



**Lomuro v Co-operative Bank of Kenya Limited; Central Bank
of Kenya (Interested Party) (Commercial Petition 001 of 2023)
[2024] KEHC 7180 (KLR) (Commercial and Tax) (7 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7180 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL PETITION 001 OF 2023
MN MWANGI, J
JUNE 7, 2024
IN THE MATTER OF: ARTICLES 2, 20, 22, 23, 27, 28, 40, 46 & 47 OF
THE CONSTITUTION OF KENYA, 2010
-AND-
IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER THE CONSTITUTION
OF KENYA
-AND-
IN THE MATTER OF: THE UNLAWFUL AND ILLEGAL
ENFORCENMENT OF ECONOMIC AND TRADE
SANCTIONS ISSUED BY THE OFFICE OF
FOREIGN ASSETS CONTROL OF THE US
DEPARTMENT OF TREASURY
-AND-
IN THE MATTER OF: THE BANKING ACT
-AND-
IN THE MATTER OF: THE CENTRAL BANK OF KENYA ACT
-AND-
IN THE MATTER OF: THE FAIR ADMINSTRATIVE ACTION ACT, 2015
BETWEEN



DR MARTIN ELIA LOMURO PETITIONER

AND

THE CO-OPERATIVE BANK OF KENYA LIMITED RESPONDENT

AND

CENTRAL BANK OF KENYA INTERESTED PARTY

(Formerly Milimani Constitutional & Human Rights Petition No. E471 of 2022)

RULING

1. The interested party filed a Notice of Motion application dated 23rd February, 2023 pursuant to the provisions of Regulation 5(d)(i) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013, and any other enabling provisions of the law seeking the following orders -
 - i. Spent;
 - ii. That the Central Bank of Kenya, the interested party/applicant herein, be struck out from the Petition (“the instant proceedings”); and
 - iii. That the costs of the application be provided for.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Kennedy Kaunda Abuga, the interested party’s General Counsel. In opposition thereto, Dr. Martin Elia Lomuro, the petitioner herein, filed a replying affidavit sworn on 17th May, 2023.
3. The instant application was canvassed by way of written submissions. The interested party’s submissions were filed by the law firm of Oraro & Company Advocates on 21st June, 2023, whereas the petitioner’s submissions were filed on 17th July, 2023 by the law firm of Kogweno & Bubi Advocates LLP. When this matter came up for highlighting of submissions on 12th March, 2024, Mr. Wanga, learned Counsel for the respondent informed this Court that the respondent was not opposing the application herein.
4. Mr. Kamara, learned Counsel for the interested party relied on the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, Legal Notice No. 117 of 2013 (the Mutunga Rules) and the *Black’s Law Dictionary*, 8th Edition definition of an “interested party”, and the Supreme Court case of *Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others* [2014] eKLR, and submitted that an interested party is one who has a stake in the proceedings and would be affected by the decision of the Court when it is made either way, hence, the said party must appear to articulate and champion his/her cause. He stated that it is not in dispute that the petitioner has neither sought any orders against the interested party nor has it demonstrated that the interested party has a stake in the proceedings that would be affected by this Court’s decision.
5. Counsel relied on the Court of Appeal decisions in *SCU Departed Asians Property Custodian Board v Jaffer Brothers* [1999] 1 EA 55 at page 68 and *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* [2015] eKLR and stated that the relationship between the petitioner and the respondent arises from a contractual arrangement between them, thus by virtue of the doctrine of



