affidavit dated 11th June, 2013, the Director James Olubayi informed that the client/respondent was a company incorporated under the [Companies Act](#) with a separate legal entity. Likewise Counsel submitted that the 2nd intended respondent did not retain or instruct the advocate/applicant in the matter and neither was it privy to the Agreement between the advocate and the client. According to Counsel the foregoing confirmed that the client/respondent had retained the services of the advocate for its sole benefit as a separate legal entity not an agent of the 2nd intended respondent as alleged.
44. Counsel submitted therefore that the relevant test for determining whether or not to join a party in proceedings were stated in the case of [Kingori vs. Chege & 3 Others](#) [2002] 2 KLR 243 as in the case of a defendant there must be a relief flowing from that defendant to the plaintiff, the order or decree cannot be enforced without his presence in the matter and his presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit. He submitted that the applicant herein had not satisfied these principles and as a result, the application failed to meet the test for joinder. In light of this, Counsel submitted that the presence of the Corporation was not necessary to enable the Court effectively and completely adjudicate upon and settle all questions.

The intended 3rd Respondent's Submissions

45. The firm of Prof. Albert Mumma & Company Advocates on behalf of the 3rd intended respondent filed written submissions dated 12th May 2022 where Counsel noted that the only issue for determination was whether the client/respondent/applicant had laid basis for joinder of the 3rd intended respondent. Counsel submitted that the Scheme's presence in the matter was not necessary to enable this Court to effectually adjudicate upon and settle the matter between the advocate/applicant/respondent and its client/respondent/applicant. This is because Schedule 6 (B) of the [Advocates Remuneration Order](#) provides that advocate-client costs are a matter between an advocate and the client which are accrued during the pendency of a suit.
46. Counsel noted that part of the reliefs sought in the main petition was to declare null and void the appointment of the applicant as corporate trustee of the Scheme. In view of this a letter of instructions dated 22nd August, 2012 as read with the replying affidavit sworn by the applicant's Director, James Olubayi on the 11th June, 2013 was issued in Constitutional and Human Rights Petition No 353 of 2012. In a nutshell the contents of the letter authorized the advocate/applicant/respondent to represent the client/respondent/applicant in the suit till its end to protect its interests. More so the client/respondent/applicant had informed the advocate/applicant/respondent that it had a separate legal entity.
47. Counsel stressed that the client/respondent/applicant did not indicate that it was defending the main suit proceedings on behalf of the Scheme or that it was the agent of the Scheme and therefore sued improperly. He argued moreover that there was no privity of contract between the 3rd intended respondent and the advocate/applicant/respondent as defined under Section 2 of the [Advocates Act](#) and Schedule 6 (B) of the [Advocates Remuneration Order](#) in order to justify and/or necessitate the



joinder of the Corporation to these proceedings. Counsel in support relied on the case of *Kingori vs. Chege & 3 others* [2002] 2 KLR 243.

48. To this end Counsel submitted that the Advocate-Client Bill of Costs ought to be allowed to proceed as between the Advocate and the respondent who are the proper & necessary parties in the suit.

Analysis and Determination

49. Having considered the parties pleadings and submissions herein, this Court with reference to the client/respondent/applicant's chamber summons application and the intended 2nd respondent's notice of preliminary objection finds that the issues that are discernable for determination are as follows:
- i. Whether the client/respondent/applicant has met the threshold for joinder of a party; and
 - ii. Whether the intended 2nd respondent's preliminary objection is merited.

Whether the Client/Respondent/Applicant has met the Threshold for Joinder of a Party

50. The client/respondent/applicant premised his application on the joinder of the intended respondents. The basis of this averment was the Agreement entered into by the client/respondent/applicant and the 2nd intended respondent on 5th July 2012 which was for the provision of corporate trustee services. According to the client/respondent/applicant it engaged the advocate/applicant/respondent in Constitutional and Human Rights Petition No 353 of 2012 in its capacity as a Trustee of the intended 3rd respondent.
51. The client/respondent/applicant argued that the Bill of Costs filed by the advocate/applicant was for the services it rendered to it by virtue of its appointment and so ought to be indemnified as per Clause 4.1(d) of the Agreement. According to the client/respondent/applicant the intended respondents were necessary parties in the suit so as to assist this Court determine the issues raised.
52. The advocate/applicant/respondent and intended respondents opposed this application. They averred that an advocate client relationship between them was non-existent. The intended respondents noted that they were not privy to the advocate-client agreement between the parties and had never instructed the advocate/applicant/respondent. The advocate/applicant/respondent similarly informed that they were not privy to the Agreement that the client/respondent/applicant was alluding to and could not enforce the same against the intended respondents. In light of this it was argued that the intended respondents were not necessary parties in this suit.
53. 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 under Rule 5 of the Rules which is also similar to Order 1, Rule 10 of the *Civil Procedure Rules*, 2010 which the application was brought under. Order 1 Rule (2) provides as follows:

“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 to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, 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.”



54. Rule 5(d) on this topic provides as follows:

“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.”

55. A reading of these provisions make it clear that parties may be enjoined into a suit. Furthermore and with reference to this case this enjoinder can be done by either party through an application. This essentially cancels the advocate/applicant’s assertion that a respondent cannot seek to enjoin another respondent. What then are the legal requirements for adding a party in a suit?

