



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 83 OF 2012**

**MIGUNA MIGUNA .....PLAINTIFF**

**VERSUS**

**FREDRICK OTIENO OUTA.....1<sup>ST</sup> DEFENDANT**

**RADIO AFRICA GROUP.....2<sup>ND</sup> DEFENDANT**

**JUSTUS OCHIENG.....3<sup>RD</sup> DEFENDANT**

**CATHERINE GICHERU.....4<sup>TH</sup> DEFENDANT**

**RULING**

By a supplementary Notice of Motion dated 6<sup>th</sup> May 2015 and filed in court on 7<sup>th</sup> May 2015, the plaintiff Miguna Miguna seeks leave of the court to amend his pleadings by correcting his plaint and or substituting and or adding the word “Limited” or Ltd to the 2<sup>nd</sup> defendant’s name, Radio Africa Group, to read Radio Africa Group and or Radio Africa Group Ltd and or Radio Africa Ltd;

An order for leave to add as a defendant in this matter “Star Publication Ltd” and or “The Star Newspaper;”

An order granting leave to file and serve his amended plaint in the form attached to his affidavit in support of the Notice of Motion;

And any other order that the plaintiff may request and or court deems just.

The application is premised on the provisions of Order 1 Rule 10(2) and (4) of the Civil Procedure Rules; Order 8 Rule 3(3); Order 8 Rule 4; Order 8 Rule 5; Section 1(a),1(b) 3(a) of the Civil Procedure Act; Article 159(2) of the Constitution of Kenya.

The application is predicated on several grounds on the face of the Notice of Motion. Materially, that at the time of filing the suit herein, the plaintiff’s counsels Kounah & company Advocates had incorrectly or erroneously named only the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants as defendants in the matter. That the impugned libelous matter was published by the Star Publications Ltd and or the Star Newspaper and Radio Africa Group/Radio Africa Ltd or Radio Africa Group Ltd which is wholly owned by and or a subsidiary of Radio Africa Group or Radio Africa Ltd and or Radio Africa Group Ltd and that the libel notice was served by the plaintiff on the named defendants including the Star

Publications Ltd and or the Star Newspaper and was responded to by the Star Newspaper's Chief Executive Officer, Mr William Pike on 23<sup>rd</sup> January 2012. That the 3<sup>rd</sup> defendant in her witness statement and being the managing editor of the Star Publication Ltd and or the Star Newspaper is a witness for the 2<sup>nd</sup> defendant Radio Africa Group or Radio Africa Group Ltd or Radio Africa Ltd.

That equally, the 3<sup>rd</sup> defendant filed his witness statement as the employee of the 2<sup>nd</sup> defendant and the same situation applies to one Pickens Ochieng Wesonga. That equally, Mr Patrick Quarcco the Founder and CEO of Radio Africa Group or Radio Africa Ltd or Radio Africa Group Ltd and the Star Publication Ltd or the Star Newspaper is also listed as a witness for the 2<sup>nd</sup> defendant. That the plaintiff's cause of action and evidence against the 2<sup>nd</sup> defendant relates to transactions and or conduct of the Star Publication Ltd or the Star Newspaper and Radio Africa Group or Radio Africa Group Ltd or Radio Africa Ltd and their employees or agents named as defendants in this matter, who are the 3<sup>rd</sup> and 4<sup>th</sup> defendants, are being represented by the same firm of advocates.

That the mistakes are genuine and ought to be corrected as they would not occasion any prejudice and the correction will bring before the court the correct identities of the parties being sued and that it is in the interest of justice that the application be allowed.

The application is supported by the affidavit sworn by the plaintiff Mr Miguna Miguna reiterating the above grounds and annexing exhibits including the proposed amended plaint, summons and wikipedia extracts of who Radio Africa Group is in the media industry.

The defendants did not file any replying affidavits and neither did they oppose the application herein when the parties appeared before me this morning and urged the application. Their only point of contention is that where parties are substituted or added to the pleadings then an amended and filed plaint and summons to enter appearance should be served on the new parties to give them an opportunity to be heard and that the parties to the suit must also be served with the new pleadings.

Mr Miguna Miguna therefore put forward his proposals in the application and urged the court to find that the 'new' parties are in essence the same as Radio Africa Group (2<sup>nd</sup> defendant) albeit he was not opposed to effecting service of summons to enter appearance and amended pleadings on the 'new' parties expeditiously.

I have carefully considered the application by the plaintiff applicant, the grounds, supporting affidavit, annexures and the oral submissions in court. I have also considered the responses by the defence counsels, wherein they intimated that they had no objection to the orders being granted save that service on new parties must be effected to bring them on board.

