



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO. 146 OF 2018

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES 3, 10, 19, 20, 21, 22, 23, 28, 29, 258 AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

KITTY NJIRU.....PETITIONER

VERSUS

NATURE & STYLE FUN DAY EVENTS.....1ST RESPONDENT

TATIANA ISABEL WHITUP.....2ND RESPONDENT

REBECCA MURIUKI T/A KAHAARI.....PROPOSED THIRD PARTY

RULING

PETITION

1. The Petitioner through a Petition dated 13th April 2018 seek the following reliefs:-

- a) That there be a declaration that the Petitioner's fundamental rights and freedom as enshrined under Article 28 of the Constitution of Kenya have been contravened and infringed upon by the Respondents.*
- b) That there be a declaration that the Petitioner's fundamental rights and freedom as enshrined under Article 29 (d) of the Constitution of Kenya have been contravened and infringed upon by the Respondents.*
- c) That there be a declaration that the Petitioner's fundamental rights and freedoms as enshrined under Article 31 (c) of the Constitution of Kenya have been contravened and infringed upon by the Respondents.*
- d) General Damages, exemplary damages and aggravated damages under Article 23(3) of the Constitution of Kenya be awarded, for the violations of the Petitioner's rights by the respondents.*
- e) Payment of Khss.150,000/= being the rightful reward for use of the Petitioner's images.*
- f) The costs be provided for the Petitioner.*

APPLICATIONS

2. Before me are two applications for determination.

RESPONDENTS APPLICATION

3. The Respondents filed an application dated 19th November 2018 seeking the following orders:-

- a) That the Court be pleased to grant leave to the Respondents to issue a third party notice to Rebecca Muriuki T/A Kahaari.*

b) That the said Third Party be at liberty to enter appearance within 15 days of service of the notice.

c) That cost of this application be in the cause.

4. The application by the Respondents is premised on the grounds on the face of the application being:-

i) That there are issues of liability to be determined between the Respondents and the intended Third Party.

ii) That the Respondent obtained the images forming the basis of his suit from Rebecca Muriuki T/A Kahaari.

iii) The said Rebecca Muriuki T/A Kahaari indicated to the 2nd Respondent that she had express permission of the Petitioner herein to use her images.

iv) That the intended Third Party did not at any point during the initial interaction indicate that they had an agreement with the Petitioner that her images were only to be used on online platforms.

v) That Plaintiff's claim should have been addressed to Rebecca Muriuki T/A Kahaari who actually provided the images to the Respondent.

vi) That it is just if the intended Third Party is joined in this suit as it will not prejudice the Petitioner's case.

5. The Application is further supported by an affidavit by Veronica Kimiti, an Advocate of the High Court of Kenya, in conduct of this matter on behalf of the Respondents/Applicants sworn on 19th November 2018. The deponent avers that she has been instructed by the 2nd Respondent that she obtained the images forming the basis of this suit from Rebecca Muriuki T/A Kahaari (as per correspondence between the 2nd Respondent and Interested Third Party marked "VK1") It is further deposed the said Rebecca Muriuki did not inform the 2nd Respondent herein that she had an agreement with the Petitioner that she would only use the images for online purposes only but the disclosure came after, the 2nd Respondent followed up the issue following the Petitioner's demands for compensation in February 2018.

6. It is Respondents contention that Rebecca Muriuki T/A Kahaari be joined as a third party to enable the Court determine the issues of liability between Petitioners, the Respondent and third party.

THIRD PARTY RESPONSE

7. The Third Party filed ground of opposition to the Respondent's application dated 19th November 2018 being as follows:-

a) That the petition makes no claim of infringement or any violation whatsoever of the Petitioner's rights by the proposed third party.

b) That the Respondents have not filed any cross-petition or clearly shown the provision of the Constitution that has been infringed by the proposed third party that would in turn violate the Petitioner's Constitutional Rights.

c) That the Respondents have no basis in law to apply to join a third party in a Constitutional Petition. A party may only be joined as an interested party by filing an application to do so by itself or if the court joins such party on its own motion.

d) That it has not been shown that the proposed third party has an identifiable legal interest in these proceedings.

e) That the proposed third party's presence is not necessary for the court to adjudicate on the constitutional claims between the Petitioner and the Respondents or to decide whether the Respondents breached the Petitioner's Constitutional Rights.

f) That the Respondents Application dated 19th November 2018 is bad in law, an abuse of the Court Process and ought to be dismissed with costs to the proposed third party.

