



REPUBLIC OF KENYA



**KENYA LAW**  
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**Motaung v Samasource Kenya EPZ Limited t/a Sama & 2 others (Petition  
E071 of 2022) [2023] KEELRC 320 (KLR) (6 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 320 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E071 OF 2022  
JK GAKERI, J  
FEBRUARY 6, 2023**

**BETWEEN**

**DANIEL MOTAUNG ..... PETITIONER**

**AND**

**SAMASOURCE KENYA EPZ LIMITED T/A SAMA ..... 1<sup>ST</sup> RESPONDENT**

**META PLATFORMS INC ..... 2<sup>ND</sup> RESPONDENT**

**META PLATFORMS IRELAND LTD ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before me for determination is Notice of Motion Application by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent dated May 30, 2022 where the applicants seek the following orders;
  - i. That the application be certified urgent and be heard ex-parte in the first instance
  - ii. That pending the hearing and determination of this application no other or further proceedings be entertained in this petition.
  - iii. That the petition herein against the second and third Respondent be struck out and wholly dismissed as this honourable court lacks jurisdiction to entertain the petition against the Second and Third respondents Jointly and severally.
  - iv. That the petition herein against the second and third respondent is incompetent, bad in law and unsustainable as provisions of the *Constitution of Kenya 2010* do not apply to either of them in the circumstance of this case.



- v. That notwithstanding and without prejudice to prayer (1) and (2) above the names of the 2<sup>nd</sup> and third respondent be struck out as parties in the petition for having been improperly joined.
  - vi. That costs of this application and this petition be granted to the second and third respondent in any event.
2. The application is based on the following grounds;
  - i. That the second and third respondents are foreign corporations who are neither resident, domiciled nor trading in Kenya and accordingly this honourable court has no jurisdiction over them.
  - ii. That the petitioner has not invoked the jurisdiction of this honourable court by seeking and obtaining leave of the Honourable court as by law required.
  - iii. That there is no basis on which the honourable court can assume jurisdiction in these circumstances of this case.
  - iv. It is just and equitable that the orders sought be granted.
3. In opposition to the application, the petitioner filed grounds of opposition dated June 24, 2022, stating that the application was bad in law as it did not state under what order or statutory provision it was made.
4. The petitioner further states that the applicant has not indicated the law that requires the petitioner to seek leave to invoke the jurisdiction of the court to hear the constitutional petition where the constitutional violations complained of took place in Kenya and were orchestrated by an entity which operates in Kenya.
5. The petitioner also states that the application is incurably vague for failure to attach a supporting affidavit therefore the same is incompetent and urges the court to have it struck out.
6. He states that the court has jurisdiction to handle the matter as provided in articles 162 and 165 of the *Constitution of Kenya, 2010* to hear and determine a constitutional petition for redress of a denial, violation or infringement or threat to, a right or fundamental freedom in the bill of rights.
7. The petitioner avers that the *Constitution of Kenya, 2010* and the Bill of Rights applies to all and binds to all persons including the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
8. He further states that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are properly joined in the petition and are necessary parties to the petition and they have extensive operations in Kenya as they have offered their products (Facebook, Instagram, WhatsApp, Market place, Facebook pay) to the public for commercial gain within the jurisdiction of this court. He states that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents draw revenue from use of their products in Kenya from advertising on the various platforms.
9. The petitioner states that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents take part in commercial and political activities in Kenya and there is no legal requirement to seek leave to invoke the jurisdiction of this court where the party operates in Kenya and therefore bound by the laws of Kenya and subject to the jurisdiction of any court in Kenya.
10. The petitioner states that the work he was engaged to carry out in the 1<sup>st</sup> Respondents facility is directly related to the survival and improvement of 2<sup>nd</sup> and 3<sup>rd</sup> respondent's product (Facebook) therefore the



2<sup>nd</sup> and 3<sup>rd</sup> Respondents were the true employers of the petitioner and the main perpetrators of the violation and denial of his rights and those of former and current Facebook content moderators.

