



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

CIVIL SUIT NO. E004 OF 2021

HON. ONESMUS MUTHOMI NJUKI.....PLAINTIFF/RESPONDENT

-VERSUS-

THE MEDIA MECHANICS LIMITED.....DEFENDANT

-AND-

DAVID MZUNGU, MERCY KENDI NJERU (jointly suing on behalf of the trustees of UPPER EASTERN

MEDIA OWNERS ASSOCIATION..... INTENDED INTERESTED PARTIES/APPLICANTS

R U L I N G

Introduction

1. Before this Court is the Notice of Motion Application dated 31st May 2021 filed by the Intended Interested Parties. The application was filed under Certificate of Urgency and is brought under **Sections 1A, 1B(1)(a) and 3A of the Civil Procedure Act (Cap 21 of the Laws of Kenya); Order 1 Rule 10(2), (4) and 14 of the Civil Procedure Rules 2010; and Articles 3(1), 22(1), 34, 35(1)(b), 10(2)(c), 129, 174(a) and 232 (e) and (f) of the Constitution of Kenya 2010**. The application is supported by the affidavit of Mercy Kendi Njeru sworn on 31st May 2021.

2. This Application stems from a defamation suit initiated by the Plaintiff, Hon. Onesmus Muthomi Njuki. The suit is brought against the Defendant for allegedly publishing, posting, and circulating defamatory statements which refer to the Plaintiff. It is the Plaintiff's case that the said words used in the said publications are false, tinged with malice, and intended to injure his character and reputation.

3. The Applicants, David Mzungu and Mercy Kendi Njeru, are stated to be authorized officials of the Upper Eastern Media Owners Association (herein referred to as the "Applicant Association") holding the positions of Chairperson and Secretary, respectively. They seek to be joined as interested parties in the suit herein.

The Applicants' Case

4. The application is premised on the ground that the Applicant Association is an umbrella body constituted of various media outlets/houses of which the Defendant is a member. The Applicants contend that their interests as well as those of all the other members of the Applicant Association necessitate the Applicants' participation in the proceedings herein. It is their case therefore that they ought to be joined in the instant suit so as to safeguard their interests.

Respondents' Case

5. The Application is not opposed by the Defendant. It is however opposed by the Plaintiff through the Replying Affidavit of Hon. Onesmus Muthomi Njuki, sworn on 6th June 2021. The Plaintiff/Respondent contends that an action for defamation is a purely personal action and as such, the proper person to be sued as a defendant is the person who published the defamatory words or caused them to be published. The Plaintiff/Respondent state that his case is against the Defendant herein and no one else. The Respondent further state that the Applicants' contention that they are vicariously responsible for the actions of the Defendant has no basis because the Plaintiff/Respondent has not brought any action against them and does not hold them liable.

6. According to the Plaintiff, the Defendant is a juristic person capable of suing and being sued while the Applicant Association is an

unincorporated body that cannot sue in its name. The Plaintiff/Respondent further contend that if the Defendant considers the Intended Interested Party responsible for any of the actions complained of, then the Defendant ought to take out a third-party notice against the Intended Interested Party.

Issue for Determination

7. The main issue arising for determination in the present application is whether the intended interested party has sufficiently demonstrated that it deserves to be admitted to these proceedings as an interested party.

Analysis

8. Rule 7 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** (the “**Mutunga Rules**”) provides as follows:

“1. A person with leave of the Court, may make an oral or written application to be joined as an interested party.

2. A court may on its own motion join any interested party to the proceedings before it.”

9. Rule 2 of the **Mutunga Rules** defines an “**Interested Party**” as:

“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.”

10. The term “interested party” was similarly defined in the case of **Francis Kariuki Muruatetu and Another v Republic & 5 Others**[2016] e KLR which cited as an authority the case of **Trusted Society of Human Rights Alliance v. MumoMatemu & 5 Others**. **Supreme Court Petition No. 12 of 2013, [2014] eKLR** where the court set out the criteria for enjoinder of a party as an interested party by finding as follows:

“One must move the Court by way of a formal application. Enjoinder is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

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.

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.”

11. An interested party is one who has a stake in the proceedings, though he was not party to the cause *ab initio*. He is one who will be affected by the decision of the Court when it is made, either way. The Court should not act in vain by enjoining a party that clearly would have no interest in the subsequent proceedings.

12. In **Skov Estate Limited & 5 others v Agricultural Development Corporation & another** [2015] eKLR Justice Munyao Sila in a persuasive decision stated the following in dismissing an application for the applicants to be enjoined to the suit because they purchased the suit property from the plaintiffs’ person;

“In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation. Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in a suit as interested party.

In other words, there needs to be a demonstration that the interest of the person goes further than “merely being affected” by the judgment or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not enjoined, the court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another. A joinder may also be allowed if the intended interested party has a claim of his own, which in the circumstances of the matter, needs to be tried, or is convenient to be tried alongside the claims of the incumbent plaintiff and defendant. The threshold for joinder of an interested party should not be too low, or else, this is prone to open doors for busybodies to be joined to proceedings, merely to spectate or confuse the issues in the matter. Apart from the above, whether or not to enjoin a person as an interested party, must be looked at within the context and surrounding circumstances of each particular case.

