REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

PETITION NO. 13 OF 2015

IN THE MATTER OF ARTICLES 1,2, 3, (1), 10, 19, 20, 21, 22, 27 (1), (2), & (3), 28, 35, 41 (1), 47 (1) & (2), 48, 50 (1), (2), (A) AND (O), & 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF RULE 4, 10, 11, 13, AND 20 OF THE CONSTITUTION OF KENYA (SUPERVISORY AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL (HIGH COURT PRACTICE AND PROCEDURE RULES 2013)

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27 (1), (2) & (3), 28, 35, 41 (1), 47 910, AND 50 (1), (2), (A) AND (O) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 76 OF THE CO-OPERATIVE SOCIETIES ACT, CAP 490, LAWS OF KENYA

AND

IN THE MATTER OF THE MUKURUWEINI PRINCIPAL MAGISTRATES CRIMINAL CASE NO. 493 OF 2014

BETWEEN

MARY WANGAI GACHIHI ……..…….1ST APPLICANT/PETITIONER

RUMUKIA FARMERS CO-OPERATIVE SOCIETY LTD.....2ND APPLICANT/PETITIONER

VERSUS

THE PRINCIPAL MAGISTRATE, MUKURUWEINI COURTS…...…..…1ST RESPONDENT

THE HON. ATTORNEY GENERAL…….……....…..…..…2ND RESPONDENT

AND

SAMUEL THANDI NJOGU…….……INTERESTED PARTY /APPLICANT

RULING

By a notice of motion dated 21st October 2015 expressed under the provisions of Order **1** Rule **10 (2)** of the Civil Procedure Rules 2010, **Samuel Thandi Njogu** (hereinafter referred to as the applicant) moved this honourable court seeking an order that he be enjoined in this suit as an interested party.

The application is premised on the grounds stated on the face of the application and the annexed affidavit of the applicant annexed thereto. The grounds stated on the application are that the applicant is the accused person in criminal case number **493** of 2014, Principal Magistrates Court, Mukuruweini, that orders sought in the present case seek to stay directions made in his favour in the said case and that it would be in the interests of justice if the applicant is allowed to participate in these proceedings.

The affidavit in support of the application contains *inter alia the following* averments:-

a. *that the learned magistrate in the said case ordered the second petitioner herein to supply him with a set of documents pursuant to an application he made in the said case and he is yet to be supplied with the said documents which he requires to prepare for his defence.*

b. *That he is still the treasurer of the second petitioner and is familiar with its operations, and that the said charges emanate from internal wrangles and that the petitioners have not specified the prejudice they will suffer if the documents are supplied.*

c. *That it is alleged that he may use the documents to commit more offences, which allegation is uncalled for, malicious and is intended to paralyse his defence in the criminal trial and that if the orders sought are granted without being heard, his rights under the rules of natural justice will be infringed hence its necessary that he be enjoined in these proceedings.*

d. *That the petitioners rights do not supersede the rights under article 35 of the constitution and that the application has merit and ought to be allowed.*

The application is opposed. The petitioners/respondents in this application filed a replying affidavit dated 7th November 2015 in which the first Respondent averred *inter alia:-*

i. that the application is misconceived.

*ii. that the issue for determination is whether a Resident Magistrate's Court has jurisdiction to issue an order under Article **35** of the Constitution when it is the preserve of the High Court under Article **23 (1)** of the Constitution and Rule **4 (1)** of the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice Rules 2013 (Legal Notice Number 117 of 2013).*

iii. that the other issue in the petition herein is whether the orders granted by the lower court violate the second petitioners rights to be heard and whether such orders could be granted against a person who was not a party to the suit.

iv. It's also averred that the applicant has nothing to do with the said issues since they can only be answered by the respondent(s).

At the hearing of the application, the applicant adopted the grounds in support of his application and the supporting affidavit and urged the court to read mischief in the petitioners application, that he has key details to provide to the court, that his input will be necessary for the court to determine the petition.

Mr. Gikonyo for the Respondents vehemently opposed the application and insisted that the issues in the petition are whether or not the magistrate can enforce Article **35** of the constitution and that what is before the court is a challenge to the jurisdiction of the learned magistrate and that the applicant does not have to participate in these proceedings for the court to determine the said issues. Counsel further insisted that the prayers in the petition do not affect the applicant. Counsel further added that if at all the applicant

requires the documents in question, he ought to move to the High Court as provided under Article **35** of the constitution and urged the court to dismiss the application.

The Hon. Attorney General did not file any reply to the application but the court allowed Mr. Njue holding brief for Mrs. Masaka for the Attorney General to address the court. Mr. Njue confirmed that the Hon. Attorney General was not opposing the application and urged the court to allow the application arguing that the applicant will in the final analysis have an interest in the courts determination of the petition, hence, counsel submitted that the applicant is a necessary party.

