



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.90 OF 2015

BETWEEN

SAMUEL MUIHIA KARIUKI & 26,248 OTHERS.....PETITIONERS

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY OF

CO-OPERATIVE DEVELOPMENT & MARKETING.....2ND RESPONDENT

THE GOVERNOR-CENTRAL BANK OF KENYA.....3RD RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY OF FINANCE.....4TH RESPONDENT

THE PRINCIPAL SECRETARY, OFFICE OF THE PRESIDENT,

MINISTRY OF INTERNAL SECURITY & CO-ORDINATION OF

NATIONAL GOVERNMENT.....5TH RESPONDENT

RULING

Introduction

1. The Petition herein was filed on 11th March 2015 and the Petitioners claim to be officials and members of the National Pyramid Scheme Victims Initiative (NPSVI). They are also allegedly victims of a financial scam popularly known as the Pyramid Scheme where they lost Kshs.4,152,008,342 in 2006/2007.
2. In the Petition aforesaid, they have sought the following orders:

***“1) That the Respondents owed a duty of care under statute and/or common law and/or equity and the Constitution, to the Petitioners, to regulate the entities and outfits which it had registered and therefore legitimised to ensure that they did not become agents of perpetration of deceit, frauds and money laundering crimes on unsuspecting citizens.*”**

2) ***An order for account and proportionate distribution among the Petitioners of all the monies which had been deposited by them in the various banks and financial institutions as set out in this Petition, and were remitted to the 3rd Respondent on directions.***

3) ***An order directed at the Respondents jointly/severally to make good, if necessary, any shortfalls of money currently held by the 3rd Respondent on proven losses suffered by the Petitioners.***

4) ***An order for refund of expenses incurred by the Petitioners in the nationwide collection of fraud data; an operation which should rightly have been undertaken by the Respondents as recommended by a Task Force set up by the 2nd Respondent in 2009.***

5) ***An order for modalities to be put in place by the Respondents to enable peaceful and systematic refund of the money recovered by the Petitioners, who have previously provided the bank account numbers to the 4th Respondent, who had indicated that he was prepared to do the refund.***

6) ***An order for costs and interests to be paid to the Petitioners for the duration their money has been impounded.***

7) ***Any other relevant and appropriate orders and/or reliefs directed at the Respondents jointly/severally, and in favour of the Petitioners, to bring this matter to an amicable conclusion.”***

3. The 3rd Respondent, Central Bank of Kenya was sued for reasons set out at Paragraph 5 of the Petition wherein it is averred as follows:

“The fraudulent national operation was brought to an end by an order made by the 3rd Respondents and directed at the banks and other financial institutions that the accounts operated by the outfits be closed. Without this intervention, the outfits, being legally registered, could have continued with their fraudulent business to this day, this confirming the responsibilities of the Respondents, in preventing what happened from the beginning.”

4. Before the Petition was heard, the 3rd Respondent by a Notice of Motion dated 25th May 2015 seeks orders that:

“1) That the 3rd Respondent be struck out from the Instant Petition.

2) That in alternative to prayer 1 above the Petitioners’ Claims against the 3rd Respondent be struck out.

3) That the costs of this application and the suit be awarded to the Petitioner.”

3rd Respondent’s Case and Submissions

5. In a supporting Affidavit sworn on 25th May 2015, a Further Affidavit sworn on 22nd October 2015, both by Kennedy Abuga and in Submissions filed on 3rd February 2016, it is the 3rd Respondents case that the Petition as against it is misconceived, frivolous, vexatious and incomprehensible because firstly, the Petition discloses no cause of action against it.

6. Secondly, that it is founded on generalised complaints without any focus on fact, law or the Constitution. It also consists of mere generalities and it is unclear what constitutional rights have been infringed, violated or threatened with infringement or violation.
7. Thirdly, that the pyramid schemes were neither licenced nor regulated by the 3rd Respondent and therefore it could not exercise any regulatory mandate over them. In any event, that the Petitioners dealt with the pyramid schemes entities within certain contractual parameters which the 3rd Respondent was not privy to.
8. Fourthly, that the Petitioners never contacted the 3rd Respondent on any issue relating to the pyramid schemes and all evidence available points to the fact that they knew that the entities operated outside the mandate of the 3rd Respondent.
9. Fifthly, that no funds from the pyramid schemes were ever transferred to it and the fact that its Banking Fraud Investigative Department (BFID) dealt with some of the complaints received from victims of the pyramid scheme scam did not mean that it was in receipt of any moneys from Commercial Banks where the Petitioners had made their deposits. That the BFID in its investigations indeed confirmed that fact.
10. On matters of the law, the 3rd Respondent while relying on **Mumo Matemu v Trusted Society of Human Rights Alliance and 5 Others [2013] eKLR** argued that where a party files a constitutional petition in abuse of the Court process, the Court must reject it at the threshold.
11. Further, while relying on **Trust Bank Ltd v Amin Company Ltd and Anor [2000] KLR 164**, it argued that a frivolous action is one without substance, is groundless or fanciful and ought to be struck off.
12. That the present Petition for the above reasons therefore must be struck off.

