



Rono v Kiptoo & 4 others; National Police Service Commission & another (Interested Parties) (Petition 17 of 2023) [2024] KEHC 272 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEHC 272 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION 17 OF 2023
RN NYAKUNDI, J
JANUARY 24, 2024**

BETWEEN

ROBERT RONO PETITIONER

AND

CHRIS KIPTOO 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

FRANCIS OMUSE 3RD RESPONDENT

DAVID MUNGA DCIO -ITEN POLICE STATION 4TH RESPONDENT

HARON ODHIAMBO, OCS-ITEN POLICE STATION 5TH RESPONDENT

AND

NATIONAL POLICE SERVICE COMMISSION INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTIONS INTERESTED PARTY

RULING

1. The applicant approached this court vide a Notice of Motion Application dated 2nd November 2023 seeking the following orders;
 1. The Applicant/ 1st Respondent name Dr. Chris Kiptoo herein be struck out and removed henceforth from these proceedings.
 2. The costs of this application and entire suit be awarded to the Applicant.
2. The application is premised on the grounds set out therein and the contents of the affidavit sworn in support of the same.



3. The applicant contends that the suit is premised on an alleged unlawful arrest and detention that took place on 27th June 2023 at Iten Police Station. The Applicant avers that he is not a proper party in this suit since he is an ordinary civilian and he did not participate in any form, since he never made a complaint to the said police station, which could have resulted to the arrest of the petitioner. Further, the Petitioners claim discloses no reasonable cause of action against the applicant in law because, in his petition, other than hearsay, he has not provided any iota of proof that the applicant recorded a complaint to Iten police stationed evidenced by an OB number and therefore petitioner's assertion that the applicant gave instructions to the said officers is misguided and unfounded.
4. In his affidavit in support of the application, the applicant deponed that he has been improperly enjoined in this suit and mentioned irregularly, yet he has no identifiable stake nor involvement or any right to participate in these proceedings. The petitioner in this suit concedes by admission that his involvement in this suit was through a hearsay from a third party. He reiterated the grounds as set out in the application and maintained that the claim discloses no reasonable cause against him.

Applicant's Submissions

5. Learned counsel for the applicant submitted that it is trite principle that this honourable court has powers to add or strike a party in any proceedings and cited Order 1 rule 10(2) of the Civil Procedure Rules in support of this submission. By dint of Order 1 rule 10(2) this court has powers to grant the prayers sought in this application: to strike out the name of the 1st Respondent in the petition. The petition is premised on an alleged unlawful arrest and detention of the petitioner which took place on 27th June 2023 at Iten Police Station. In paragraph 11 of the petitioners undated supporting affidavit filed alongside the petition, the petitioner alleges that the 1st Respondent was behind his arrest and detention.
6. The applicant urged that it is important to note that the 1st Respondent/applicant is an ordinary civilian and in his sworn affidavit in support of this application, the 1st applicant avers that he did not file or report any complaint before Iten Police station which ordinarily would have necessitated the police to investigate and where circumstances of the case dictate might lead to an arrest of such offender. In this particular case, the petitioner, other than the hearsay that his arrest was orchestrated by the 1st Respondent/Applicant, has not produced any O.B number lodged at any police station in this republic showing that it was filed or made by the 1st Respondent complaining against the conduct of the Petitioner. The Petitioner, as clearly stated under paragraph 11 of his supporting affidavit that he learnt that the 1st Respondent/Applicant was the reason for his arrest attributing his source of information to 'a friendlier police officers' at the Iten police station. To the contrary, the reason for the petitioner's arrest and detention was clearly captured in the lower court record annexed in the petition and marked as "RR1" and "RR1" which application and supporting affidavit sworn by IP Francis Omuse (the 3rd Respondent in the petition) in SPM at Iten Misc. Criminal Application No. E032 OF 2023 stating that the petitioner was detained and was under investigated for the offence of cyber harassment and publication of false information contrary to Sec 27 (1) (a),(b),(c) and read with Sec 27(2) and 23 of the Computer Misuse and Cyber Crime Act. According to the aforementioned affidavit sworn by IP Omuse in the lower courts record shows that alleged offence took place in a social platform- a WhatsApp groups: namely; 'KEIYO GAA and EMC comprising over 250-300 participant's in each of the two social media platforms. The applicant in his supporting affidavit dated 2nd November 2023 averred that he never made a complaint against the petitioner and in fact he came to learn of the happenings later on.



