



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.38 OF 2016

IN THE MATTER OF ARTICLES 3, 10, 19, 20, 22(1), (1), 29, 35(1), 73, 159(2D), 165, 201 AND 227 AND 73 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA (2010)

AND

IN THE MATTER OF THE NON-GOVERNMENTAL ORGANIZATIONS COORDINATION BOARD

IN THE MATTER OF CONSTITUTIONAL PETITION FOR ACCESS TO INFORMATION, RIGHTS AND FUNDAMENTAL FREEDOMS,

AND

IN THE MATTER OF TRANSPARENCY AND ACCOUNTABILIBY OF PUBLIC BODIES TO THE PUBLIC, ACCOUNTABILITY IN PUBLIC PROCUREMENT AND LEADERSHIP AND INTEGRITY OF PUBLIC OFFICERS

AND

IN THE MATTER OF PUBLIC PROCUREMENT AND DISPOSALS ACT (NO. 3 OF 2005), PUBLIC FINANCE MANAGEMENT ACT (NO. 18 OF 2012), LAWS OF KENYA.

MICHAEL JUMA OTIENO.....PETITIONER

-VS-

THE EXECUTIVE DIRECTOR OF NON-GOVERNMENTAL ORGANIZATIONS

COORDINATION BOARD.....1ST RESPONDENT

NON-GOVERNMENTAL ORGANIZATIONS COORDINATION BOARD.....2ND RESPONDENT

OTIENO, YOGO, OJURO & CO. ADVOCATES.....THE INTENDED 3RD RESPONDENT

RULING

1. The petitioner through a Notice of Motion dated 20th December 2016 seeks the following orders:-

1. **THAT** leave be granted to the petitioner to amend the petition and join the intended 3rd respondent as per the annexed copy of the amended petition.
2. **THAT** the annexed copy of petition be deemed as filed.
3. **THAT** the respondents be at liberty to file supplementary/further affidavit within (14) days from the date of service of the amended petition.

4. **THAT** costs of this application be in the cause.

2. The application is premised on the grounds on the face of the application *inter-alia*:- that the petitioner wishes to amend its petition to include the 3rd respondent; that joining the 3rd Respondent in this suit would not prejudice the case against the 1st & 2nd Respondents; that for proper determination of this constitutional petition, it is fair that the 3rd intended Respondent be enjoined as a necessary party.

3. The application is further supported by supporting affidavit by Michael Juma Otieno sworn on 26th January 2017 to which the draft amended petition and supporting affidavit thereto is attached and marked "**Mjo**". The Petitioner/Applicant seeks to amend a petition dated 28th January 2015 to include a 3rd respondent; urging if the order sought is granted no party would be prejudiced. It is contended the amendment is necessary to enable this court have a chance to adequately and effectively adjudicate on the matters before the court.

4. The application is opposed. The intended 3rd Respondent filed a Replying affidavit filed on 30/3/2017. The intended 3rd Respondent contend, that the application is misconceived, bad in law, does not disclose a cause of action against the intended 3rd Respondent and is an abuse of court process and ought to be struck out with costs.

5. The intended 3rd Respondent avers, that it was duly and lawfully retained and instructed to represent the 1st and 2nd Respondents (*attached see minutes of the Technical Committee for pre-qualification E 00-1*), that since retention and/or instruction, the intended 3rd Respondent still represent the 1st and 2nd Respondents in the present suit and also in previous suit under paragraph 5(a) – (f) of the supporting affidavit. It is further contended the 3rd intended respondent being qualified Advocates, they are merely agents of the 1st and 2nd Respondents, who have a duty to represent their respective clients at their request. It is further averred, that the intended 3rd Respondent have never been involved in influencing the procurement process, that led to its retention as advocate for 1st and 2nd Respondents.

