Sarma Enterprises Ltd & another v Superloop Ltd & 2 others; Mugendi & 6 others (Interested Parties) (Petition E412 of 2022) [2024] KEHC 14499 (KLR) (Constitutional and Human Rights) (21 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14499 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E412 OF 2022

LN MUGAMBI, J

NOVEMBER 21, 2024

BETWEEN

SARMA ENTERPRISES LTD ..... 1ST PETITIONER

SARAH MBETI KARINGI ..... 2ND PETITIONER

AND

SUPERLOOP LTD ..... 1ST RESPONDENT

ELIZAPHAN MAINA MURANGUARI ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

HARUN MUGENDI ..... INTERESTED PARTY

LILIAN NGIRICHI ..... INTERESTED PARTY

LUKE NGENYE ..... INTERESTED PARTY

ALFRED SILA ..... INTERESTED PARTY

TERRY NJOKI ..... INTERESTED PARTY

BILLIA MAKENA ..... INTERESTED PARTY

REGINA MWANGI ..... INTERESTED PARTY

RULING

Introduction

1. By a Notice of Motion application dated 7th March 2023 supported by an affidavit of even date, the Applicants who are the Respondents and Interested Parties herein seek orders that:

    i. This Court be pleased to strike out the 1st Petitioner and 2nd Respondent as parties in this suit; and

    ii. The costs for this application be provided for.

Background of the case

2. The genesis of this dispute as stated in the Petition dated 12th August 2022 is that the Petitioners who were members of the Business Network International (BNI Kenya) were un – procedurally removed from the Kenya Charter on 3rd August 2022. For context, the 1st Respondent is the franchise holder of BNI Kenya in East Africa where the 2nd Respondent is the National Director for Kenya. The local Chapter of BNI Kenya called the Mavuno Chapter, is where the Petitioners membership was terminated.

Applicants' Case

3. The Applicants' through the 1st Respondent's Director, Elizaphan Maina Muraguri, depone that the Petition does not disclose any cause of action against him and the Interested Parties. He notes that he has been sued in his personal capacity and joined by virtue of the 1st Respondent.

4. He as well argues that there is a misjoinder of parties in relation to himself and the 1st Petitioner. For this reason, he urges the Court to strike out his name and that of the 1st Petitioner from the Petition as no cause of action has been brought against them.

Petitioners/Respondents' Case

5. The Petitioners herein opposed the Applicants application in two sets of grounds of opposition dated 19th September 2023 and 8th March 2024.In the first set, the application is opposed on the premise that:

    i. The Application is misconceived and bad in law as the issues raised herein were raised during the hearing of the Respondents' Preliminary Objection dated 22nd August 2022 and by a Ruling dated 7th October 2022.

    ii. The Application is misconceived and bad in law as the 1st Petitioner is a legal person in the eyes of the law and as such sui juris, with corporate personality and capacity to sue and be sued in its own name. Rightfully the 2nd Respondent the Director of the 1st Respondent can rightfully be sued and as such suing the 2nd Respondent violates no legal provision of law.

    iii. The Respondents/Applicants' notice of motion is frivolous, vexatious and an abuse of the court process meant to frustrate the hearing of the main Petition.

    iv. The Application is an abuse of the court process, a lame tactic meant to prolong, elongate and delay the hearing of this matter and as such ought to be dismissed, with costs to be borne personally by the 2nd Respondent.

v. The Application is misconceived and bad in law and an abuse of the court processes as the same is full of red herrings meant to mislead this court into issuing orders while the same is unmerited.

vi. In the circumstances, the Respondents'/Applicants' application is a waste of the court's valuable time and the orders or prayers sought therein is an abuse of the Court process, vexatious, mischievous and a proper candidate for dismissal and or striking out with costs.

vii. The Petitioners therefore pray that the Respondents'/Applicants' application be dismissed with costs.

6. Further that:

i. The Application is frivolous, vexatious and an abuse of the court process as the issue of joinder was addressed by Lady Justice M. Thande at paragraph 27 of the Ruling dated 7th October 2022.

ii. The Respondents'/Applicants' application is an abuse of the court process and forms part of a strategy to prolong the hearing and determination of the Petition.

iii. The matter has never proceeded despite the matter being certified urgent on 17th August 2022 by Lady Justice H.I. Ong'udi, it has been 2 years since the matter was certified urgent.

iv. The Respondents/Applicants have willfully neglected to respond to the Petition since it was filed in August 2022 and should not be allowed to misuse court processes to avoid the consequences of their willful negligence.

v. The Application herein is misconceived and bad in law as the 1st Petitioner/Respondent is a correct party in this Petition and the Respondents/Applicants cannot purport that the 1st Petitioner/Respondent has no cause of action against the Respondents/Applicants.