PETITIONERS' APPLICATION

8. The Petitioner through an application dated 17/11/2019 seek the following orders:-

a) Prayer No. 1 spent.

b) That Court give directions regarding the determination of liability of the third party in this matter.

9. The application is based on the ground on the face of the application and is supported by affidavits by Tatiana Isabel Whitup sworn on 17th November 2019.

10. The Petitioner's application upon being placed before this honourable Court, directions were given on 4th December 2019 that the two applications be heard together and that submissions be filed and served within 21 days from then in respect of the two applications dated 19th

November 2018 and 17th November 2019.

11. In the instant application Respondent/applicants counsel did not file submissions inspite of having been afforded sufficient opportunity to do so on 4/12/2019, 4/3/2020; 5/5/2020. 9/6/2020 and 29/6/2020. The only submissions on record are those of the Petitioner/Applicant and those of the proposed third party.

ANALYSIS AND DETERMINATION

12. I have considered the applications and submission on record and authorities relied upon and the issues for consideration are as follows:-

a) Whether the provisions of Civil Procedure Act and Rules in regard to issuance of Third Party notice and 2nd Party Directions apply to constitutional petitions?

b) Whether there has been inordinate delay in filing both applications?

c) Whether the Respondent's have met the threshold to warrant third party notice to issue and grant of Third Party Directions?

A. WHETHER THE PROVISIONS OF CIVIL PROCEDURE ACT AND RULES IN REGARD TO ISSUANCE OF THIRD PARTY NOTICE AND 2ND PARTY DIRECTIONS APPLY TO CONSTITUTIONAL PETITIONS?

13. The Respondents application is brought pursuant to **Order 1 Rule 15 of Civil Procedure Rules**, and **Section 3A of the Civil Procedure Act**. The Respondents have not cited any single provision from the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** (otherwise commonly referred to as "**the Mutunga Rules**") or any provision of the Constitution. The application is otherwise based on the ground on the face of the application.

14. **The Mutunga Rules** do not contain any provision stating what should happen in a situation such as the one before this court. This causes a challenge where a litigant is desirous as taking a step that is not provided for specifically in the **Mutunga Rules**. The major question that a court concerns itself with in such a situation is how to ensure fidelity to **Article 159(2)(d) of the Constitution** requiring to administer justice without undue regard to procedural technicality and Rules of the **Mutunga Rules** on addition, joinder, substitution and striking out of parties.

15. **The Mutunga Rules** were formulated in exercise of the authority conferred by **Article 22(3) read with Article 23** as well as **Article 165 (3) (b) of the Constitution of Kenya 2010**. **Article 23(3)** provides in any proceedings brought under **Article 22(a)** Court may grant appropriate relief; including ones listed under **(a) – (f)** thereof.

16. Appropriate relief are provided under **Article 23(3) of the Constitution** which states as follows:-

"In any proceedings brought under Article 22, a Court may grant appropriate relief, including..."

17. In the case of **Law Society of Kenya v. Cabinet Secretary for Health & 6 Others HC Pet No. 78 of 2020 consolidated with Petition No. 79/2020 and Pet 80/2020 and Pt 81/2020** the court stated under paragraphs 23 and 24 as regards "**Appropriate relief**" as follows:

"23. Articles 23(3) of the Constitution of Kenya 2010, is clear that it entitles the court to grant any "appropriate relief" in any proceedings brought under Article 22 of the Constitution. In the case of EWA and 2 others v. Director of Immigration and Registration of Persons & another (2018) eKLR it defines "appropriate relief" as a relief that is required to protect and enforce the Constitution "... a declaration of rights, an interdict, mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced" The same position was held in the case of Fose v. Minister of Safety and Security (CCT 14/96) 1997, ZACC 6, 1997.

24. "Appropriate relief" will be in essence be relief that is required to protect and enforce the Constitution depending on the circumstances of each case. The relief may be a declaration of rights, on interdict, a mandamus or such other relief as may be required to ensure that the right as enshrined in the constitution are protected."