11. The petitioners aver that the tools used to carry out the petitioner's work were provided by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and all factors of his work were controlled by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
12. The petitioner avers that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents appointed an agent in Kenya who confirmed was authorised to receive correspondence concerning this petition and accept service of pleadings in this petition.
13. The petitioner further states that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents failed to comply with the notice to produce whose compliance is necessary to demonstrate the principal agency relationship between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
14. The petitioner states that the issues raised in this application can only be considered after the hearing of the petition when the court has been presented with all the relevant facts in the petition.

### **Applicants' submissions**

15. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the applicants in this case submitted that the petitioner is a South African national who was employed by the 1<sup>st</sup> Respondent as a content moderator on the social media platform (Facebook) in Nairobi on the March 13, 2019. They submitted that the 1<sup>st</sup> Respondent is the Kenyan subsidiary of Samasource International BV, a company registered in Hague, Netherlands.
16. They submitted that the applicants had no contractual relationship with the petitioner and that the petition herein alleging violation of the constitutional rights allegedly occurred during the petitioner's course of employment with the 1<sup>st</sup> Respondent in Nairobi.
17. The applicants contended that the petitioner was required to seek leave to serve the summons outside the jurisdiction of the court which they failed to do hence leading to the applicants filling a Memorandum of Appearance under protest.
18. The applicant's preliminary objection is that the court lacks jurisdiction over the petition and relies in the holding in *Mukhisa Biscuit Manufacturing Co Limited v West End Distributors Limited* [1969] EA 696.
19. The applicants submitted that jurisdiction was a fundamental prerequisite to any court process as was held by the Court of Appeal in *Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR,

“Jurisdiction is everything without it a court has no more power to make one more step.”

20. The applicants further submitted that the court had no jurisdiction as the *Constitution of Kenya* had no extraterritorial application and could not apply to the applicants as foreign corporates.
21. The applicants relied on several cases on territorial jurisdiction among them is *James Finlay (Kenya) Limited v Elly Okongo Inganga & 6 others* [2019] eKLR where the court held;

“There has been a strong presumption against the extraterritorial application of domestic law in foreign jurisdiction because of theory of sovereignty. Sovereign power, it is trite has territorial limits hence the prerequisite for the enforcement of foreign judgments by domestic courts. As a consequence, territorial boundaries have for a long time acted as a restriction on judicial and legislative jurisdiction/power.”



22. The applicants further submitted that order 5 rule 12 of the *Civil Procedure Rules, 2010* instructed the mode of service of summons out of Kenya for a foreign Defendant and rule 21 was a mandatory prerequisite to the court assuming jurisdiction over a foreign Defendant.
23. In *Misnak International (UK) Limited v 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan & 3 others* [2019] eKLR, the court held;

“The manner in which such jurisdiction is assumed by court is that firstly, the plaintiff has to seek leave of court to serve such summons outside courts jurisdiction. The purpose of seeking leave is for the court to weigh the reasons adduced by the plaintiff and determine whether a proper case has been made out for service of summons outside the jurisdiction. . . Secondly, upon such leave being granted, the summons have to be served upon such a defendant. It is only upon such service of the summons that the court assumes jurisdiction over foreign defendant and not a moment sooner.
24. The applicants submitted that the petitioner was required to apply and obtain leave to serve the applicants outside the jurisdiction of this court and that the provisions of order 5 rule 21 apply to this case and therefore urged the court to strike the petition out against the applicants.
25. The applicant further submitted that upon being notified of the petition they filed a conditional memorandum of appearance (under protest) and contemporaneously filed the instant application to have the petition struck out for want of jurisdiction.
26. The applicants relied on the holding in *Raytheon Aircraft Credit Corporation v Air Al-Faraj Ltd* [2005] eKLR where the Court of Appeal while quoting *Prabhadas (N) & Co v Standard Bank* [1968] EA 679 held that the procedure for challenging the jurisdiction of a court where a foreign defendant is served without leave was to enter conditional appearance and therefore move the court to set aside the process.
27. The applicant urged the court to allow the application dated May 30, 2022 as prayed.

#### **Petitioner's submissions**

28. The Petitioner identified five issues for determination;
  - i. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents application is competent.
  - ii. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are proper parties in the petition.
  - iii. Whether this honourable court has jurisdiction to hear the petition.
  - iv. Whether Order 5 rule 21 of the *Civil Procedure Rules* applies in this case.
  - v. Whether there was proper service of the petition on the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
29. On the first issue the petitioner submitted that rule 19 of the *Mutunga Rules* was specific that an application shall be in the format set out in form D in the schedule and bears mandatory text

‘and which application is supported by the annexed affidavit and such other grounds, reasons and arguments as shall be adduced at the hearing hereof.’