- privity of contract, the interested party is not a necessary party in these proceedings since it has no role to play in the contractual dispute that forms the subject of this petition. In addition, Counsel contended that the petitioner has failed to demonstrate how the prayers sought in this petition would legally affect the interested party, the likelihood of the interested party filing a suit against the parties herein, and that the petitioner admits that no prayer has been sought against the interested party. Counsel submitted that for the foregoing reasons, the interested party's inclusion to these proceedings is unnecessary and without any foundation.
6. Mr. Kamara further stated that in as much as the petitioner alleges that the interested party is the proper agency to authorize the respondent to release the amounts frozen in its Kenya Shillings account, no such reliefs have been sought against the interested party, and in any event, the petitioner in his petition has acknowledged this Court's jurisdiction to authorize the release of such funds by seeking an order of mandamus to compel the respondent to reimburse the petitioner the amounts allegedly withheld. Counsel argued that the issues arising from this petition can be determined by this Court without the involvement of the interested party.
 7. Mrs. Mwangi, learned Counsel for the petitioner submitted that pursuant to the provisions of the Central Bank of Kenya Act and the Banking Act, the interested party is the only body in Kenya authorized to regulate the respondent's business by licensing it to carry out the business of banking, and to endorse on the license such conditions as the interested party considers necessary, advise and direct the respondent if it has reason to believe that its business is being conducted in a manner contrary to, or not in compliance with the requirements of the Banking Act, or of any regulations made thereunder, and impose restrictions on the respondent's business so as to enable the Government of Kenya to meet its obligations under any international treaty
 8. She relied on the Ugandan case of *Departed Asians Property Custodian Board v Jaffer Brothers Ltd [1999] 1EA 55 (SCU)*, and submitted that due to the peculiar facts and circumstances of the matter before this Court, the interested party is a necessary party for the just determination of the issues raised by the Petitioner. Counsel admitted that the petitioner has no cause of action against the interested party and that is why he does not seek any orders against it.
 9. Mrs. Mwangi argued that the petitioner's role in these proceedings will be limited to providing this Court with information on whether the respondent's actions and justification are pursuant to its directive while carrying out its mandate under the Central Bank of Kenya Act or the Banking Act, since it is the only one that has information on the terms and conditions of the respondent's license. That thereafter, this Court will be in a position to aptly determine all questions involved in this matter.
 10. Counsel for the petitioner referred to the case of *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* [2017] eKLR, and contended that the interested party is a necessary party to these proceedings since it needs to explain to the Court whether it is the regulatory agency that is to authorize the respondent to release the monies to the petitioner, and if it is not, then which other regulatory agency has the power to control the respondent's operations with respect to its customers' transactions. Counsel stated that in the event that this petition succeeds, the implementation of the judgment would have an effect on the entire banking industry which is regulated by the interested party. She submitted that for this reason, the interested party has an identifiable stake, legal interest and duty in these proceedings.
 11. In a rejoinder, Mr. Kamara submitted that the petitioner has stated that he wants the interested party to be a party to these proceedings for it to explain whether they are the ones who requested for withholding of the petitioner's funds. Counsel stated that it is however clear that the agency that directed withholding of funds is Western Union and not the interested party. He further stated that the



Access to Information Act provides for access to information on request, thus joining the interested party to these proceedings is an abuse of the Court process,

Analysis And Determination.

12. I have considered the instant application, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the replying affidavit filed by the interested party, and the written submissions by Counsel for the parties. The issue that arises for determination is whether the interested party should be struck out from this petition.
13. In the affidavit filed by the interested party sworn by Mr. Kennedy Kaunda Abuga, he deposed that the reliefs being sought by the petitioner against the respondent arise from a contractual arrangement entered into between the petitioner and the respondent sometime in September 2017, wherein they mutually agreed that the petitioner was to open and operate two accounts with the respondent, namely account numbers 02.....3700 (USD) and 01.....3700 (KSHS).
14. Mr. Kaunda averred that the petitioner's case is that he operated the said accounts seamlessly until 16th December, 2019 when the Office of Foreign Assets Control (OFAC) issued sanctions against him with the effect that the respondent blocked him from operating his USD account number 02.....3700. That the petitioner claims that the respondent informed him that he could only access the funds in his USD account by closing it, and transferring the said funds to his Kenya Shillings (KSHS) account, which he eventually did.
15. That thereafter, the petitioner made 2 transactions, being the transfer of Kshs. 1,000,000/= to Nigeria through Western Union and a transfer of Kshs. 2,250,000/= to Rev. Dr Elizabeth Ann King in Ghana. That the petitioner further claims that in as much as the said transactions were debited from his account, the respondent proceeded to block them, and has never credited the said amount to his account on the grounds that the two transactions were blocked by Western Union pursuant to OFAC Rules, and that said funds would only be refunded with authorization by OFAC.
16. It was stated by Mr. Abuga that the petitioner has expressly admitted at paragraph 50 of the petition that he does not seek any orders against the interested party. In addition, the petitioner has not disclosed any reasonable cause of action against the interested party. He further stated that in view of the objects, powers and mandate of the interested party, the petitioner has not demonstrated the manner in which the respondent has breached banking laws, so as to invoke the regulatory powers and mandate of the interested party.
17. Mr. Abuga contended that the interested party has no interest whatsoever in the instant proceedings hence this Court does not stand to benefit from its joinder to these proceedings. In addition, the petitioner averred that the authorization to freeze his two accounts came from either OFAC, the High Court, the Government of the United States and/or the respondent, and that the interested party was not involved in the said authorization,
18. The petitioner in his replying affidavit deposed that on 22nd December, 2020 he made two transactions from his Kenya Shillings account No. 01.....3700 held at Co-operative Bank of Kenya Limited, being transfer of Kshs.1,000,000/= to Nigeria through Western Union and Kshs.2,250,000/= to Rev. Dr. Elizabeth Ann King in Ghana.
19. He averred that even though the sums of money were debited from his account, the said transactions were stopped/blocked by Co-operative Bank of Kenya Limited (respondent), without any explanation, but the said amounts were not credited back to his account and have not been refunded to date.