7. Learned counsel for the applicant cited the case of Republic v Commissioner of Police & another ex parte Michael Monari & another (2012) eKLR in support of his submissions and further, that the police have powers under Section 58 of the [National Police Service Act](#) to arrest and detain any person whom they deem has offended the law without instructions or directions from a complainant or any other person other than the inspector General of police as provided for under Sec 8 of the [National Police Service Act](#). The prayers sought by the petitioners related to remedies for alleged unlawful arrest and detention by the said officers of Iten Police station and which orders, if so granted as prayed, can only be enforced against an entity which has, as per the law- the powers to arrest and or detain.
8. Counsel urged that the petitioner has not provided any evidence to show the nexus, other than hear say, that the 1st respondent/applicant should be a party in this suit. Therefore, there is no prima facie case. Secondly, the primary prayers sought by the petitioner in the suit are against alleged illegal arrest and detention, which orders can only be made against an entity which-by law, has the power and the mandate to arrest and detain offenders.
9. Counsel urged the court to allow the application and strike the applicant out of the proceedings.

Respondent's Case

10. The respondent opposed the application vide a replying affidavit dated 4th December 2023. He stated that the application is unmeritorious and further that the applicant has mischievously concealed material facts with the objective of misleading this Court in respect of his participation in maliciously setting in motion the criminal process against him. He set out a recollection of a trail of events as follows; The Applicant herein made/ caused to be made a malicious complaint against the Petitioner at Iten Police Station on the 27th June 2023; Acting on the said malicious and false complaint; Officers from the said Police Station proceeded to arrest him from his home at Kimumu on the night of the 27th June, 2023 and thereafter detained him until 29th June 2023 when he was subsequently presented before the Senior Principal Magistrate Court at Iten; On the said date, the ODPP was granted 4 days to further hold him in custody on the premise that the Investigating officer was still in the process of gathering more evidence. When the matter subsequently came up for Mention at the lapse of the four (4) days granted to the Investigating Officer, the ODPP proceeded to withdraw the Miscellaneous Application and thereafter closed urged the Honourable Court to close the file.
11. The respondent submitted that the police act upon a complaint lodged by a complainant and such complaint forms the bedrock of investigation. Where the complaint lodged with the police turns out to be false and/or malicious, then the complainant becomes a proper Respondent in ensuing actions for unlawful arrests and detention and malicious prosecution. The respondent maintained that the speculation and splitting of hairs as to who may have lodged the complaint of the over 300 members of the WhatsApp groups is unnecessary given that the Complainant is unmistakably identified by the Investigating Officer both under the 2nd Ground upon which the Notice of Motion dated 29th June 2023 is based and the 4th, 5th and 6th Paragraphs of the Affidavit of Francis Omuse; in support of the said Application.
12. Further, that over and above identifying the Complainant through-the aforestated application; the Investigating Officer at paragraph 2 of the supporting Affidavit indicates the OB Number 42/27/6/2023 upon which the complaint was lodged. As to whether the Applicant made the complaint, which question is settled by the 2nd ground to the Notice of Motion Application, the same shall become clearer when the court appreciates all the evidence before it at trial.



Analysis & Determination

13. The following issues arise for determination;
 1. Whether the applicant should be struck out of the suit

Whether the applicant should be struck out of the suit

14. The application is expressed to be brought under Order 1 Rule 10(1),(2), Rule 15(1)(a)(b)(c) and (d) of the Civil Procedure Rules 2010.

15. Order 1 Rule 10 (2) of the Civil Procedure Rules also provides that: -

The court may at any stage of the proceedings, either upon or without the application of either part, 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 defendants, 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.”

16. A clear reading of the same reveals that the court may on its own motion or on application of any party to the proceedings order the striking out of a party, who the court finds was improperly joined. The question that falls for determination therefore is whether the Applicant is a necessary party to this suit and if so, whether any cause of action is disclosed against it.

