



**Mugambi v Inspector General of Police (National Police Service) & 2 others;
Angwenyi & another (Proposed Respondents) (Constitutional Petition
E006 of 2023) [2024] KEHC 1587 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1587 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E006 OF 2023**

OA SEWE, J

FEBRUARY 8, 2024

**IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23,
28 & 29 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE CRIMINAL PROCEDURE
CODE, CAP 75 OF THE LAWS OF KENYA**

AND

**IN THE MATTER OF JURISDICTION OF THE HONOURABLE COURT
(ORIGINAL) TO GRANT ANTICIPATORY BAIL PENDING ARREST**

AND

**IN THE MATTER OF VIOLATION AND INFRINGEMENT OF FUNDAMENTAL
RIGHTS AND FREEDOMS AS ENSHRINED IN THE BILL OF RIGHTS**

BETWEEN

PRISCILLA KAGWIRIA MUGAMBI PETITIONER

AND

**INSPECTOR GENERAL OF POLICE (NATIONAL POLICE
SERVICE) 1ST RESPONDENT**

**COUNTY CRIMINAL INVESTIGATIONS OFFICER (C.C.I.O) 2ND
RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

AND

EZEKIEL ANGWENYI PROPOSED RESPONDENT

SANGARA PROPERTIES LIMITED PROPOSED RESPONDENT



RULING

1. Before the Court for determination is the Notice of Motion dated 20th June 2023. It is expressed to be brought by the proposed 4th and 5th respondents (hereinafter, “the applicants”) under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 1 Rule 10(2) and Order 51 of the *Civil Procedure Rules*, 2010. They thereby prayed that:
 - (a) The Court be pleased to issue an order transferring this Petition to either the High Court of Kenya at Malindi or the High Court of Kenya at Nairobi.
 - (b) The Court be pleased to add Ezekiel Angwenyi and Sangara Properties Limited in this Petition as the 4th and 5th respondents, respectively.
 - (c) The costs of the application be borne by the petitioner/respondent.
2. In support of the application, the applicants averred that they entered into a joint venture agreement for the purchase of land in Malindi, in respect of which they retained the services of the respondent. They further averred that, subsequently, the relationship between them and the respondent irretrievably broke down before the conclusion of the transaction; whereupon the proposed 5th respondent/2nd applicant lodged a complaint against the respondent before the Advocates Complaints Commission on 24th October 2022. The complaint is pending hearing and determination.
3. The applicants further averred that they were surprised to learn only recently that the petitioner had filed this Petition, alleging, among other things, that the 1st applicant harassed, threatened, intimidated and embarrassed her, by saying he was going to use the police to teach her a lesson, take away her Practising Certificate and make her wish she was never born; yet they were not impleaded as respondents to the Petition. In the circumstances, the applicants contended that it is necessary for them to be enjoined to this Petition in order to respond to the said allegations, and thereby enable the Court to effectually and completely adjudicate upon and settle all questions involved in the Petition. They added that no prejudice shall be occasioned to the respondent if the orders prayed for are granted.
4. The application was premised on the affidavit of the 1st applicant as well as the affidavit of Amb. Peter Maragia Nyamweya on behalf of the 2nd applicant. In his affidavit, the 1st applicant explained that they entered into a joint venture agreement with the 2nd applicant for the purchase of some 500 acres of land in Magarini Sub-county in Kilifi County; and that to take care of the transaction, they engaged the services of the respondent. The 1st applicant further explained that, by the end of December 2021, they had paid a total of Kshs. 9,622,500/= to the respondent’s firm and were therefore surprised to learn from the vendors that they had been paid Kshs. 3,250,000/= only.
5. The 1st applicant further averred that, after repeatedly asking the respondent to account for the funds and failing, they resolved to terminate her services and firmly requested her not to make any further remittances. In addition, they filed a complaint to the Advocates Complaints Commission; which complaint is yet to be determined. He added that he was recently surprised to learn that the respondent had filed this Petition, alleging that he had harassed and intimidated her in connection with the joint venture transaction, and yet neither him nor the 2nd applicant had been enjoined to the Petition as respondents.
6. Accordingly, the 1st applicant posited that it is necessary that he be joined to this Petition in order to respond to the petitioner’s allegations and to enable the Court to effectually and completely adjudicate



upon and settle all questions involved in the Petition. The 1st applicant added that it is also in the interest of equity and justice that he be added as a respondent.

