



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO.205 OF 2018**

**PHOENIX GLOBAL KENYA LIMITED.....PETITIONER**

**VERSUS**

**KENYA REVENUE AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL**

**INVESTIGATIONS (on behalf of himself**

**as well as the ANTI-MONEY LAUNDERING**

**UNIT, ANTI-BANKING FRAUD UNIT AND**

**THE CYBER CRIME UNIT.....3<sup>RD</sup> RESPONDENT**

**ANTI-COUNTERFEIT AGENCY.....4<sup>TH</sup> RESPONDENT**

**FINANCIAL REPORTING CENTRE.....5<sup>TH</sup> RESPONDENT**

**KENYA BUREAU OF STANDARDS.....6<sup>TH</sup> RESPONDENT**

**MITCHELL COTTS (K) LTD.....7<sup>TH</sup> RESPONDENT**

**RULING OF THE COURT**

1. On 6<sup>th</sup> November, 2018 while this matter was coming up for hearing, the 7<sup>th</sup> Respondent made an application under Article 159 of the Constitution to have its name reflected as MITCHELL COTTS FREIGHT (K) LIMITED. The 7<sup>th</sup> Respondent stated that it had mistakenly been described in these proceedings as MITCHELL COTTS (K) LIMITED. In support of the application the 7<sup>th</sup> Respondent urged the court to consider that all pleadings by the Petitioner had been served on MITCHELL COTTS FREIGHT (K) LIMITED. Also, the Applicant contended that in the said pleadings the Petitioner had referred to the 7<sup>th</sup> Respondent by the name MITCHELL COTTS FREIGHT (K) LIMITED, for instance, at page 81 of the Further Replying Affidavit of the Petitioner filed on 19<sup>th</sup> October, 2018 and the Petition at page 242.

2. Mr. Mogaka, counsel for the 7<sup>th</sup> Respondent submitted that the 7<sup>th</sup> Respondent had filed an amended cross-petition dated 3<sup>rd</sup> October, 2018 to reflect its correct name and further that the 7<sup>th</sup> Respondent had attached copies of titles of ownership of its warehouse which show the name of the 7<sup>th</sup> Respondent as MITCHELL COTTS FREIGHT (K) LIMITED. Counsel opined that Rule 3 (8) of the Mutunga Rules allows the court to substitute parties in a bid to do justice. Therefore, Counsel urged the court to consider all admitted pleadings referring to the 7<sup>th</sup> Respondent as MITCHELL COTTS FREIGHT (K) LIMITED as the alleged error/mistake as mere procedural technicality.

**The Responses**

3. Ms. Lavuna, Counsel for the 1<sup>st</sup> Respondent opposed the application submitting that the notice of appointment filed by Mr. Mogaka showed that his firm was representing MITCHELL COTTS KENYA LIMITED and not MITCHELL COTTS FREIGHT KENYA LIMITED. Counsel opined that if the substitution is allowed it would change the suit's cause of action.

4. Ms. Lavuna introduced the issue of impropriety of the cross petition by the 7<sup>th</sup> Respondent urging that the same was not properly described under the Mutunga Rules. Counsel contended that the 7<sup>th</sup> Respondent had not shown the relationship that it had with the suit subject matter hence the cross petition was simply mischievous.

5. Mr. Makuto, Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the application seeks to amend the Petition by introducing a party that was not initially part of the proceedings. Counsel suggested that the cross petition was filed by a stranger as the party named by the Petitioner as the 7<sup>th</sup> Respondent is not the cross petitioner therein. For this reason, Counsel urged the court to strike out the cross petition but allow the cross petitioner to set out his claim in another petition.

6. Ms. Owesi, Counsel for the 6<sup>th</sup> Respondent submitted on the issue of impropriety of the cross petition stating that a Respondent has only a right to file a cross petition against the Petitioner and not against fellow Respondents.

7. Mr. Khagram, Counsel for the Petitioner submitted that the petition should be heard first and the cross petition later as the two raise two distinct issues.

### **The Determination**

8. I have carefully considered the application. The issues that arise for determination by this court are:

a) Whether the 7<sup>th</sup> Respondent referred to in these proceedings as MITCHELL COTTS KENYA LIMITED should be substituted with MITCHELL COTTS FREIGHT KENYA LIMITED in both the petition and the cross petition.

b) Whether the amended cross petition is improperly before this court, or whether the amended cross petition should be struck out or whether the petition should be separated from the petition.