Applicants' Submissions

7. The Applicants through Njeru Nyaga and Company Advocates filed submissions dated 6th March 2024 in support of this application.

8. Counsel commenced by stating that misjoinder of parties is an abuse of the Court process. The Petitioners' misjoinder was also stated to be apparent in the case of the Attorney General where this Court directed the Petitioners to withdraw their case against the Attorney General. According to Counsel this is the same scenario in the case of the 1st Petitioner and the 1st Respondent.

9. In the 1st Petitioner's case, it was submitted that only natural persons can become members of BNI. On the 2nd Respondent's part, it was submitted that he is the Director of the 1st Respondent and not a member of BNI. Moreover, that the 2nd Petitioner had no cause of action against him at a personal level and only sued by virtue of being the 1st Respondent's Director which has legal capacity to be sued on its own.

Petitioners/Respondents' Submissions

10. On 8th March 2024, Kamuti Waweru and Company Advocates filed submissions for the Petitioners. Counsel on why the two parties are properly joined in this suit submitted that the 1st Petitioner/Respondent is a Limited Liability Company while the 2nd Respondent is a Director at the 1st Petitioner's company. Additionally, that both are members of the Mavuno Chapter (BNI-Kenya). It is

further stated that the 1st Petitioner/Respondent joined BNI Kenya after the successful vetting by the 2nd Respondent/Applicant's predecessor BNI East Africa Ltd.

11. Moreover, that the Terms of service of BNI expressly state that one can only be a member on behalf of a company, organization, government, or other legal entity. Considering this, Counsel submitted that the parties are properly joined in this suit.

12. Reliance was placed in Apex International Ltd and Anglo Leasing and Finance International Finance Ltd v Kenya Anti-Corruption Commission (2012) eKLR where it was 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 must be shown to be proper parties whom rights and obligations arising from the cause of action attach."

13. Counsel furthermore submitted that the issue of the 1st Petitioner/Respondent's not being a natural person eligible to be a member of the 1st Respondent had already been adjudicated upon by Hon. Lady Justice M. Thande in the Ruling dated 7th October 2022 on the Respondents Preliminary Objection. It is argued therefore that the Applicants application is an afterthought and an attempt to delay justice.

Analysis and Determination

14. The is a singular issue for determination in this Petition, which is:

> Whether or not this Court should strike out the 1st Petitioner and the 2nd Respondent from the instant Petition.

15. The law on joinder of parties in constitutional petitions is provided for in *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Rule 5 provides as follows:

Addition, joinder, substitution and striking out of parties.

5. The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties-

   a. Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties.

   b. A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.

   c. Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.

   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.

16. Addressing this issue in Speaker of the National Assembly v Centre for Rights Education & Awareness & 7 others (Civil Appeal 148 of 2017) [2019] KECA 655 (KLR) (5 April 2019) (Judgment) the Court of Appeal opined as follows:

> " 62. ...Article 22 of *the Constitution*, which provides for enforcement of the Bill of Rights, obliges the Chief Justice to make rules of procedure to enable parties like the 1st and 2nd respondents, who allege that their rights under *the Constitution* have been denied, violated or infringed, to access the court for redress. Article 22(3) specifically demands that those rules shall ensure that formalities are kept to a minimum, to the extent of admitting proceedings on the basis of informal documentation. Pursuant to the above constitutional provision, the Chief Justice made *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 whose overriding objective is, among others, to facilitate access to justice to all persons and to advance the realization of the rights and fundamental freedoms enshrined in the Bill of Rights as well as the values and principles of *the Constitution*. Rule 5 of the rules addresses the issue of non-joinder and misjoinder of parties... Under the rules, a petition for enforcement of fundamental rights cannot be defeated merely because of misjoinder or non-joinder and the court is enjoined, as much as possible, to hear and determine the substantive dispute."

17. In like manner, the Court of Appeal in William Kiprono Towett & 1597 Others v Farmland Aviation Ltd & 2 Others (2016)eKLR in this regard observed as follows:

> " Perusal of the respondent's respective statements of defence reveals that the preliminary objections raised were multi-faceted so to speak, with the larger part comprised of misjoinder... We are of the considered view that the preliminary objections raised by the respondents did not raise any pure point of law... Even if for a moment, and for arguments sake, we were to take the subject of misjoinder as a pure point of law, the veracity of the respondent's pleadings in this regard cannot be vouched for in the absence of a trial. Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit."