30. The petitioner relied on the sentiments of Justice Mbaru in *University of Nairobi v George Mabele Sifuna* ELRC Appeal No 22 of 2020 [2021] eKLR where the court held;

“That an application without a supporting Affidavit lacks in a material way. It is filed against the rules of the court. It is not a mere technicality that can be cured in any manner by the court and must be struck of for want of supporting affidavit”.
31. The petitioner submitted that that the application did not follow the format mandated by rule 19 of the *Mutunga Rules, 2013* as it was not supported by an affidavit and the want of form affected the substance of the application.
32. The petitioner further submitted that the application stated that it was brought under section 3 (viii) of the *Employment and Labour Relations Court Act* but the said section did not exist and could not be invoked.
33. The petitioner further submitted that the vagueness of the application offended the petitioner’s right under article 50(2) of the *Constitution*, ie, right to be informed of the allegations against him in sufficient detail to answer them.
34. On the 2<sup>nd</sup> issue, the petitioner submitted rule 2 of the Mutunga Rules defined a ‘respondent’ as a person who is alleged to have denied, violated or infringed or threatened to deny, violate or infringe a right or fundamental freedom.
35. The petitioner relied on the holding in *Rose Wangui Mambo & 2 others v Limuru County Club and 17 others* [2014] eKLR where Lenaora J, Ngugi J and Majanja J, held that any person can be joined as a respondent so long as there is an allegation that the person infringed or threatens to infringe the petitioner’s fundamental rights.
36. The petitioner submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were proper respondents in the petition as their conduct could be linked to specific allegations of human rights violations in the petition.
37. The petitioner further relied on the holding in *Kanuri Limited & 33 others v Uber Kenya Limited & 2 others* (Civil Case 356 of 2016) [2021] KEHC 138 (KLR) (7 October 2021) against Uber, a multinational company whose products are used all over the world including Kenya. Tuiyott, J rejected Ubers application to be struck off the suit as the plaintiff had pleaded agency between Uber Kenya Limited, Uber International Holding BV and Uber International BV. The court held that both Principal and agent can be sued jointly.
38. The petitioner submitted that the work he did as Facebook content moderator at the 1<sup>st</sup> Respondent’s premises was assigned and supervised by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and that the human rights violations occurred in the performance of this work, therefore the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were true employers of the petitioner and therefore proper parties in this petition.
39. On the third issue, the petitioner submitted that the cause of action arose at the 1<sup>st</sup> Respondent’s premises at Sameer Business Park along Mombasa Road, Nairobi Kenya.
40. The petitioner submitted that the cause of action arouse out of the employment of the petitioner and the petition was for redress for violation of human rights which this court sitting as a Constitutional Court vide Article 165(3)(b) had jurisdiction to hear.
41. It was submitted that section 12(1)(a) of the *Employment and Labour Relations Court Act* provides that the Employment and Labour Relations Court has exclusive original jurisdiction to hear and determine all disputes relating to or arising out of employment between an employer and employee.