Petitioner's Case and Submissions

13. The Petitioners responded to the Application under consideration by filing Grounds of Opposition on 15th December 2015, Replying Affidavits all sworn on 2nd September 2015 by Kennedy Oyugi Oyieke, Margaret Muthoni Mwaniki and Bernard Muchiri Mwati as well as written Submissions and List of Authorities filed on 8th February 2016.
14. In a nutshell, their case is that their Petition is properly before this Court and that they have specifically pointed out that all their assertions against the 3rd Respondent were based on findings made in the Report of the Taskforce on the Pyramid Schemes presented in 2009 to the 2nd Respondent.
15. Further, that the 3rd Respondent and the other Respondents committed a misfeasance by failing to protect and supervise the financial market and institutions resulting in massive losses to the Petitioners during the years 2005 – 2007. That contrary to the 3rd Respondent's assertions, some of them had approached the BFID for their losses to be made good but they never received just satisfaction.
16. In their Affidavits, Kennedy Oyugi Oyieke, Petitioner No.26,862, Margaret Muthoni Mwaniki, Petitioner No.26,945 and Bernard Muchiri Mwati Petitioner No.9,504 deponed that they all lost monies to fraudsters who ran the pyramid schemes and that the 3rd Respondent owed them a refund thereof.
17. That therefore the 3rd Respondent is a necessary party to the Petition and ought to remain as such.
18. Counsel for the Petitioners relied on extracts from the Report of the Taskforce on Pyramid

Schemes to submit that a sum of Kshs.5 Billion was held in frozen accounts by the 3rd Respondent and because it declined to divulge how much money was held in those accounts, the Taskforce aforesaid was unable to access the said accounts nor the amount of money held therein. The Taskforce had meanwhile noted that BFID had made applications to Court for suspension of back accounts where pyramid scheme monies were allegedly deposited to facilitate investigations.

19. While admitting that the Chief Magistrate's Court at Nairobi had issued orders suspending those accounts, Counsel added that the same Court additionally directed one, Inspector Muita of BFID to ensure that BFID supervised release of monies in the suspended accounts to the complainants in that case but the Taskforce was not able to access the data relating to those payments.
20. Counsel lastly relied on the decisions in **Central Bank of Kenya v Akiba Microfinance Ltd and 14 Others [2013] eKLR** and **Three Rivers District Council v Governor and Company of the Bank of England [2001] UKHL16** to submit that the present application is without merit and ought to be dismissed with costs.

Determination

21. The 3rd Respondent has argued that the entire Petition as against it should be struck out as there is no evidence or any legal basis for it to have been enjoined as a Respondent. The Petitioners on the other hand have claimed that looking at the dispute in totality and particularly from a reading of the Report of the Taskforce on Pyramid Schemes commissioned by the then Minister for Co-operative Development, sued through the 2nd Respondent, there is a proper basis in law and in fact for the 3rd Respondent to remain in these proceedings.
22. To address the above issue, what is the law on striking out a party in a constitutional petition premised on the Bill of Rights such as the present one against the 3rd Respondent?
23. **Rule 5 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules** provides as follows:
- “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. ***(i) 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.”

24.**Rule 5(b)** as read with **Rule 5(d)** above would seem to leave striking out of any party to the discretion of the Court and like all discretion, the same must be exercised judiciously and to ensure that no party is thereby prejudiced by whatever decision the Court takes.

25.In the present circumstances, I am quite satisfied that, like Lord Steyn in **Three Rivers District Council (supra)** “*the interests of justice require that the entire action should be permitted to go to trial. This conclusion involves no judgment about the likely outcome of the case but merely because the threshold requirement for striking out has not been satisfied.*”

26.I say because at the hearing the Report of the Taskforce on pyramid schemes will form a central part of the Petitioner’s case according to submissions by its Counsel. If so, the role of the 3rd Respondent in handling the scam will come into sharp scrutiny against its mandate in law. It has denied any mandate in that regard a point contested by the Petitioners and therefore a valid issue to be tried by this Court. To remove the 3rd Respondent at this point will certainly prejudice the Petitioner’s case without the same being heard on its merits.

27.It matters not that in the eyes of the 3rd Respondent the Petitioner’s case is very weak. As long as the primary pleading discloses some cause of action, more so in a constitutional petition, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out – see **Wenlock v Moloney [1965] 1 WLR 1238**.

28.Further, in civil law, the case of **D.T. Dobie & C. v Muchina [1982] KLR 1** has often been quoted as the leading authority for the proposition that a pleading should not be struck out willy-willy by any Court hence the statement that:

“The power to strike out a pleading in a summary manner is a draconian remedy that should only be exercised in the clearest of cases, in plain and obvious cases where the pleading in question is unsustainable. It is a power to be exercised with extreme caution and that it is a strong power to be sparingly exercised.”

29.I adopt the above finding as if it were mine and read against the dictates of **Articles 48** and **159** of the **Constitution**, the present case is not one where any party should be allowed to walk away from proceedings, at the interlocutory stage.

30.Lastly and to buttress my findings above, the role of the BFID will have to be addressed including its role in executing the mandate of the 3rd Respondent as well as its specific role in investigations into the pyramid scheme. In that regard, the Press Statement by the 3rd Respondent dated 25th May 2007 asking members of the public to report any persons soliciting funds in the name of the pyramid scheme to the Director BFID will also demand scrutiny.

Disposition

31.Having held as above, it is obvious that I see no merit in the Application dated 11th March 2015 and the same is dismissed.

32.Let costs abide the outcome of the Petition.

33.Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MAY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Kihoro for Applicant

Mr. Ouma for 3rd Respondent

Mr. Njoroge for 1st, 4th and 5th Respondent

Order

Ruling duly read.

Further Order

Mention on 10/6/2016 for directions.

ISAAC LENAOLA

JUDGE