18. The proposed Third Party urges both applications are supported by inapplicable law in this case.

19. In construing the constitution this court is required under **Article 259 of the Constitution** to interpreted the Constitution in a manner that promoted its purposes, values and principles, advance the rule of law, and the human rights and fundamental freedoms in the Bill of Rights, permit the development of the law and contribute to good governance. The National values and principle of governance, binds all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution. The national values and principles of governance include the rule of law, human dignity, equity, social justice, inclusiveness, human rights, non-discrimination, integrity, transparency and accountability.

20. In the spirit and the letter of the constitution, this honourable court is called upon to do justice to all, irrespective of status and do so without undue regard to procedural technicalities. The Court in discharge of its duty and in interpretation of this constitution should not run away from correcting glaring errors of the law when presented by litigants and/or counsel as was stated, inter alia; in **Nicholas Kiptoo Arap Korir Salat v independent Electoral and Boundaries Commissions & 7 Others [2014] eKLR** that:-

"It is unfortunate that the learned Counsel for the 2nd Respondent has sought to strike out the draft Petition on the basis that the

Notice of Appeal was filed before grant of leave and cited Rule 30(2) of the Supreme Court Rules, 2011 in support of his claim. This error is puzzling. An advocate is an officer of the Court and has a duty to aid the Court reach a legitimate determination founded on sound law. Hence, an advocate has to be abreast with the law and keep pace with the various developments. It is surprising that the learned Counsel referred to the Supreme Court, Rules 2011 which were repealed on 26th October 2012 via Legal Notice No. 123 by the enactment of Supreme Court Rules, 2012. Under the Supreme Court Rules, 2012 the relevant rule is Rule 31.”

21. The Proposed Third Party urges that it is unfortunate the counsel seeks to enjoin a third party in a constitutional Petition and cited **Order 1 Rule 19 of the Civil Procedure Rules** in support of the 1st application which the proposed Third Party refers to as inapplicable as there is no provision under the **Mutunga Rules**, which is applicable in this case, for the Respondents to seek to join a Third Party from where it is claiming contribution or indemnity. The proposed Third Party urges that there is a good reason for this as **Article 22** deals with infringement of fundamental rights. It is therefore in that regard that the Respondent in the 2nd Application cannot apply to court for directions as to the liability of the proposed Third Party as the 2nd Application is supported by **Order 1 Rule 22 of Civil Procedure Rules** which is also inapplicable in this matter.

22. The Proposed Third Party urges from the reading of the **Mutunga Rules**, the only way the proposed Third Party can be a party in this matter is if it applied to be joined under **Rule 7(1) of the Mutunga Rules** or if it is joined by this court *suo moto* under **Rule 7(2) of the Mutunga Rules**. The Proposed Third Party prays the application be dismissed as no violation of Constitutional rights has been raised against the proposed Third Party.

23. The Proposed Third Party sought reliance from the case of **L.A.W & 2 others v Marura Maternity Nursing Home & 2 others [2016] eKLR** where it was held that:-

“No authorities were placed before the Court to support the applicability of third-party proceedings in constitutional litigation. In the present case, the 1st respondent’s claim is based on a contract between it and the proposed interested party, and on the basis of the material before me, I am unable to see how a claim of constitutional violation can give rise to a claim for indemnity under a contract.... I therefore decline to allow the application for joinder of PWC and OBA –RH as interested parties. The upshot is that the application by the 1st respondent is dismissed.”

24. The Petitioner/Applicant relies on provisions of **Article 159(2)(d) of the Constitution** urging that justice shall be administered without undue regard to procedural technicalities. The Petitioner/Applicant in support of this proposition referred to the case of **Abdisalam Hassan Ismail & 2 others v. Kenya Railways Corporation & 3 others [2015] eKLR** which an application was made under **Order 45 of the Civil Procedure Rules** requesting the Court to review one of its decisions. An argument was brought that the application was incompetent for the reason that the Civil Procedure Rules should not apply to constitutional petitions. The Court stated in making its determination on this issue that:-

“13. I reject the Petitioner’s submission that the application is incompetent for having been brought under the provisions of the Civil Procedure Act. I hold the view, that technicalities of procedure should not be entertained in matters of constitutional rights. I put reliance to the case of VALLERIE NAMTILU WAFULA & ANOTHER V KENYA NATIONAL UNION OF TEACHERS (KNUT) & 2 OTHERS eKLR where it was held as follows