20. It was stated by the petitioner that after following up with the respondent, he was informed that Western Union and Co-operative Bank of Kenya Limited's correspondent Bank stopped the transactions based on Rules issued by the OFAC in the United States Department of Treasury, which also required the funds to be blocked and deposited into an account until authorization was obtained from the said regulatory agency. The petitioner deposed that he was also informed that he was not authorized to carry out any cross-border payments since he was sanctioned by the Government of the United States of America through OFAC.
21. That the said circumstances led him to file this petition to protest against Co-operative Bank of Kenya Limited's application of Rules, Regulations and Administrative Directions issued by the Government of the United States of America and OFAC in the United States Department of Treasury, in the management of the transactions in his account with the Co-operative Bank of Kenya Limited.
22. The petitioner contended that the respondent is regulated by the interested party and not OFAC, and that the terms and conditions of the operation of his account are governed by Kenyan law. He stated that for the said reason, it was necessary to join Central Bank of Kenya as an interested party since as the Regulator of the banking business in Kenya, it is able to provide this Court with information on whether the respondent is bound by the laws of the United States of America and specifically, the Rules and Regulations issued by OFAC in the United States Department of Treasury in respect to the transactions in his account at the respondent Bank.
23. The petitioner averred that the interested party will also establish whether the respondent is legally bound to enforce the unlawful economic and trade sanctions issued against him on 16th December, 2019 by OFAC in the United States Department of Treasury by halting transactions and withholding funds from his account with Co-operative Bank of Kenya Limited, and if it is the regulatory agency (interested party) that should authorize the respondent to release the said funds to him.

Whether the interested party should be struck out from this petition.

24. The interested party's position is that it should be struck out of this petition since the said petition does not disclose any reasonable cause of action against it, and that the petitioner has not sought any orders against it, a fact which is admitted by the petitioner. The interested party averred that the petitioner has also not demonstrated that the former has a stake in these proceedings that would be affected by this Court's decision.
25. The petitioner on the other hand contended that the interested party is a necessary party to these proceedings for it is required to provide this Court with information on whether the respondent's actions and justification are pursuant to its directive while carrying out its mandate under the Central Bank of Kenya Act or the Banking Act. The petitioner expounded that this is because the interested party is the only one that has information on the terms and conditions of the respondent's license, which information will enable this Court to aptly determine all questions involved in this matter. The petitioner submitted that the interested party also needs to explain to the Court the Regulatory Agency with the power to authorize the respondent to release the monies in issue to the petitioner, Counsel for the petitioner submitted that the resultant judgment in this petition is likely to have an effect on the entire banking industry which is regulated by the interested party.



26. The instant application was filed pursuant to the provisions of Regulation 5(d)(i) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) which states the following –

“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.”

27. Further, Order 1 Rule 10(2) of the [Civil Procedure Rules, 2010](#) provides as hereunder -

“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.”

28. It is evident that this Court has the jurisdiction and discretion to either have a party improperly before it struck out from the proceedings or have a necessary party joined to the proceedings. An interested party is defined under Rule 2 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) quoted by the Court in the case of [Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others](#) [2015] eKLR as hereunder -

“interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”

29. The guiding principles to be considered when dealing with an application for joinder of an interested party to a suit on the other hand were articulated by the Supreme Court in the decision of [Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others & Michael Wainaina Mwaura \(as Amicus Curiae\)](#) [2017] eKLR with reference to [Francis Kariuki Muruatetu & Another v Republic & 5 others](#) [2016] eKLR as follows:

- (i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral;
- (ii) The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote; and
- (iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”