13. This court should be guided by the provisions that the application is brought under. I shall therefore start by looking at the said provisions. **Sections 1A, 1B(1)(a) and 3A of the Civil Procedure Act (Cap 21 of the Laws of Kenya)** provide as follows:

“1A. Objective of Act

- 1. The overriding objective of this Act and rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.**
- 2. The court shall, in the exercise of its power under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).**
- 3. A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”**

14. The application further relies on the provisions of Order 1 Rule 10(2), (4) and 14 of the Civil Procedure Rules 2010 which provide as follows:

“[Order 1, Rule 10]. Substitution and addition of parties

(1) ...

(2) 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.

(3) ...

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.”

15. In my view, the above provisions do not apply in this case as the instant application is not for the substitution of the parties but rather for the intended interested party to be enjoined in the suit.

16. In Marigat Group Ranch & 3 others v Wesley Chepkoiment & 19 others [2014] eKLR, the application before court was for prayers filed by 110 persons seeking to be enjoined as interested parties and Justice Munyao Sila was of the view that;

“For purposes of one who wants to be enjoined as an interested party, I think, that such person needs to fit himself into the catch words "whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit..." This is the same position I took in the case of *Joseph Leboo v Director, Kenya Forest Service & Others (Eldoret ELC No 273 of 2013)*.

It should be appreciated that an interested party is not strictly plaintiff or defendant. The contest in a suit is between plaintiff and defendant and if any person has a claim over the subject matter, then such party needs to apply to be enjoined and considered as plaintiff or defendant, and not as interested party. An interested party would be a person who has a close connection to the subject matter of the suit yet not claiming any rights over it.....

It follows therefore that applications seeking to join proceedings as interested parties ought to be handled with caution so that a person does not come to a suit, disguised as an interested party, while all along he/she wishes to agitate rights of his/her own over the subject matter of the suit.”

17. The present application is also brought under the following constitutional provisions:

“Defence of this Constitution.

3. (1) Every person has an obligation to respect, uphold and defend this Constitution.

National values and principles of governance.

10. (1)...

(2) The national values and principles of governance include—

(a) ...

(b) ...

(c) good governance, integrity, transparency and accountability;

Enforcement of Bill of Rights.

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.

Freedom of the media.

34. (1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33 (2).

(2) The State shall not—

(a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or

(b) penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.

(3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that—

(a) are necessary to regulate the airwaves and other forms of signal distribution; and

(b) are independent of control by government, political interests or commercial interests.

(4) All State-owned media shall—

(a) be free to determine independently the editorial content of their broadcasts or other communications;

(b) be impartial; and

(c) afford fair opportunity for the presentation of divergent views and dissenting opinions.

(5) Parliament shall enact legislation that provides for the establishment of a body, which shall—

(a) be independent of control by government, political interests or commercial interests;

(b) reflect the interests of all sections of the society; and

(c) set media standards and regulate and monitor compliance with those standards.

Access to information.

35. (1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

Principles of executive authority.

129. (1) Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution.

(2) Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their wellbeing and benefit.

Objects of devolution.

174. The objects of the devolution of government are—

(a) to promote democratic and accountable exercise of power;

Values and principles of public service.

232. (1) The values and principles of public service include—

(a) ...

(b) ...

(c) ...

(d) ...

(e) accountability for administrative acts;

(f) transparency and provision to the public of timely, accurate information;”

18. The foregoing legal provisions and persuasive decisions set out the correct legal position with regard to joining interested parties to a suit. It thus follows that this court is called upon to determine whether the Applicant Association herein has shown:

- a. an identifiable interest or stake in the subject matter or in its outcome;
- b. the prejudice it would suffer if not enjoined as a party.

Applicant’s interest in the matter

19. The Applicant Association identifies itself as an umbrella body constituted of various media houses within the Upper Eastern Region of Kenya (covering Tharaka Nithi, Embu, Meru and Isiolo counties). The Defendant is incorporated as a limited liability company and is stated to be a member of the Applicant Association. The Applicant contends that this application is in line with the association’s objective of defending media freedom and the right of free speech.

20. The freedom of expression is secured under Article 33 of the Constitution and for it to be limited, the limitation must fall within the scope and ambit of the provisions of Article 24 of the Constitution. The core question for determination in the main suit is whether or not the elements of defamation have been proved against the Defendant. In my view, enjoining the Applicants herein will not assist in the determination of that question. An action for defamation is purely a personal action between the person defamed and the person alleged to have been published defamatory words.

21. According to the Applicants, the Applicant Association owes a duty of care to the Defendant and is vicariously responsible for the securing, and ensuring protection of the Defendant’s rights, overall interests and wellbeing. It is further the Applicant’s contention that the Defendant and all other member of the Applicant association operate in one common geographical and business environment, tap their business sources from the same realm and have generally shared values and business interests and that their business operations are determined, influenced and affected by the same factors and dynamics. The Applicant thus aver that it is pivotally positioned and will render crucial information that will offer critical value for the expeditious determination and settlement of the dispute herein.