### **a) Whether the 7<sup>th</sup> Respondent referred to in these proceedings as MITCHELL COTTS KENYA LIMITED should be substituted with MITCHELL COTTS FREIGHT KENYA LIMITED in both the petition and the cross petition.**

9. The 7<sup>th</sup> Respondent argued that it was erroneously referred to in these proceedings as MITCHELL COTTS KENYA LIMITED while the correct party ought to be MITCHELL COTTS FREIGHT KENYA LIMITED. In a bid to correct this alleged error the 7<sup>th</sup> Respondent filed an amended cross petition on 4<sup>th</sup> October, 2018. The Respondents, on their part, opine that this was not simply an error as the 7<sup>th</sup> Respondent's advocate in his notice of appointment indicated that his firm would be representing MITCHELL COTTS KENYA LIMITED. The Respondents, therefore, concluded that the cross petitioner was a stranger to these proceedings.

10. I have carefully perused the pleadings herein. On several of the Petitioners' pleadings, specifically the Petition filed on 3<sup>rd</sup> August, 2018 and the Further Affidavit filed on 19<sup>th</sup> September, 2018 documents are annexed referring to one MITCHELL COTTS FREIGHT (K) LIMITED. To my mind, the said MITCHELL COTTS FREIGHT (K) LIMITED could only be used in reference to the 7<sup>th</sup> Respondent. This would mean that there was no confusion as whom the Petitioner was referring to. In any event it is the Petitioner who made the mistake by enjoining the 7<sup>th</sup> Respondent to these proceedings using the name MITCHELL COTTS KENYA LIMITED and the 7<sup>th</sup> Respondents made no attempt to rectify this error up until when it filed an amended cross petition.

11. In my view, the issue herein is a mere procedural technicality. Article 159 (2) (d) of the Constitution is very clear that one of the guiding principles for the courts is that justice should be administered without undue regard to procedural technicalities. In the case of **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR (Civil Appeal No. (Application) 228 of 2013)** Ouko, JA. opined as follows with regard to applicability of the aforementioned principle:

**“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or which do not occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness... it ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why the Constitution and other statutes that promote substantive justice deliberately use the phrase that justice be done without “undue regard” to procedural technicalities.”**

12. In this case, no party will be prejudiced if the application by the cross petitioner is allowed as it relates to substitution of MITCHELL

COTTS KENYA LIMITED with MITCHELL COTTS FREIGHT KENYA LIMITED. If anything the said substitution will be in the interest of justice s it will facilitate the expeditious resolution of this matter.

13. Further, Rule 5 (b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules (2013) (herein after referred to as the “Mutunga Rules”) provides that a petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute. Also sub-rule (d) states that the Court may at any stage of the proceedings on its own motion or on application order that the name of any party improperly joined, be struck out; and 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. I therefore do not find any reason as to why the party herein named as MITCHELL COTTS KENYA LIMITED should not be replaced with MITCHELL COTTS FREIGHT KENYA LIMITED in both the petition and the cross petition.

**b) Whether the amended cross petition is properly before this court**

13. The Respondents contend that the cross petition by the 7<sup>th</sup> Respondent is not recognized under the Mutunga Rules. They therefore opine that the same should be struck out and the cross petitioner allowed to set out his claim in another petition.

14. I do agree with the Respondents that the Mutunga Rules do not make any provisions for a cross petition. However, in the interest of promoting access to justice under Article 48 of the Constitution, it is my view that a cross petitioner should not be turned away by the courts simply because rules have not been provided as to how such a party should approach the court to ventilate his or her issues especially when the said issues arise from the petition before the court and involve the same parties. I do not find the amended cross petition to be improperly before court.

15. This being the position, the next issue for determination is whether the amended cross petition should be determined concurrently with the petition or whether the petition should be determined first and the amended cross petition determined after. In my view, the issues raised in the amended cross petition are hinged on the main petition. The main petition is partly heard and is nearly concluded. For ease of management of this suit, it would be prudent to determine the main petition first and deal with the amended cross petition later.

16. For these reasons the oral application made by the cross petitioner on 6<sup>th</sup> November, 2018 is allowed. Orders are made as follows:

a) The 7<sup>th</sup> Respondent who is also the cross petitioner, MITCHELL COTTS KENYA LIMITED is substituted with MITCHELL COTTS FREIGHT KENYA LIMITED.

b) The court will proceed with the determination of the main petition and after finalization deal with the amended cross petition.

c) No order as to costs.

**Dated, Signed and Delivered in Mombasa this 28<sup>th</sup> Day of November, 2018.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Khagram for Petitioner

Mr. Mogaka for 7<sup>th</sup> Respondent

M/S Lavuna for 1<sup>st</sup> Respondent

M/S Kariuki for 6<sup>th</sup> Respondent

M/S Kiti& Mr. Makuto for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Mr. S. Kaunda Court Assistant