“It is the second respondent’s contention that in Petitions of this nature the Civil Procedure Rules have no place and therefore any application expressed to be brought under the latter is incompetent. First and foremost it must be noted that under Article 22(3), the Chief Justice is enjoined to make rules inter alia providing for the court proceedings which shall satisfy the criteria that the Court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Although the said rules are yet to be promulgated (the rules have since been promulgated hereinbefore referred to as Mutunga Rules), the spirit of the foregoing provision as read together with the provisions of Article 159(2)(d) is clear that technicalities of procedure, more particularly in application brought for the enforcement of the Bill of rights, should not be entertained. Even prior to the promulgation of the current Constitution the relevance of the Civil Procedure Rules was considered in Meme Vs. Republic [2014] 1 EA 124; [2004] 1 KLR 637, in which Rawal J (as she then was), Njagi J & Ojwang’ AJ (as he then was) held that at a very basic level the Court is empowered to draw from the Civil Procedure Rules in its exercise of powers under the Constitution of Kenya (Protection of Fundamental right and Freedoms of the Individual) Practice and Procedure Rules and by virtue of Order 1 Rule 10(2). This decision should put the second Respondent’s position on the applicability of Civil Procedure Rules to Constitutional Petitions to rest.”

25. The Court of Appeal in its decision considered whether Civil Procedure Rules can apply to Constitutional Petitions in the case of **Karl Wehner Claasen v. Commissioner of Lands & 4 others [2019] eKLR** in this matter, the Petitioner died before the case was concluded and an application for substitution by his legal representative was brought under the provisions of the Civil Procedure Act. The judgment of the Court recapped that of the High Court which stated:

“[6] Upon consideration of the grounds of opposition, the learned judge identified two main issues for determination, firstly, whether the provisions of the Civil Procedure Act are available in constitutional petitions, and, secondly, whether a constitutional petition filed by a sole Petitioner survives upon the death of a Petitioner. On the first issue, the court appreciated that the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, 2013 – LN No. 117 of 2013 (hereinafter referred to as Practice and Procedure Rules) has no provisions for substitution of a deceased Petitioner. Nevertheless, the Court held that there was nothing wrong in relying on the enabling provisions of the Civil Procedure Rules and the Civil Procedure Act.”

26. Under **Article 159(2)(d) and (e) of the Constitution; Rule 5(a) and Rule 8 of Mutunga Rules**, this court is enjoined to administer justice

without undue regard to procedural technicalities and protect and promote the purpose and principles of the Constitution.

27. **Rule 5(a) of Mutunga Rules** is clear that for the purposes of furthering the overriding objective under **Rule 3 of the Mutunga Rules**, the Court is required to handle all matters presented before it to achieve just determination of the proceedings and that **Rule 3(8) of the Mutunga Rules** crowns it all by stating that nothing in these Rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

28. From the authorities relied upon by the Petitioner and the provisions of the Constitution as well as **the Mutunga Rules**, referred herein above, I find that there is ample jurisprudence allowing importation of the Civil Procedure Rules to fill any lacuna in **the Mutunga Rules**. I find the provisions of Civil Procedure Rules are applicable to Constitutional Petitions where such provisions gives Court inherent power to make such orders as may be necessary for ends of justice. **Rule 3 (8) of the Mutunga Rules** provides that nothing in the rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. This Court finds that the litigants have the right to use the Civil Procedure Rules to fill any lacuna in **the Mutunga Rules** to seek leave to issue Third Party notice and to seek Third Party directions from the Court.

29. I have considered the decision of **L.A.W & 2 others v. Marura Maternity Nursing Home & 2 Others [2016] eKLR**. In which Lady Justice Ngugi declined to grant third Party directions as a persuasive precedent albeit one which can be distinguished from the case before me. In that matter the Respondent alleged that it had a relationship with PWC, the proposed Third Party, which ran the project that resulted in the violation of the Petitioner's rights.