7. In similar fashion, Amb. Peter Maragia Nyamweya, as a director of the 2nd applicant, deposed that their company got to know of the large tract of land that was up for sale in Magarini Sub-County in Kilifi County; and that, together with Mr. Ezekiel Angwenyi (the 1st applicant), they engaged the respondent's firm to handle the transaction on their behalf as a joint venture. In essence, Amb. Nyamweya reiterated the assertions of the 1st applicant and concluded his affidavit by similarly praying that the Company be enjoined to the Petition as the 5th respondent.
8. The application remains unopposed to date as no response was filed thereto by the respondent or any of the other parties to the Petition. Thus, in accordance with the directions given herein on 2nd May 2023, the applicants filed written submissions dated 7th November 2023, thereby proposing the following issues for determination:
 - (a) Whether the applicants should be added as parties to the Petition;
 - (b) Whether the Petition should be transferred to the High Court of Kenya at Malindi or Nairobi.
9. Although no response was filed to the application, the Court is duty bound to consider it on the merits and make a determination in that regard. In *Gideon Sitelu Konchellab v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR the Supreme Court reiterated that:

"10 ...as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter..."
10. Accordingly, I have perused the application and identified the following two issues for determination:
 - (a) Whether sufficient cause has been made for the joinder of the two applicants to this suit; and,
 - (b) Whether the Petition should be transferred to either the High Court at Malindi or Nairobi.

A. On joinder of the proposed 4th and 5th respondents:

11. First and foremost, it is notable that the applicants approached the Court under Order 1 Rule 10(2) of the *Civil Procedure Rules*. It is now trite that the applicable procedure in constitutional matters is set out in *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, otherwise known as "The Mutunga Rules". Accordingly, I am in total agreement with the expressions of Hon. Musyoka, J. in *Francis Angueyah Ominde & another v Vibiga County Executive Committee Members Finance Economic Planning and 3 others; Controller of Budget and 10 others (Interested Parties)* [2021] eKLR that:
 11. On the matter of the joinder of the 2nd petitioner, it should be pointed out that the constitutional petitions are governed and regulated by *the Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, so far as procedures and processes are concerned. They are not subject to the Civil Procedure Rules, which governs processes that are brought under the *Civil Procedure Act*, Cap 21, Laws of Kenya. So far as procedure is concerned, *the Constitution* of Kenya (Protection of Rights and Freedoms) Practice and



Procedure Rules, 2013 captures the spirit of article 159(2)(d) of *the Constitution*, which is an injunction against constitutional proceedings being hostage to technicalities of procedure, and which enjoins courts to protect and promote the principles of *the Constitution*. The focus is trained on substance rather than process. *The Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 are more flexible compared with the provisions of the *Civil Procedure Rules*, with respect to who may bring proceedings and the manner of initiating the proceedings.”

12. Accordingly, the applicable provision is Rule 5 of the *Mutunga Rules*, which states thus at Sub rules (d) and (e):

- (d) 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 just—
 - (i) order that the name of any party improperly joined, be struck out; and (ii) 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.
- (e) Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents.

13. Hence, the Court of Appeal in the case of *EG v Attorney General; David Kuria Mbote & 10 others (Interested Parties)* [2021] eKLR, reiterated the prerequisites of joinder of a party to be:

- (1) The core of the court’s power to join a party to any proceedings including at the appellate stage, as aptly discussed in *Hamisi Yawa & 36,000 others v Tsangwa Ngala Chome & 19 others* [2018] eKLR, is to bring on board a necessary party for purposes of determining the real issue(s) in dispute. Also, a joinder of a party is not an automatic right, but one which is granted upon exercise of the discretion of the court concerned. Nonetheless, the court exercises such discretion under defined parameters, that is, it must be satisfied that: -
 - a) The intended party has a personal interest or stake in the matter in question; and that interest is clearly identifiable and proximate enough and not merely peripheral.
 - b) The intended party’s presence would enable court to resolve all the matters in the dispute.
 - c) The intended party would suffer prejudice in case of non-joinder.
 - d) The joinder of the intended party will not vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings.