The power to allow amendments to pleadings is donated by Section 100 of the Civil Procedure Act which provides that the court may at any time, and on such terms as to costs or otherwise as it may think fit amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.

The procedural law is found in Order 8 Rules 3,4,5,7 and 8 of the Civil Procedure Rules.

In the instant case, the plaintiff seeks for an amendment that would have the effect of correcting and or substituting and or adding other named parties to the proceedings herein.

Accordingly, the provision of order 1 Rule 10 of the Civil Procedure Rules comes into play. Under 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 and settle all question involved in the suit, be added.

Under Sub Rule (4) thereof, where a defendant is added or substituted, the plaintiff shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaintiff shall be served on the new defendant and, if the court thinks fit, on the original defendant.

From the above provisions, it is clear that the court has the power to grant the orders sought by the plaintiff, which orders are discretionary and in this case, intended to enable the court effectually and completely adjudicate on all the issues involved in the dispute. The Rules also mandate that where such amendment involves the addition or substitution of the parties then the new parties must be served with the amended plaintiff and the amended summons to enter appearance. The court may also in its discretion order that the original defendants be served.

There being no objection to the orders being sought being granted, and as the plaintiff's own application seeks for an order that the amended pleadings be served in the form attached to his affidavit, I accordingly grant the plaintiff/applicant the orders sought in the Supplementary Notice of Motion dated 6<sup>th</sup> May 2015.

However, as to the exact description of the parties intended to be substituted or added to the pleadings, it is important to note that Wikipedia or World Wide Web links cannot be used to provide accurate description of parties to suits. It is important to note that proper parties before a court of law is what confers the court with jurisdiction to hear and determine disputes. This is because where a 'party' to a suit turns out not to have the legal standing or capacity to sue or to be sued the suit cannot stand. In the case of natural persons, the law is clear that the parties must be adults of sound mind or in case of minors and or persons of unsound mind as declared under the Children's Act and the Mental Health Act respectively, they can sue and be sued in the name of either next friend or guardian ad litem or as the case may be in representative suits.

In the case of Limited liability Companies, the party suing or being sued is so sued or suing in its corporate name. The authenticity of the names of incorporated companies can only be verified by or vide a search being carried out at the Registrar of Companies. From the many alternative descriptions given by the plaintiff concerning who the 2<sup>nd</sup> defendant is and as to who the Star Publication Ltd or the Star Newspaper is, it is clear that the plaintiff is not sure which of the names should be used to describe the said parties who are said to be limited liability companies. That being the case, and noting that as was held in the case **Richardson V Smith & Company [1882] 21 FLA 336,341** that the right to sue and be sued is a corporate franchise, it will not serve the interest of justice if this court was to determine the correct name of the parties sought to be substituted or added to these proceedings in the absence of certificate of search from the Registrar of companies.

**In Apex International Ltd & Anglo Leasing & Finance International Limited V Kenya Anti Corruption Commission [2012] e KLR** the court citing with approval the Nigerian Supreme Court decision on the case of **Good will & Trust Investments Ltd & Another V Bill and Bush Ltd** the court held that:

***“It is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed. The parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach.***

***The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court the court lacks jurisdiction to hear and determine the suit and where the court purports to exercise jurisdiction which it does not have, the proceedings before it and its judgment will amount to a nullity no matter how well reasoned.”***

In the corporate world, names mean everything, and a misdescription of a party can be fatal and even incurable by Article 159(2) (c) of the Constitution where it causes confusion as to who is being referred to or if the party or intended party is not aware that it is the one being referred to. It is for

that reason that Section 100 of the Civil Procedure Act and Order 8 Rule 5 of the Civil Procedure Rules were enacted to correct any error or default in the proceedings.

It therefore follows that it is critical for the plaintiff to get the correct description of the defendants which will not cause any confusion as to who is being sued. To do so, it is vital to get to know whether the alternative names or descriptions of the 2<sup>nd</sup> defendant and The Star Publication Limited refer to one and the same entities, and therefore the correct description can only be obtained from the Registrar of Companies.

Accordingly, the leave to amend is granted. The amended plaint and summons to enter appearance to be filed and served upon all the original defendants and the 'new' defendants within 30 days from the date hereof.

Each party to bear its own costs of this application

Dated, signed and delivered in open court at Nairobi this 24<sup>th</sup> day of November 2015.

**R.E. ABURILI**

**JUDGE**

24/11/2015

Later at 2.30 p.m.

Coram R.E. Aburili J

C.A. Samuel

Mr Mabera for 1<sup>st</sup> defendant also holds brief for Mr Khaseke who is not before court for 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

Mr Miguna Miguna in person present.

COURT –Ruling read and delivered in open court as scheduled.

**R.E. ABURILI**

**JUDGE**

24.11.2015