22. It is further the Applicant’s contention that their participation in the proceedings herein is essentially critical and necessary because the proceedings and any determinations thereof will most likely have a substantial bearing on all members of the Applicant Association and/or set a precedence with the capacity to affect the operations and interests of virtually all other members of the Applicant Association.

23. In opposing the application, the Respondent has attacked the document titled ‘Authority to Plead/Execute Document’ which the Applicants have annexed to the application. The Plaintiff/Respondent argues that application has not been properly brought before this court because the said document is allegedly defective. The application has been brought by two officials of the Application Association on behalf of the rest and it is the Plaintiff’s/Respondent’s contention that the authority to swear the application should have been executed by all officials of the Applicant Association who should have given their authority in writing. The Plaintiff/Respondent further point out that the said authority is only signed by one person whose designation is not disclosed.

24. A look at the document referred to shows that the same contain two signatures and as rightly put by the Respondent, the document does not disclose the positions held by the people who signed the same. A perusal of the court record confirms that a meeting was held by the management committee of the Applicant Association on 24/05/2021. As per Minute 3/5/21 of the said meeting, it was resolved, inter alia, that Mercy Kendi Njeru, the secretary of the Association, was authorized by the management committee to “sign any required documents and correspondence regarding the case on behalf of the [Applicant] Association. While the citation of this case is not given in the minutes of the meeting, the parties herein have been correctly identified. Present in the meeting were David Mzungu (Chairperson); Nathan Mucena (Vice Chairperson); Mercy Njeru (Secretary); Cedrin Kagwiria (Vice Secretary) and Loyd Nkonge (Treasurer). The minutes of meeting were then confirmed and signed by the Vice Secretary (on behalf of the Chairman) as well as the Secretary of the Applicant. In my view, the authority to plead forms part of “any required documents... regarding the case” and was consequently properly signed by the secretary of the association.

25. As regards their personal interest in the proceedings herein, the Applicants contend that its mandate as per its constitution is, *inter alia*, "To advocate, promote, ensure, facilitate and/or aide and give support for the protection of the welfare, interests and rights of all members." Although the said constitution was never annexed to the application, the Applicants contend that the interests of the defendant are substantively embodied in the role of the Applicant Association as the umbrella body of all media practitioners in the Upper Eastern region of Kenya. In my view, the Applicants have only merely stated that they have an interest in these proceedings. They have however not clearly demonstrated how these proceedings have affected or will affect the other members of the association.

26. See **Skov Estate Limited & 5 others v Agricultural Development Corporation & another (supra)**.

A party wishing to be joined in a suit as an interested party must demonstrate he has a definite interest in the matter which is clearly stated and its presence is therefore necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved. As such mere claim of interest is not sufficient a party must convince the court that its presence will assist the court in determining the issue in dispute and that the party will suffer prejudice if it is not joined. To my mind this has not been demonstrated

27. In the circumstances, I opine that the application should fail under this head. The mere fact that a party to a suit enjoys membership in an association does not by itself warrant the admission of such an association in a case. Being a case of alleged defamation, I am of the view that this court will be able to determine the matter between the Plaintiff and the Defendant without having to enjoin the intended interested party. Consequently, this court should then consider whether the Applicants have disclosed any prejudice that they will suffer if the application is disallowed.

Prejudice likely to be suffered in the case of non-joinder

28. The Applicants contend that the other parties to the suit will suffer no prejudice if the Applicant Association is enjoined as a party in the proceedings hereof. In their submissions, the Applicants have addressed the issue on possibility of prejudice arising against the Plaintiff if the application is allowed. They submitted that the possibility of the application delaying the determination of the matter is unfounded as the Applicant does not intend to run a parallel process in the matter.

29. As it was held in the binding decision in **Francis Kariuki Muruatetu and Another v Republic & 5 Others (supra)**, **a party seeking to be enjoined as an interested party has to demonstrate the prejudice it stands to suffer if not enjoined. It is not for the applicant to negate the possibility of prejudice to be suffered by the principal parties if the application is allowed. As noted above, the Applicants have failed to demonstrate how the orders sought in these proceeding will affect the Applicant. Association or any of its members. It is therefore my view that the application also fails under this head.**

Conclusion

30. In conclusion, it is my view that the applicant has not made out a case for joinder in line with Rule 2 of the *Mutungu Rules* which defines an interested party as one with identifiable stake, legal interest, or duty in the proceedings. However, as it was held in the case of **Francis Kariuki Muruatetu and Another v Republic & 5 Others (supra)**, **the power of a court to join a party to a suit as an interested party is discretionary in nature. It is trite that the court's discretion must be exercised fairly and judicially.** Having considered the submissions and the grounds in support of the application and supporting affidavit, I find that the proposed interested party has not demonstrated the personal interest or stake it has in the matter before this court. The applicants have not met the threshold of being joined in the suit as interested parties. I dismiss the application with costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 1ST DAY OF JULY, 2021

L. W. GITARI

JUDGE