14. Further, the Court of Appeal in *JMK v MWM & another* [2015] eKLR, stated: -

...This Court adopted the same approach in *Central Kenya LTD. v Trust Bank & 4 Others*, CA No. 222 of 1998, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that:

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in



prejudice or injustice to the other party which cannot properly be compensated for in costs.”

15. It is evident from the above cases that joinder as a party is not an automatic right and one must show that they are compliant with the principles outlined in the authorities relied on herein. Further to the foregoing, Rule 2 of the Mutunga Rules has a definition as to who qualifies as a respondent, namely:

a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom.”
16. The applicants seek to be enjoined in the matter herein on the ground that they have been adversely mentioned in the Petition on allegations that they harassed, threatened, intimidated, and harassed the Petitioner. They seek to be enjoined so as to respond to the allegations as they believe their presence will assist the court in effectively determining the suit herein. Hence, I have perused the Notice of Motion dated 1st February 2023 and confirmed that the applicants have been mentioned in paragraphs 1, 2, 3, 7, 8, 9 and 10 of the Grounds set out on the face of the application in connection with allegations of harassment, intimidation, and threats to the petitioner. Similarly, at paragraphs 3, 4, 5, 9, 10 and 11 of the Supporting Affidavit, the same allegations were reiterated.
17. Thus, roundly considered, it is plain that the Petition and the interlocutory application revolve around the property transaction for which the applicants’ retained the legal services of the petitioner. In the premises, sufficient cause for the joinder of the applicants has been demonstrated. It has been shown by the applicants that their presence will enable court to effectually resolve all the matters in the dispute.

B. Whether the Petition should be transferred either to the High Court at Malindi or Nairobi:

18. Again, although the applicants anchored their application on Sections 12 and 15 of the [Civil Procedure Act](#), the applicable provision is Rule 8 of the Mutunga Rules, which provides as follows:
 - (1) Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place.
 - (2) Despite sub-rule (1), the High Court may order that a petition be transferred to another court of competent jurisdiction either on its own motion or on the application of a party.
19. The applicants have asked that the Petition be transferred to Malindi as that is where the cause of action arose. As for Nairobi, their only justification was that it is the place where most of their businesses are situated. They also pointed out that such a transfer will not occasion any prejudice to the parties as the 1st, 2nd and 3rd Respondents have their headquarters in Nairobi. Thus, Nairobi was proposed simply for reasons of convenience on the part of the applicants as well as the respondents.
20. A perusal of the Petition reveals that the alleged violations complained of occurred in Malindi and, that the petitioner’s main office where she alleges the violations occasioned is also in Malindi. The Petitioner has not responded to the application herein and therefore it is not apparent why the Petition was not filed at the High Court Registry in Malindi. Accordingly, it is my considered view, guided by Rule 8 of the Mutunga Rules, that sufficient justification has been made by the applicants for the transfer of the Petition to the High Court at Malindi for hearing and determination. That is the Court within whose jurisdiction the alleged violations took place.
21. In the result, the application dated 20th June 2023 is hereby allowed and orders granted as hereunder:
 - (a) The two applicants, Ezekiel Angwenyi and Sangara Properties Limited, be and are hereby enjoined to the Petition dated 1st February 2023 as the 4th and 5th Respondents, respectively.



- (b) The Petition dated 1st February 2023 be amended accordingly for service on the applicants and the other parties to the Petition within 14 days from the date hereof. Any responses to the Petition as amended to be filed within 14 days of service of the Amended Petition.
- (c) The Petition be and is hereby transferred to the High Court at Malindi for hearing and determination.
- (d) Costs of the application to be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 8TH DAY OF
FEBRUARY 2024**

OLGA SEWE

JUDGE