The issue for determination in my view is whether or not the presence of the applicant is necessary to enable the court to effectively and competently adjudicate upon and settle all the questions involved in this suit. The application is expressed under Order **1** Rule **10 (2)** of the Civil Procedure Rules 2010 which provides that:-

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.

I find it fit at this early stage to seek guidance in the words of Devlin J. in *Amon vs Raphael Tuck & Sons Ltd*[1] where the learned judge put it succinctly as follows:-

> *"What makes a person a necessary party? It is not of course, merely he has relevant evidence to give on some of the questions involved; that would only make a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately....the court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to make a person a party to an action so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party."(Emphasis added)*

Nambuye J (as she then was)in *Kingori vs Chege & 3 others*[2] put it clearly when she held that *"necessary parties who ought to be joined in proceedings are the parties necessary to the constitution of the suit without whom no decree at all can be passed."* (Emphasis added)

The presence of opposing parties is one of the essential requirements of any civil suit. But all parties are not necessary for the suit to be adjudicated upon. Therefore, distinction should be made between necessary and non-necessary parties. **'Necessary Parties'** are those parties from whom relief is claimed. **'Non-necessary Parties'** are those parties who may be party to the suit, but from whom no relief has been claimed. The presence of necessary parties is obviously required for the court to adjudicate and pass an effective and complete decree granting relief to the plaintiff. However, the same does not hold good for non-necessary parties. In the absence of necessary parties, the court may dismiss the suit, as it shall not be able to pass an effective decree. But a suit can never be dismissed due to absence of non necessary-party. As **Nambuye J** (as she then was) held in the above cited case, **'Necessary Parties'** are those parties in the absence of whom no effective decree can be passed by the court.
In the Indian case of *Benares Bank Ltd. v. Bhagwandas**[3]* the court laid down the two tests for determining the questions whether a particular party is necessary party to the proceedings. The said tests were reiterated in the case of *Deputy Commissioner of Hardoi v. Rama Krishna.**[4]* The said tests are:-

> *i. There has to be a right of relief against such a party in respect of the matters involved in the suit.*
> *ii. The court must not be in a position to pass an effective decree in the absence of such a party.*

Generally, a party from whom no relief is sought is not a necessary party.***[5]*** Thus, the nature of relief claimed is important in deciding who is a necessary party. Necessary parties are essentially those parties from whom the plaintiff has claimed relief, not those parties from whom he may claim relief. Proper parties need not be impleaded. Therefore, if complete and effective relief can be claimed by the plaintiff from some parties, there is no need to join other parties since other parties are not necessary parties.

In some cases, a person who is not a party to the suit, may apply to the court to implead him as an additional defendant stating that he would be affected by the decision that may be taken in the suit. If the court finds that he is a necessary party or proper party, he would be impleaded as an additional defendant. The person sought to be added should have a direct interest in the subject matter of the suit.

The yardstick to be applied while considering an application filed by the plaintiff to implead an additional defendant may not be the same while considering an application by a person who wants to get himself impleaded against the wishes of the plaintiff. The plaintiff is the *dominus litis*, a term defined in the Black's Law Dictionary a *"the party who makes the decisions in a lawsuit"*[6] Normally the plaintiff would not be compelled to fight a litigation against a person with whom he does not want to fight and from whom he does not want to get a relief.

But the court may, even against the wishes of the plaintiff, add such person as an additional defendant, if the court finds that he is a necessary party and he ought to have been joined as a party to the suit. The court may also allow a third person to come on record as an additional defendant if his rights are likely to be affected by the decree that may be passed in the suit and whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit.

The striking out or adding of parties is in the realm of judicial discretion of the Court, which will be exercised in the light of the principles underlying sub rule (2) of Rule 10 of Order I Civil Procedure Rules. Order 1 Rule (10) (2) consists of two parts, namely:-[7]

> *i. Striking off the name of a person who has been improperly joined whether as plaintiff or defendant; or*
>
> *ii. adding the name of a person whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit.*

The second category mentioned above pertains to proper parties. When a person is neither a necessary party nor a proper party, the Court would not allow him to be added as a party to the suit. The scope of the suit cannot be enlarged and questions which are not involved in the suit cannot be decided, simply by adding parties.

Guided by the aforesaid authorities and considering the relevant law, the facts of this case and the submissions by the parties, I find that the issue that falls for determination is whether or not the presence of the applicant in these proceedings is necessary to enable the court to wholly and effectively determine the matters in question. This necessitates a close examination of the relief sought in the petition.