17. The court in Apex International Ltd and Anglo Leasing Finance International Finance Ltd Vs Kenya Anti-Corruption (2012) oeKLR, the court quoted the words of Mukhtar J. of the Supreme Court of Nigeria in Goodwill and Trust Investment Ltd Will and Bush Ltd (2011) LCN/B820 (SC) as follows;

“it is trite law to be competent and have jurisdiction over a matter proper parties must be identified before the action can succeed, the parties must be shown to the 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 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.”

18. For the sake of the petitioner the law is very clear that his petition shall not be defeated by a misjoinder or a non-joinder of parties. In this respect to tests are set for a person to be a necessary party that, first there must be right to some relief against such party in respect of the matter involved in the proceedings in question. Secondly, it should not be possible to pass an effective decree in the absence of such party. A review of the petition and the affidavit in support by the petitioner I am of the considered view that the petitioner has not met this conditions for the first respondent to be joint as a necessary party in the case at hand. It is also recognized that the court has wide discretionary powers to control the conduct of proceedings where there has been a joinder of causes of action of parties which may embarrass or delay the trial or is otherwise inconvenient for reasons of misjoinder. Broadly speaking the petition bearing sufficient importance to the petitioner should have answered the question in respect of the exacting remedies likely to accrue against the first respondent. I hold the strong view that on the facts and in the circumstances of the case and the nature of the pleadings it will be just and proper struck out the first respondent as a necessary party. The saving clause being that the proceedings will not be a nullity on



the ground of lack of competence of the first respondent in matters of controversy so far as the rights and interests of the petitioner are concerned.

19. In order to determine whether the applicant should not be a party to the suit, this court must delve into some elements of the petition. The petition is premised on the arrest and detention of the petitioner, which he alleges was due to the actions of the applicant. The crux of the petition is that the applicant lodged a complaint against the petitioner regarding the posting of misinformation on two social media platform groups on whatsapp. It follows that in order to determine whether the applicant is properly suited, the court must determine whether this is a fact. The court is well aware that such a determination poses the risk of determining the petition at this stage but, the same is paramount to determining the pending application as well. Every judicial cause of action must therefore involve the following elements: first a primary right possessed by the plaintiff, claimant or petitioner and a corresponding primary duty capable of being enforced against the defendant/respondent for the wrong done or breach of the law for a remedial order to issue in favour of the plaintiff, petitioner or claimant. I think as one counts the features of a litigation it is possible to give a fairly accurate definition of the cause of action. How then is it possible to have inconsistency causes of action? Can one truth be inconsistent with another truth? The petitioner must fashion another cause of action with precision likely to affect the relief obtainable against the first respondent.
20. The petitioner, at paragraph 11 of the affidavit in support of the petition, urged that he was told by a friendlier officer that he was to call the applicant and apologize if he needed his freedom, imputing that the applicant was the cause of all his troubles. Notably, the petitioner did not provide any documentary evidence that corroborated the allegation that the applicant was the complainant who made the complaint. If the information was to be reliable, at the very least, documentary evidence confirming the identity of the complainant or an affidavit sworn by the 'friendlier officer' would have lent credence to the petitioners' allegations. The petitioner alleges that the applicant is identified as the complainant the investigating officer under the 2nd ground in the Notice of Motion dated 29th June 2023 and in the supporting affidavit to the application, which was used to seek for more time to detain the petitioner. However, there is no copy of the said documents filed with the replying affidavit or the petition which therefore leaves the court without any evidence of the same. It is trite that he who alleges must prove and therefore, merely stating the same in the affidavit without any evidence to corroborate the same is insufficient proof. The petitioner has failed to satisfy the burden of proof that the applicant was identified as the complainant.
21. In the premises, the petition clearly discloses no cause of action against the applicant and he is therefore improperly joined. The application dated 2nd November 2023 is allowed and the applicant is hereby struck out of this petition with costs.
22. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 24TH DAY OF JANUARY 2024

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R. NYAKUNDI

JUDGE

In the presence of:

Ms. Keter Advocate for Marimoi for the 1st Respondent

Mr. Kirwa Advocate for the Petitioner