56. The essence of joinder of parties was aptly captured by the Court in the case of *Joan Akoth Ajuang & another v Michaels Owuor Osodo - Chief Simur Kondiek, Ukwala Location & 3 others; Malaika Foundation (Proposed Interested Party)* [2020] eKLR where it was noted that

“20. The main purpose of joining parties is to enable the court to deal with matters brought before it fully and exhaustively and to avoid a multiplicity of suits. It is a fundamental consideration that before a person can be joined as a party, it must be established that the party has an interest in the case. In addition, it must be clearly demonstrated that the orders sought in the case in question would directly and legally affect the party seeking to be enjoined.”

57. 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.”



Also see: *JMK vs. MWM and another* [2015] eKLR.

58. A couple of things can be gathered from a reading of the law and cited authorities. Although joinder of 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.
59. The premise of the present application is an advocate – client relationship. This relationship commences when a client issues instructions to an advocate. Section 2 of the *Advocates Act* defines a client as:
- “client” includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs.”
60. It is discernable that the relationship in this matter commenced vide a letter dated 22nd August 2012 from Antony Kilavi, the Director of the client/respondent to the advocate/applicant. For context the letter titled: Appointment to represent the company in high court Constitutional Petition No.353 of 2012 – *Tom Kusienya & 7 others v Kenya Railways Corporation & 2 others* instructed as follows:
- “The telephone conversation between our Mr.James Olubayi and your Ms.Caroline Ayugi on 22nd August 2012 at 4:30p.m. refers.
- By this letter we hereby authorize you to represent the company in the referenced proceedings to their logical conclusion or unless otherwise instructed in writing by ourselves.
- We trust that you shall act to safeguard the company’s interests at all times in the course of the proceedings.”
61. It is plain from this letter that the client/respondent/applicant issued clear instructions to the advocate/applicant/respondent with reference to defending its cause in the main petition. It is noted that although the client/respondent/applicant relied on its Agreement with the intended 2nd respondent dated 5th July 2012, it failed to notify the advocate/applicant/respondent of this fact but engaged the Firm as a competent legal personality with the requisite legal capacity to engage as such. The client/respondent/applicant likewise failed to share any material connecting the advocate/applicant to the said contractual relationship between itself and the intended 2nd respondent.
62. This is because the client/respondent/applicant asserted that it acted as the 2nd intended respondent’s trustee yet there was no demonstration for instance through any correspondence with the intended respondents that the Firm was pursuing the main petition as its trustee in the main suit. It is reasonable to assume that if it were so the intended respondents would have similarly been actively engaged in the main suit with reference to the client/respondent/applicant and such evidence adduced before this Court.
63. The requirement of proving one’s case as set out under Sections 107 and 108 of the *Evidence Act* is on the one who desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts. He must prove that those facts exist.



64. In the same way the Court in case of *Alice Wanjiru Rubiu v Messiac Assembly of Yabweh* [2021] eKLR noted as follows:

“22. I also refer to *The Halsbury’s Laws of England*, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case....”

65. In the light of the foregoing, I find that the client/respondent/applicant failed to produce any such material to ascertain existence of an advocate - client relationship and obligation of the intended respondents in indemnifying the legal costs accrued from the main suit. This is against a background where the advocate/applicant/respondent asserted that they were unaware of the Agreement relied upon by the client/respondent/applicant. Similarly, the intended respondents’ denial that the main suit was pursued on their behalf by their trustee the client/respondent/applicant or that they issued any instructions to the advocate/applicant/respondent. It was thus incumbent on the client/respondent/applicant to prove the existence of its assertions for this Court to render a pronouncement in its favour.

66. It bears recognizing as guided by the cited authorities that before a person can be enjoined as a party, it must be established that the person has an interest in the case. In addition, it must be clearly demonstrated that the orders sought in the case would directly and legally affect the party seeking to be enjoined. This demonstration would have been made certain by establishing the connection between the intended respondents and the advocate/applicant. This was not done in this matter and as such the intended respondents have no bearing on the taxation of the advocate/applicant/respondent’s Bill of costs.

67. In view of the material placed before this Court it is well appreciated that the joinder of the intended respondents is not as a matter of right. The application for joinder has to be examined on its own merits and circumstances as against the established principles governing admission to proceedings. It is my humble opinion that the client/respondent/applicant has failed to establish why the intended respondents’ presence is necessary for the effective and complete settlement of the issues raised in the advocate/applicant/respondent’s application.

68. I must also mention that the consolidated Petition was heard and finalized without the mention of the intended respondents. What is pending is the taxation of an advocate/client bill of costs. If there were any agreements on payments of bills / costs / charges between the parties that should not be a matter for this forum, as the intended parties were not parties in the said petition.

69. In the same way, the instant application as pleaded would be prejudicial to the advocate/applicant/respondent as its Bill of costs is long overdue. It is my humble finding that the addition of the intended respondents will not add value on to the case put forward by the principal party and neither assist the taxation master to arrive at a definitive determination of the Bill of costs. As such, the application for joinder lacks merit.



Whether the Intended 2nd Respondent's Preliminary Objection is Merited:

70. As at the time the intended 2nd respondent was filing the preliminary objection it was not a party in these proceedings. It could not therefore file any application before it was enjoined as a party. Therefore its preliminary objection is a non-starter. Further following the rejection of the application to enjoin it as a respondent, it would be a mere academic exercise, to argue the said preliminary objection.
71. The upshot of the foregoing and for the reasons stated above, I find the client / respondent's application dated 30th September 2021 to lack merit and is dismissed. The preliminary objection dated 21st February 2021 was filed without locus standi and is hereby struck out. Costs of the application dated 30th September 2021 to be borne by the Client/respondent/applicant.

Orders accordingly.

DELIVERED VIRTUALLY, DATED & SIGNED THIS 18TH DAY OF NOVEMBER, 2022 IN OPEN COURT AT MILIMANI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