6. It is the intended 3rd Respondent contention, that the Applicant has not shown what prejudice he has faced by the intended 3rd Respondent, representation of the 1st and 2nd Respondents in the previous suits and present suit, urging, that the intended 3rd Respondent is properly on record for the 1st and 2nd Respondents and in all other aforesaid previous suits. The intended 3rd Respondent urges, that it will be greatly prejudiced if the application is allowed as it will amount to making an advocate a party to proceedings between parties yet it is discharging its statutory mandate.

7. I have very carefully considered the application, affidavit in support, the Replying affidavit and counsel submissions and authorities in support. The issues arising for consideration in this matter are mainly two thus:-

a. Whether the petitioner has met the threshold for granting leave to amend the petition to include the intended 3rd Respondent herein?

b. Whether costs should be awarded to any party in this application.

8. The petitioner's submission are, that the firm of M/s Otieno Yogo Ojuno and Company was allegedly retained and/or instructed by the 1st Respondent to represent it as outlined in the petitioner's supporting affidavit. These are what the petitioners urges are the crux of the petitioner's petition. It is further urged that these issues will be better delved into during the hearing of the petition.

9. The attached intended amendment petition seeks to amend paragraphs 5 a, 5 b and 5 c of the petition as follows:-

5a).The intended 3rd Respondent herein is a firm of advocates which represents and advises respondent. NGOs Coordination Board, which is a Public Entity established under the NGOs Coordination Board Act (1990), and it is legally sued in this petition on its capacity as the firm of advocates that, represents the NGO co-ordination board though aware that its services were procured in contravention of the procedures and the provisions of the law relating to procurement.

5b. The 3rd defendant has continued to represent the 2nd Respondent, with impunity despite the fact that it is aware of the illegality, the procedure and the lacuna surrounding procurement of its services.

5c. The procurement of the legal services of the 3rd Defendant, by the 2nd Defendant, is tainted with want of procedure and legality.

10. Order 8 Rule 5 of the Civil Procedure Rules provides as follows:-

"(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

(2) This rule shall not have effect in relation to a judgment or order."

11. The petitioner in intended amended petition urges the intended 3rd Respondent has continued to represent the 2nd Respondent with impunity despite the fact, that it is aware of the illegality, the procedure and the lacuna surrounding procurement of its services. It is further pleaded the procurement of the legal services of the 3rd Respondent, by the 2nd Respondent it tainted with want of procedure and legality. The pleadings as drawn raises legal issues and issues of fact which would require the presence of the intended 3rd Respondent before full determination of the real question in controversy between the parties; for which even this court can either of its own motion or on the application of any party order the document to be amended in such a manner as it directs and in such terms to costs or otherwise in the

interest of justice. I further note even before the petitioner sought to amend the petition, had sought for a declaration that in the absence of the firm of M/s Otieno Yogo Ojuno and Company Advocates any payment to the said firm by the NGOs Coordination Board were illegal and that the costs being sought from the petition are invalid null and void.

12. Article 50 of the Constitution of Kenya 2010 provides every person has the right to have any dispute that, can be resolved by the application of law decided in fair and public hearing before court. I find the intended 3rd Respondent having been mentioned in the petition herein should be afforded and opportunity to be heard. I accordingly find that for the 3rd Respondent to actualize the right to be heard the petitioner should be granted leave to amend the petition and join the intended 3rd Respondent in the petition.

13. The upshot is that the petitioner's Notice of Motion dated 20th December 2016 is merited. I proceed to make the following orders:-

a. The petitioner is granted leave to amend the petition to join the intended 3rd Respondent as the 3rd Respondent in the amended petition dated 20th December 2016.

b. The amended copy of the petition be and is hereby deemed as duly filed upon payment of the prescribed court fee within the next fifteen (15) days from the date of this ruling without extension of the said period.

c. The intended 3rd Respondent be served with the amended duly filed petition within 21 days from the date of this ruling.

d. Costs of the application be in the cause.

Dated, signed and delivered at Nairobi this 23rd day of May, 2019.

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J .A. MAKAU

JUDGE