30. In determining whether the interested party herein should be struck out from these proceedings, this Court shall consider the following elements-
- i. Whether the presence of the interested party in these proceedings will assist this court in the effective and effectual determination of all questions arising in this suit;
 - ii. Whether the interested party herein has any identifiable stake, legal interest or duty in the proceedings; and
 - iii. Whether the interested party herein is likely to suffer any prejudice by participating in these proceedings.
31. It is not disputed that this petition neither discloses any reasonable cause of action against the interested party, nor has any relief been sought by the petitioner as against the interested party. The petitioner contends that the interested party is a necessary party to the petition as its participation will assist this Court in effectively determining the issues arising in the petition as a result of the dispute between the petitioner and the respondent.
32. As was correctly submitted by Counsel for the interested party, the relationship between the petitioner and the respondent is of a contractual nature, which contract the interested party is not a party to. The interested party is also not privy to the terms therein. The facts as outlined by the petitioner is that sometime in December 2020, he made two transactions from his Kenya Shillings account No. 01.....3700 held at Co-operative Bank of Kenya Limited, being transfer of Kshs.1,000,000/= to Nigeria through Western Union and Kshs.2,250,000/= to Rev. Dr. Elizabeth Ann King in Ghana, however despite his account having been debited with the said sums of money, the said transactions were stopped by the respondent, but the money has never been credited to the petitioner's account to date.
33. It was stated by the petitioner that the respondent informed him that Western Union and Co-operative Bank of Kenya Limited's correspondent Bank stopped the transactions based on Rules issued by the OFAC in the United States Department of Treasury, which also required the funds to be blocked and deposited into an account until authorization was obtained from the said Regulatory Agency, and as a result, he filed this petition. The petitioner averred that since the interested party is the Regulator of the banking business in Kenya, it is able to provide this Court with information on whether the respondent is bound by the laws of the United States of America, and specifically, the Rules and Regulations issued by OFAC in the United States Department of Treasury in respect to the transactions in his account at the respondent Bank.
34. I have considered the averments and contestations by the applicant and it is my finding that the issue of whether or not the respondent is bound by the laws of the United States of America and more specifically, the Rules and Regulations issued by OFAC in the United States Department of Treasury in respect to the transactions in the petitioner's account at the respondent Bank, is a matter that can aptly be determined by this Court without the participation of the interested party. The interested party is not a party to the contract between the petitioner and the respondent, thus it cannot speak to the terms thereof and/or the extent of its applicability to the relationship between the said parties.
35. Further, it is my considered view that the respondent is better placed to demonstrate and/or explain to this Court the reason as to why, if at all, it implemented directions issued to it by its correspondent Bank, based on Rules issued by the OFAC in the United States Department of Treasury. Whereas this Court appreciates that the interested party is a regulatory body which regulates the operations of the respondent bank in accordance with the provisions of the Central Bank Act and the Banking Act, any regulations, terms and conditions of the respondent's license, can be easily obtained from the interested



party pursuant to the Access to information Act, without the interested party being a party to these proceedings.

36. The issue of who and/or which regulatory body has the mandate of authorizing the respondent to release the petitioner's funds is also an issue that can be determined without the participation of the interested party in these proceedings. Once this Court determines whether or not the said funds have been legally withheld by the respondent, it has the discretion to issue appropriate orders. In any event, the petitioner in its replying affidavit to the application herein and in its affidavit in support of this petition averred that the respondent informed it that it was its correspondent Bank that stopped the transactions, based on Rules issued by the OFAC in the United States Department of Treasury, and required the funds to be blocked and deposited into an account until authorization was obtained from the said Regulatory Agency.
37. In the said circumstances, this Court finds that the interested party has no identifiable stake, legal interest or duty in these proceedings and its participation is therefore not necessary for the effective determination of the dispute between the petitioner and the respondent. To the contrary, this Court finds that the interested party's participation in these proceedings will cause it to suffer prejudice in terms of Advocates' costs, since it will be forced to engage the services of Counsel to represent it in this matter and file pleadings in answer to the petition. This Court's finding is that there is also no reasonable cause of action against the interested party, and no orders and/or reliefs have been sought against it by the petitioner.
38. This Court finds that the interested party does not have a recognizable stake in these proceedings, and its presence and/or participation in these proceedings will not assist this Court in the effective and effectual determination of all the issues in controversy between the petitioner and the respondent herein.
39. In the end, this Court finds that the application herein is merited. I hereby make the following orders –
- i. That the Central Bank of Kenya, the interested party in these proceedings is hereby struck out from this petition;
 - ii. That the petitioner is hereby directed to forthwith amend his petition in not later than 21 days so as to reflect the changes brought about by this ruling;
 - iii. Costs of this application are hereby awarded to the interested party.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF JUNE 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mrs Mwangi for the petitioner

Ms Kemigisha h/b for Mr. Wanga for the respondent

No appearance for the interested party

Ms B. Wokabi – Court Assistant.