42. The petitioner further relied on the holding by Odunga, J in *SN v Cabinet Secretary for Interior and Coordination of National Management Services, Director General, Kenya Citizens & Foreign Nationals Management Services & Attorney General* [2016] eKLR that the petitioner, who was not a citizen of Kenya was nevertheless entitled to the protection of their rights as rights were recognized by all modern and democratic societies.
43. The petitioner further submitted that the court had jurisdiction to hear and determine the petition before it.
44. On the fourth issue, the petitioner submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were incorporated in the United States of America and Ireland respectively, but conducted business in Kenya and had kept their corporate structure opaque leading to the petitioner filling a notice to produce as such documents would conclusively show how the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent are registered in Kenya and their local address for purposes of service.
45. He submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents carried out the business of advertising in Kenya and paid taxes to the Government of Kenya.
46. The petitioner further submitted that Order 5 Rule 21 did not provide for the circumstances under which one had to seek leave rather it provided for situations where the court may allow a party to serve summons out of Kenya.
47. The petitioner relied on the holding in *Raytheon Aircraft Credit Corporations & another v Air Al-Faraj Limited* (*supra*) where the court held that only where the foreign company was not trading or domiciled in Kenya could order 5 rule 21 of the *Civil Procedure Rules* kick in.
48. On the fifth issue, the petitioner submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were served through the advocates and had informed the petitioner that they were retained by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in compliance with order 5 rule 8(2) of the *Civil Procedure Rules* which provide that service of summons maybe served upon an advocate who has instructions to accept service.
49. The petitioner submitted that before filling the petition, he served a demand letter to the Respondents directly through their email addresses and received a formal response from their advocates Anjawalla & Khanna LLP which expressly stated that they had been retained by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
50. Upon the petitioner filling the petition, he served the pleadings to the Respondents Advocates who accepted service upon acknowledgement that they had instructions to receive pleadings on behalf of their clients. Therefore, the petitioner submitted that there was proper service.

#### **Submissions by the 10<sup>th</sup> Interested Party**

51. The 10<sup>th</sup> Interested Party submitted that jurisdiction encompassed four elements; territorial jurisdiction, subject matter jurisdiction, personal jurisdiction and temporal jurisdiction and the case before the court met all the four aspects.
52. The 10<sup>th</sup> Interested Party further submitted that the applicants contest of territorial jurisdiction was made in jest as there was sufficient nexus between the territory of Kenya and Meta which employed the petitioner as a Facebook content moderator in Kenya.



53. Reliance was made on the holding in *Dorcas Kemunto Wainaina v IPAS* [2018] eKLR, where the court held

“In cases of international contracts where there is no express provision of choice of law and which contract is performed majorly in Kenya, by a Kenyan citizen and where the employer has a presence within the country, the court will have jurisdiction. In other words, the question of application of foreign law maybe irrelevant to the question of jurisdiction in certain instances.”

54. It was submitted that with today’s reality of virtual offices, Meta’s objection would only immunise multinational corporations from employment disputes arising in Kenya. The court was urged to dismiss the application and hear petition on merit.

### **Rejoinder by the Applicants**

55. In rejoinder, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that it was undisputed that the Honourable court was not moved for an order for leave that it may assume jurisdiction and that the petitioner did not serve summons in a manner prescribed by law.

56. It was submitted that the proceedings would amount to nought if the court acted without jurisdiction and orders would be futile. The court was urged to allow the application.

### **Analysis and Determination**

57. Having considered the pleadings, written submissions and highlighting by counsel, the issues for determination are;

- i. Whether the application is competent?
- ii. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents should be struck off as parties to this petition?
- iii. Whether the petitioner should have sought leave to serve the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents?

58. The petitioner urges that the application dated May 30, 2022 was incompetent for lack of a Supporting Affidavit and relies on the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure), Rules, 2013* commonly referred as “*Mutunga Rules*” as the guide on the application of the *Constitution*.

59. Rule 19 of *Mutunga Rules* states;

“A formal application under these rules shall be by Notice of Motion set out in Form D in the Schedule and may be supported by an affidavit.”

60. A plain reading of the foregoing regulation reveals that Rule 19 makes and does not make a Supporting Affidavit mandatory or obligatory as it uses the term “shall” which denotes a mandatory requirement and the term “may” which denotes permissiveness. The terms “shall” and “may” are also used in different Rules and have different connotations.

61. In the absence of a definition or explanation to the effect that the two terms are used interchangeably, the court is persuaded that they are used in their ordinary meaning. Is Rule 19 of the *Mutunga Rules*, therefore contradictory?