The petition seeks two substantive reliefs, namely:-

> *i. A declaration that the act of the first respondent in granting an order for supply of documents under article 35 of the constitution was without jurisdiction and in violation of the petitioners rights under article 29, 31, and 47 of the constitution.*
>
> *ii. An order quashing the order of the first respondent dated 5th August 2015 and 14th September 2015 and all subsequent orders.*

The Petitioners' major contention is that the magistrates court has no jurisdiction to grant orders under

Article **35** of the constitution. Article **23 (1)** of the Constitution provides that:-

> *23 (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.*

I agree entirely with counsel for the petitioner that indeed the magistrates court has no jurisdiction to grant the orders in question. More light can be shed on the issues by examining the clear and highly relevant provisions of Article **23 (2)** which provides as follows:-

> *(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, right or fundamental freedom in the Bill of Rights.*

The question is had this legislation been enacted by the time the orders in question were made so as to clothe the court with the requisite jurisdiction. My answer is a resounding No. The Magistrates' Courts Act, 2015 which was enacted to give effect to Articles **23(2**) and **169(1)(a)** and **(2)** of the Constitution; to confer jurisdiction, functions and powers on the magistrates' courts; to provide for the procedure of the magistrates' courts, and for connected purposes came into force on **2nd January 2016**. Section **8** of the said Act provides as follows:-

> *8. (1) Subject to Article 165 (3) (b) of the Constitution and the pecuniary limitations set out in section 7(1), a magistrate's court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.*
>
> *(2) The applications contemplated in subsection (1) shall only relate to the rights guaranteed in Article 25 (a) and (b) of the Constitution.*

There is no mention of article **35** in the new Act. It's evident that from the above, a magistrates court has no jurisdiction to entertain an application for redress under Article **35** of the Constitution. The orders complained of were made before The Magistrates' Courts Act, 2015 came into force AND the new Act still does not confer jurisdiction to magistrates courts to hear applications for redress under Article **35** of the Constitution. Even if the new act conferred jurisdiction under Article 35 (which it does not), the act cannot operate retrogressively.

Clearly, the issues raised in the petition are purely matters of jurisdiction. I am alive to the fact that at this stage I am not determining the petition and I cannot go into details of the merits or otherwise of the petition. But it will suffice for me to recall with approval the words in *Petrojessica Enterprises Ltd v. Leventis Technical Co. Ltd**[8]** where Belgore J.S.C. put it plainly thus: -

> *"Jurisdiction is the very basis on which any Tribunal tries a case; it is the lifeline of all trials. A trial without jurisdiction is a nullity. The importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, on appeal to Court of Appeal or to this Court; afortiori the Court can suo motu raise it. It is desirable that Preliminary Objection be raised early on the issue of jurisdiction; but once it is apparent to any party that the Court may not have jurisdiction, it can be raised even viva voce as in this case. It is always in the interest of justice to raise issue of jurisdiction so as to save time and costs and to avoid a trial in nullity".*

I find myself in agreement with counsel for the Petitioners that the petition raises serious issues relating to the jurisdiction of the learned magistrate and the legality or otherwise of the order complained of. Applying the tests laid down in the above cited case of *Benares Bank Ltd. v. Bhagwandas**[9]** I find that there is nothing to show that "*the court will not be in a position to pass an effective decree or order in the absence of the applicant*".

In my view, the issue of jurisdiction does not require the presence of the applicant to be resolved

effectively and completely. The presence of the applicant is not necessary to enable the court to wholly and effectively determine the matters in question in this petition. Accordingly I find that the application does not satisfy the requirements under Order **1** Rule **10 (2)** of the Civil Procedure Rules. The upshot is that the application is dismissed with no orders as to costs.

Orders accordingly

Dated at Nyeri this **17th** day of **February** 2016

John M. Mativo

Judge

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[1] {1956} 1 ALL ER 273 at pages 286 to 287.

[2] {2000} 2 KLR

[3] A.I.R. 1947 All. 18

[4] AIR 1953 SC 521

[5] Pravin v. State of Maharashtra {2001} CriLJ 3417 , Gujarat SRTC v. Saroj {2001} (2) SCC 9, Praveen Bhatia v. Dr. M Ghosh (1999) 2 MLJ 690

[6] Black's Law Dictionary, Eight Edition, Thomson West, Editor, Bryan A. Garner.

[7] Thavarayil Salim Vs. Thekkeveettil Karuvantevalappil Saru, 2011 (3) KLT 280 : 2011 (3) KLJ 348 : ILR 2011 (3) Ker. 376 : 2011 (3) KHC 100]

[8] (1992) 5 NWLR (Pt. 244) 675 at 693,

[9] A.I.R. 1947 All. 18