18. On the factors to consider before striking out a party, the Court in Kepha Marita Okemwa suing as the personal representative of the estate of Johnsom Okemwa Nyakundi v Mega Choice Limited & another (2021)eKLR discoursed as follows:

> " 12. From the passage above, it is clear 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. In the exercise of that discretion, the court must as a matter of cause, act according to reason and fairness and not according to its whims and caprice.

13. The question that falls for determination therefore is whether the 2nd Defendant is a necessary party to this suit and if so, whether any cause of action is disclosed against it.

14. The power to strike out a party from a suit should be approached with caution. This court has to assess whether or not there is a prima face case against the 2nd Defendant……"

19. The Court went on to note that:

" …I am of the view that the merits and demerits of the claims against the 2nd Defendant cannot be summarily decided through this application.

16. In so holding, I am guided by the wise words of Madan. J.A in the case of DT Dobie and Company (K) Ltd vs Joseph Mbaria Muchina& Another (1982) KLR 1 wherein he stated that-;

"The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case."

20. Addressing a comparable application and echoing the caution discussed above, the Court in Pinnacle Projects Limited & 3 others v Beatper Enterprises Limited & 4 others (2016) eKLR stated as follows:

" With regard to the alternative prayer that the 2nd,3rd and 4th Plaintiff's case against the Defendant's should be struck out, it is my opinion that whether or not there was any contract, written or oral between the said Plaintiffs and the 1st Defendant is a question that cannot be determined at this juncture.

I think that to ascertain this at this stage the court would be required to go into the rigorous exercise of trying to determine whether the Plaintiffs have a proper case against the 1st Defendant by assessing the evidence in place.

This in my view is premature as evidence can only be tendered at the trial…Further, I am of the opinion that the whether or not the 1st Defendant is liable for the purported actions that it is being accused of, namely not upholding its end of the bargain in the oral agreements, should essentially be controverted by way of a Defence."

21. Equally, in Motaung v Samasource Kenya EPZ Limited t/a Sama & 2 others (Petition E071 of 2022) [2023] KEELRC 320 (KLR) (6 February 2023) (Ruling) the Court opined as follows:

" 117. The crucial question is whether the petitioner's case against the 2nd and 3rd respondents should be dismissed at this stage… While striking out the petition against the 2nd and 3rd respondents is one of the options available to the court, as part of procedural justice, it would leave certain questions unanswered, perhaps to the detriment of the petitioner. Moreover, the court is inter alia enjoined to administer justice expeditiously and without undue regard to procedural technicalities.

118. The courts understanding of the foregoing is that while procedure is an elemental component in the administration of justice, substantive justice is the ultimate goal unless the procedural deficiency is sufficiently grave to render substantial justice unattainable."

22. Guided by the above authorities, I am also of the humble view that at this juncture, the Court has not evaluated the entirety of the facts that comprise the Petitioners grievances against the Respondents and thus it would not be prudent to order any of the Parties struck out at this juncture.

23. The claim that only natural persons can be members of BNI (Business Network International) hence the 1st Petitioner is incapable of suing because it is not a natural person demonstrates a lack of understanding as the purpose of a Constitutional Petition. The present dispute hinges on the violation of *the Constitution* touching on the manner the Petitioners membership was terminated. That termination is to be weighed against the Constitutional standards or safeguards. Under rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013) "person" includes an individual, organization, company, association or any other body of persons whether incorporated or unincorporated.'

24. On the other hand, "Petitioner" means "Any person who institutes proceedings or cross- petitions under these rules and for purposes of cross-petition includes cross-petitioner"

25. Manifestly, a Petitioner for purposes of instituting a Petition, includes 'an organization, association or any other body of persons whether incorporated or unincorporated'.

26. Under Article 22 (1) every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.

27. Any rule of an organization that restricts or can be interpreted as barring 1st Petitioner from filing a Petition on violation of *the Constitution* or participating in such proceedings is thus null and void and of no legal effect. The purported rules of the 1st Respondent cannot thus be invoked to deny the 1st Petitioner standing before this Court on account that it is an unnatural person.

28. Moreover, this is a matter which in my view it would be imprudent to strike out these parties at this stage unless and until the Court has had the benefit of listening to the full facts to be able to decide on the matter substantively as right now, the full extent the relationship and how the same was administered has not been fully disclosed.

29. For reasons aforesaid, I reject and dismiss the application accordingly. All the Parties remain in the Petition until the matter is determined on merits.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2024.

L N MUGAMBI

JUDGE