62. A casual examination of Form D of the Schedule to the Mutunga Rules reveals that the Supporting Affidavit is an integral part of the Notice of Motion filed under Rule 19, which the first limb of the rule. The second limb makes the affidavit non-obligatory.
63. In *University of Nairobi v George Mabele Sifuna* (*supra*), relied upon by the petitioner, Mbaru, J was emphatic that;
- “An application without a Supporting Affidavit lack in a material way. It is filed against the rules of the court such stands alone as unsupported. This is not a mere technicality that can be cured in any manner by the court, it has to suffer the obvious. Being struck off for want of a Supporting Affidavit.”
64. In this case, the issue revolves around Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* which is phrased in a manner not too dissimilar to Rule 19.
65. Rule 17(1) provides that;
- An interlocutory Application shall be made by notice of motion and shall be heard in open court.
66. Rule 17(8) provides that;
- A Notice of Motion shall state in general terms the grounds of the application and where the motion is supported by an affidavit, both the Notice of Motion and a copy of the Affidavit shall be served on the other party.
67. Regulation 17 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* does not appear to make the affidavit a mandatory requirement.
68. Although the decision relied upon by the Petitioner is invariably persuasive authority, the ruling by the learned judge was not based on a construction of Mutunga Rules which are specific to the enforcement of rights and fundamental freedoms and is therefore distinguishable.
69. In *Ashioya & Co. Advocates v Busia Sugar Co Ltd & 2 others* [2007] eKLR, relied upon by the Petitioner in support of his submission, the court agreed it was not mandatory for all applications to be accompanied by affidavits but equally provided that
- “and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”
70. A formulation similar to Rule 17 above.
71. The court dismissed the application on the ground that it was not supported by affidavit.
72. This decision was a construction of the *Civil Procedure Rules* whose formulation was different from the *Mutunga Rules* which use the terms “shall” any “may” and prescribe a Schedule which is based on the “shall”.
73. The Petitioner urges that the applicants allegation that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were foreign corporations neither resident or domiciled in Kenya was a factual issue that required evidential support by way of affidavit.



74. However, the petitioner appears to admit the fact that these were foreign corporations in his submission that the corporations “are incorporated in the United States of America and Ireland respectively and had kept their corporate structure opaque.”
75. In the court’s view, since rule 19 of the *Mutunga Rules, 2013* does not make it mandatory that all applications must be accompanied by affidavits and the authorities relied upon though consistent relate to the construction and application of other Rules, and the reasons stated above, the court is persuaded that the Notice of Motion Application before it is competent.
76. As to whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents should be struck off, parties have adopted opposing arguments. While the applicants urges that the court had no jurisdiction over the corporates since they have not been served as prescribed by law, the Petitioner and 10<sup>th</sup> Interested Party urge that the two are proper parties to the suit as they carried on business in Kenya, engaged the petitioner to work for them in Kenya and supervised his work, paid taxes in Kenya and violated the petitioner’s rights. That the 1<sup>st</sup> Respondent was their agent.
77. According to 10<sup>th</sup> Interested Party, there was sufficient nexus between Meta and Kenya since Meta employed the Petitioner as a Facebook Content Moderator in Kenya.
78. The decision in *Dorcas Kemunto Wainaina v IPAS* [2018] eKLR relied upon related to international contracts a fact not pleaded by the petitioner in this application.
79. The court is in agreement with the three Judge Bench decision in *Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others* (*supra*) that any person may be joined as a Respondent so long as there was an allegation that the person had violated or threatened to violate the rights of the party suing.
80. Relatedly, and as urged by the Petitioner, a petitioner shall not be defecated by reason of misjoinder or non-joinder of parties.
81. Similarly, it was submitted that the petitioner had pleaded agency and the Court of Appeal decision in *CPC Industrial Products (K) Ltd v Samuel Kirwa Kosgei* [2005] eKLR was relied upon to reinforce the submission.
82. The decision in *SBI International (K) Ltd v Fredrick Matheka Kisilu* [2021] eKLR was also cited on subcontracting agreements to urge that the person who assigned and supervised work could not escape liability where an employee suffered harm in doing the work.
83. Without delving into the substance of the petition, documents on record reveal that the Petitioner entered into a contract of employment with the 1<sup>st</sup> Respondent as a content moderator on February 27, 2019 at a monthly salary of Kshs 60,000/= and was based in Nairobi, Kenya. Equally, the employment contract provided that it would be governed by and construed in accordance with Kenyan Law and the parties submitted to the jurisdiction of the Kenyan Court.
84. It is trite law that a registered company is a legal entity, a body corporate distinct from its members and officials and with powers to undertake lawful transactions.
85. This principle was aptly articulated by Lord Mac Naghten in his celebrated sentiments in the locus classicus decision of the House of Lords in *Salomon v Salomon & Co Ltd* [1897] AC 22 at 51 – 54 as follows;

“The company attains maturity on its birth. There is no period of minority – no interval of incapacity. . . The company is at law a different person altogether from the subscribers to the memorandum and though it may be that after incorporation, the business is precisely



the same as it was before, and same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them. Nor are the subscribers as members liable, in any shape or form except to the extent and in the manner provided by the Act . . .”

