



**Lalmareny v Natural World Kenya Safaris & another (Constitutional Petition E042 of 2023) [2024] KEHC 12099 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12099 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION E042 OF 2023**

**OA SEWE, J**

**OCTOBER 9, 2024**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19, 22, 23, 25, 27(1), 28, 29(D), 31 & 33 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEEDURE RULES, 2013**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION OF RIGHTS ENSHRINED IN CHAPTER FOUR OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**JULIUS LALMARENY ..... PETITIONER**

**AND**

**NATURAL WORLD KENYA SAFARIS ..... 1<sup>ST</sup> RESPONDENT**

**KENYA ASSOCIATION OF TOUR OPERATORS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before the Court for determination is the Notice of Motion dated 17<sup>th</sup> April 2024. It is expressed to be brought by the petitioner, Julius Lalmareny, under Article 50(1) of the Constitution of Kenya; Sections 1A, 3A and 100 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya; Order 7 Rule 17, Order 8 Rules 3 & 5, and Order 51 of the *Civil Procedure Rules, 2010*, for orders that:
  - (a) Leave be granted to the petitioner to amend the Petition in accordance with the draft Amended Petition annexed to the application.



- (b) The draft Amended Petition be deemed as duly filed upon payment of the requisite filing fees.
  - (c) Leave be granted for the petitioner/applicant to file a further affidavit out of time in response to the issues raised in the respondent's Replying Affidavit dated 13<sup>th</sup> February 2024
  - (d) The costs of the application be in the cause.
2. The application was premised on the grounds that the amendment is necessary to enable the Court effectually and completely adjudicate and settle all questions in dispute in this suit. The petitioner further averred that, at the time of preparation and filing of the Petition, the 2<sup>nd</sup> respondent, Kenya Association of Tour Operators, was not sued through its registered members as required by the *Societies Act*. It contended that it is necessary that the Petition be amended in order to reflect the said position; and that no prejudice will be occasioned to the respondents by the proposed amendment.
  3. The 2<sup>nd</sup> respondent opposed the application vide a Replying Affidavit sworn on its behalf by one of its directors, Humphrey Ndara. It averred that it is registered under the *Societies Act* and is therefore incapable of suing or being sued. It further averred that the petitioner's image was rightfully acquired from Shutterstock, a duly licensed American company offering royalty-free photographs, vectors, illustrations and motion graphics. The 2<sup>nd</sup> respondent deposed therefore that the amendments proposed are a delay gimmick and are calculated to frustrate, delay and derail the expeditious disposal and determination of this Petition.
  4. The application was urged orally on the 27<sup>th</sup> May 2024. Mr. Lenkidi for the applicant relied on the averments set out in the Supporting Affidavit and submitted that amendments are intended to help the Court arrive at a just decision. He relied on *Bosire Ogero v Royal Media Services* [2015] eKLR and HCCC No. 480 of 2017: *Emerge Development Limited v Chestnut Uganda Ltd & another* [2020] eKLR to buttress his submissions.
  5. Mr. Mukuria for the respondents opposed the application contending that the petitioner had the option of amending the Petition without leave before close of pleadings, but chose not to. He argued that, in the absence that the erstwhile advocates had closed down their firm, the attempt by the petitioner to blame his counsel is untenable. The respondents relied on *Harison Kariuki v Blue Shield Insurance Co. Ltd.* They also submitted that the dispute is purely a commercial one in nature and ought not to be entertained by this Court as a constitutional matter.
  6. The application was brought pursuant to Sections 1A, 3A and 100 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya; Order 7 Rule 17, Order 8 Rules 3 & 5, and Order 51 of the *Civil Procedure Rules*, yet 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. ...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.”

7. Accordingly, Rule 3(8) of the Mutunga Rules provides that:

“Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

8. In the instant application, the single amendment sought by the petitioner is to add the words to the effect that the 2<sup>nd</sup> respondent has been “sued through its registered members”. The proposed amendment is therefore innocuous in my careful consideration, considering that in Rule 4(2) of the Mutunga Rules, it is recognized that:

- (2) In addition to a person acting in their own interest, court proceedings under sub rule (1) may be instituted by—
- (i) a person acting on behalf of another person who cannot act in their own name;
  - (ii) a person acting as a member of, or in the interest of, a group or class of persons;
  - (iii) a person acting in the public interest; or
  - (iv) an association acting in the interest of one or more of its members.

9. Moreover, in JMK v MWM & another [2015] eKLR, the Court of Appeal held:

...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.”

10. In the premises, I find merit in the petitioner’s application dated 17<sup>th</sup> April 2024. The same is hereby allowed and orders granted as hereunder:

- (a) Leave be and is hereby granted to the petitioner to amend the Petition in accordance with the draft Amended Petition annexed to the application.
- (b) The Amended Petition be filed and served within 7 days from the date hereof.
- (c) Leave be and is hereby granted to the respondent to file a Further response, if need be, within 7 days of service of the Amended Petition.
- (d) Corresponding leave be and is hereby granted to the petitioner to file a Further Affidavit, if need be, within 7 days of service of the respondent’s response to the Amended Petition.



(e) The costs of the application be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 9TH DAY OF  
OCTOBER 2024**

**OLGA SEWE**

**JUDGE**