30. In the instant Petition the claim is not under any contractual relationship with the Third Party. Instead the Respondent's claim is that if there was a violation of the Petitioner's rights it was done by the Third Party who claimed to have received consent to publish the Petitioner's images. This would have been akin to PWC in the previous case represented to Marura Maternity Nursing Home that they had the consent of the Petitioner to carry out sterilisation a claim that was never made. In her judgment Lady Justice Ngugi states:

"29. No authorities were placed before the Court to support the applicability of Third Party proceedings in constitutional litigation. In the present case, the 1st respondent's claim is based on a contract between and the proposed interested party, and on the basis of the material before me, I am unable to see how a claim of constitutional violation can give rise to a claim for indemnity under a contract. At the very least, the applicant should have placed before the court material on the basis of which it could include that a party has been induced, under a contractual relationship, to commit a constitutional violation. I therefore decline to allow the application for joinder of PWC and OBA-RH as interested parties."

31. It should be noted in the instant application unlike the matter before Hon. Lady Justice Mumbi, the Petitioner was able to place ample authorities before this Court showing the applicability of the Civil Procedure Rules to the Constitutional Petitions. They are used to bridge a gap and to pursue the ends of justice in order to uphold **Article 159(2)(d) and (e) of the Constitution** as stated by the Court of Appeal. In the matter before Lady Justice Ngugi the party failed to place any material before the court showing how it could have been induced to commit a breach of constitutional rights.

32. I therefore find that provisions of Civil Procedure Act and Rules can be relied upon in regard to grant leave to issue third party notice and Third Party directions in Constitutional Petitions.

B. WHETHER THERE HAS BEEN INORDINATE DELAY IN FILING BOTH APPLICATIONS?

33. The Proposed 2nd Third Party urge that under **Order 1 Rule 15 of Civil Procedure Rules** provides that the 1st application to have been filed within fourteen (14) days after the close of the pleadings. It is contended the application was not filed within the required time and that the leave of this court was never sought to file the application out of time or rather seeking an extension of time. It is proposed Third Party's, contention that the 1st application is inordinately and incurably delayed and that no reasonable explanation has been given by the Respondents for not filing their application within the requisite time.

34. To buttress that point the proposed Third Party refers to the case of **Boniface Mutinda Kabaka v David Mutua Kamonde Katua & 51 others [2018] eKLR** where Justice O.A Angote stated as follows:

"It is therefore obvious that in the absence of a Reply by the Plaintiff after the filing of the Defence, the pleadings herein closed fourteen (14) days after 4th April, 2016. Consequently, the Defendants could not have filed the Amended Defence and Counterclaim on 10th May, 2016 without the leave of the court. Having filed the Amended Defence and Counter-claim dated 10th May, 2016 and filed on the same day is a nullity."

35. The Proposed Third Party further relies on the case of **Nicholas Kiptoo Arap Korir Salat v independent Electoral and Boundaries Commissions & 7 Others [2014] eKLR** stated, inter alia that:-

"Time is a crucial component in dispensation of justice, hence the maxim: Justice delayed is justice denied. It is a litigants' legitimate expectation where they seek justice that the same will be dispensed timeously. Hence, the various constitutional and statutory provisions on time frames within which matters have to be heard and determined."

36. **Order 1 Rule 15 of the Civil Procedure Rules** provides:

"15.(1) Where a defendant claims as against any other person not already a party to the suite (hereinafter called the Third Party)

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(a) That he is entitled to contribution or indemnity; or

(b) That he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) That any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the Third Party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called Third Party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.”

37. The ex parte application under **Order 1 Rule 15 of the Civil Procedure Rules** was filed on 19th November 2018, in which the Applicants seek indemnity from the proposed Third Party for printing of images of the Petitioner that the Third Party had been led to believe she had the right to publish. The proposed Third Party was served and appeared in the matter.

38. In the instant application the Respondents/Applicants filed their replying affidavit on 18th July, 2018. Pleadings closed 14 days later on 1st August, 2018. The Civil Procedure Rules allow 15 days after this for the filing of an application seeking Third Party directions. This takes the calendar to 16th August, 2018. The chamber summons was filed on 19th November, 2018. There was a delay of 3 months, the question however is whether or not this was an inordinate delay.

39. The issue that arises for consideration is whether there has been inordinate delay in issuing of Third Party notice.

40. A Constitutional Petition equivalent to the overriding objective is **Article 159(2)(d) of the Constitution, and Rule 3(8) of the Mutunga Rules**. The Courts are enjoined to make such orders as may be necessary for the end of justice or to prevent abuse of the process of Court. In the interest of doing justice to all and enable litigants have access to justice the Court is not required to shut the door to the corridors of Justice especially where a party can be compensated by way of costs. I find that there is no prejudice to parties should the Proposed Third Party be enjoined in these proceedings. I find due to the uncontroverted and thus admitted fact that the Third Party did in fact provide the images of the Petitioner, that are the subject of the entire Petition, then it is necessary the truth and justice to have these matters adjudicated and decided upon. Any delay caused was inadvertent and not inordinate to justify refusal of joinder of a third party.

C. WHETHER THE RESPONDENT'S HAVE MET THE THRESHOLD TO WARRANT THIRD PARTY NOTICE TO ISSUE AND GRANT OF THIRD PARTY DIRECTIONS?

41. **Order 1 Rule 22 of the Civil Procedure Rules** state;-

“22. If a Third Party enters an appearance pursuant to the Third Party notice, the defendant giving the notice may apply to the court by summons in chambers for directions, and the court upon the hearing of such application may, if satisfied that there is a proper question to be tried as to the liability of the Third Party, order the question of such liability as between the Third Party and the defendant giving notice, to be tried in such manner, at or after the trial of the suit, as the court may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the Third Party.

42. The Applicants/Respondents seek indemnity from the Proposed Third Party under **Order 1 Rule 15(1)(a) of the Civil Procedure Rules**. The Petitioner refers to the case of **Roshanara Ebrahim v Ashileys Kenya Limited & 3 Others [2016] eKLR** in this matter the 3rd Respondent had forwarded compromising pictures of the Petitioner to the 1st Respondent. The images had been obtained as a result of an intimate relationship between the Petitioner and the 3rd Respondent. As a result of sending these unauthorised images to the 1st Respondent, the Petitioner lost her title as Miss Kenya and brought the case claiming breach of her constitutional rights to privacy. The court delivered judgment against the 3rd Respondent stating:

“39. The 3rd Respondent had by his close relationship as a boy-friend of the petitioner accessed the petitioner’s photographs, and may indeed have taken some of them, but he had no authority to publish the private photographs. In forwarding the private photographs of the petitioner to the 2nd Respondent, the 3rd petitioner had violated the petitioner’s right to privacy of information under Article 31(c) of the Constitution, and the petitioner is entitled to compensation in damages.”

43. In the instant Petition the Petitioner claims that Applicants/Respondents without any lawful authority published images of the petitioner, thus violates her constitutional rights. The Applicants/Respondents contend that while they did not indeed publish those images they received the images from a 3rd Party, who represented herself as having received consent from the Applicant/Respondent to have these images, and the Applicants/Respondents published the same based on this representation of consent, therefore if there is any claim of violation of constitutional rights; it is contended, it is the Third Party who should answer to it as she stands in the same relation to the Petitioner in this matter as the Third Party did to the Petitioner; that is a procession of images that were allegedly forwarded without consent.

44. On issue under **Order 1 Rule 15(1)(c) of the Civil Procedure Rules** the Petitioner refers to the case of **Interactive Advertising Limited & another v Equity Bank Limited & 2 Others [2016] eKLR** where an application was made for Third Party Directions and inadvertently served upon the proposed Third Party though it should have been considered ex-parte. The proposed Third Party opposed the application and the Court proceeded to make a decision on this. Justice Ogola stated in the ruling that:-

“5. Turning to the legal issues, it is clear from Order 1 Rule 15(1) of the Rules, that an application for leave to issue Third Party notice must be made ex-parte It is clear from the face of the application that the same was made ex-parte, inadvertently the said

Application was served on the Plaintiffs before the leave was granted. The Plaintiffs have thus filed a replying affidavit opposing the said Application. This Court will however consider the application as opposed by the Respondents.

6. The Courts have had occasion to consider an application for leave to issue Third Party notices or joinder of third parties in proceedings. In *Yafesi Wahisimbi vs. Attorney General of Uganda (1959) EA 223*, the Court was emphatic as hereunder;

In order to join a Third Party the subject between the Third Party and the defendant must be the same as the subject matter between the plaintiff and the defendant and the original cause of action must be the same.

7. Under Order 1 Rule 15(1) (c) of the Rules, for a Defendant to apply or leave to issue Third Party notice, it is important to show that any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the Plaintiff and the Defendant and should properly be determined not only as between the Plaintiff and the Defendant but as between the Plaintiff and Defendant and the Third Party or between any or either of them.”

45. In the instant matter, it is clear that the events and liability flow from the same source and is so intertwined and interconnected that it should all be decided in one case. I find that the subject matter is the same, as regards the publishing of images of the Petitioner and alleged breach of the Petitioner’s constitutional rights by publishing of those images. I find from the pleadings all possible issues and matters in controversy such as whether consent was actually given or not; to whom and for what purpose, can easily be decided by having Third Party as a part of these proceedings in order to answer for her part in the determination of the images of the Applicant.

46. The Court of Appeal had an occasion to consider the question of Third Party directions in the case of *Savji Harji Varsani v Kanjee Naranjee (Kenya) Ltd [1977] eKLR* in which matter involved a tenant (the plaintiff) whose goods were destroyed while repairs were being undertaken on the premises he occupied by the landlord (the defendant) who wanted to be indemnified for any damage done by the contractor, who had been instructed (the Third Party).

47. The substantive part of the appeal dealt with an application made by the Third Party to discharge the issued notice on the basis that the contract between him and the defendant specifically excluded works on the roof of the premises (the plaintiff’s goods had been damaged by rain.) the Court held:

“Be that as it may Kneller J was satisfied that, in his words: The [tenant], [the landlord] and third parties are bound together by the same facts. The issue in the end will be who is ultimately liable for the damage, if any, suffered by the [tenant] “it is better to have all these matters thrashed out in one suit....

In other words, the judge was satisfied that the landlord’s claim against the applicant as Third Party was connected with the original subject matter of the suit and that the was a question relating to, or connected with, the original subject matter which was substantially the same and should be properly determined not only between the tenant and the landlord but also between the landlord and the Third party. The cause of complaint is the same; damage to property by rain water. All the parties were, so to speak, at the scene. The relief sought is the same; damages. The causes of action are the same; negligence and nuisance. Mr. Khanna dealt on the issue of the contract; but we would say that it does not follow, in the circumstances of this case, that the absence, if any, of any contractual obligations as regards the works to be executed, would automatically exonerate the applicant from liability in negligence or nuisance as to the manner of execution of the agreed works. We find it impossible to determine this question unless evidence is heard. Prima facie grounds for negligence were shown.”

48. I have considered the various affidavits in support of the two applications. That the proposed Third Party did forward images of the Petitioner to the Respondents/Applicants. An email has been introduced and a certificate under **Section 106 B of the Evidence Act** deponed to its authenticity which has the proposed Third Party state that she sold images of the Petitioner to the Respondents/Applicants for marketing purposes. I find that the evidence remain uncontradicted by the proposed Third Party in any document introduced in opposition of these applications. This being uncontroverted evidence, it should be taken as correct facts. The fact of dissemination of Petitioner’s images by the Proposed Third Party and the statement that there was an agreement allowing publishing of the photographs brings all the parties to these application, to the scene of the allegations for which none can escape as far as that is concerned. The email at the very least is a prima facie proof that the proposed Third Party is a necessary Party in these proceedings regarding any allegations of breach of the rights, that might have occurred due to the publishing of images of the Petitioner.

49. To the extent of my findings hereinabove I proceed to make the following orders:-

a) The Respondents/Applicants application dated 19th November 2018 be and is hereby allowed in the following terms:-

i) The Respondent do issue a Third Party Notice to Rebecca Muriuki T/a Kahaari within the next 15 days from the date of Ruling herein.

ii) The Third Party be at liberty to enter appearance within 15 days of service of the notice.

b) Application dated 17th November 2019 is premature and directions regarding liability of the third party in the matter is deferred pending service of the notice, as directed herein above and appearance of the Third Party in terms of Order 1 Rule 22 of Civil Procedure Rules and Order 1 Rule 15(1)(c) of Civil Procedure Rules the Respondent giving notice is at liberty to apply for directions regarding determination of liability of the third party in the matter within 30 days from the date of appearance of the Third Party.

c) Costs of the applications shall be in the cause.

Dated, Signed and Delivered at Nairobi on this 29th day of October, 2020.

.....

J. A. MAKAU

JUDGE