86. These sentiments are part of the Kenyan law as they were part of the UK Law from 1897.
87. Upon registration, a company becomes an incorporated association, an artificial person. A legal entity or body corporate.
88. Evidently, the Petitioner was employed by the 1<sup>st</sup> Respondent and prima facie the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were not privy to the contract.
89. Be that as it may, the petitioner alleges that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were his employers as well, in that they supervised and assigned tasks and carried on business in Kenya.
90. It requires no gainsaying that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are incorporated outside Kenya and their relationship and dealings with the 1<sup>st</sup> respondent are yet to be canvassed.
91. As the foregoing is a matter of evidence and which is the substratum of the petition herein, the court is persuaded that it would be pre-mature to strike off the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents names from the Petition. There are weighty outstanding issues yet to be determined.
92. Relatedly, the loss or damage the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are likely to suffer is compensatable by way of costs.
93. As to whether the petitioner should have sought leave to serve the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, the parties have opposing submissions.
94. The applicants urged that the court could not assume jurisdiction over the applicants as the petitioner had not complied with order 5 rule 21 of the Civil Procedure Rules, 2010. They maintained that leave to serve summons outside the court’s jurisdiction was mandatory before a court could assume jurisdiction over the respondent. Order 5 rule 21 of the Civil Procedure Rules, 2010 prescribed the mode of service of summons outside Kenya on a foreign defendant or respondent.
95. Order 5 rule 21 of the *Civil Procedure Rules, 2010* prescribes the circumstances in which service of summons or notice of a summons out of Kenya may be allowed, in particular, Order 5 rule 21(b) which states that

“any person out of Kenya is a necessary or proper party to a suit properly brought against some other person duly served in Kenya.”

Consistent with the Petitioner’s submissions that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were necessary and proper parties to the suit herein.

96. The court is in agreement with and bound by the sentiments of the Court of Appeal in *TNT Express Worldwide (Kenya) Ltd v Timothy Graeme Steel* [2022] eKLR on the applicability of the *Civil Procedure Rules, 2010* by the Employment and Labour Relations Court whenever the *Employment and Labour Relations Court (Procedure) Rules, 2016* are deficient so as to meet the ends of justice.
97. In the instant case, since the *Employment and Labour Relations Court (Procedure) Rules, 2016* have no express rule on service to a respondent domiciled outside the country, the *Civil Procedure Rules* are applicable and ought to have been complied with in the 1<sup>st</sup> instance.



98. The court is guided by the sentiments of the Court of Appeal in *Misnak International (UK) Ltd v 4MB Mining Ltd c/o Ministry of Mining, Juba, Republic of South Sudan & 3 others* (*supra*) and *Raytheon Aircraft Credit Corporation & another v Air Al-Faraj Ltd* (*supra*) relied upon by the Applicants.
99. The decisions articulate the law and are binding on this court as ordained by the principle of judicial precedent or stare decisis.
100. As correctly stated, section 3(1) of the *Companies Act, 2015*, states that;
- Foreign company means “a company incorporated outside Kenya.”
101. Equally, it is common ground that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are incorporated outside Kenya whether or not they carry on business in Kenya is a different issue as both parties acknowledge.
102. Although the petitioner maintains that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents trade in Kenya and exemplifies the submission through its response to the Replying Affidavit, the petitioner has not annexed documentary evidence of the registered offices or physical addresses from which the companies operate or the manner in which the two companies operate in Kenya in the context of Part XXXVII of the *Companies Act, 2015* which governs the circumstances in which a foreign company may carry on business in Kenya.
103. The petitioner submits that the duty to establish that the two respondents do not carry on business in Kenya rested on them by virtue of the provisions of the *Evidence Act*. The submission is founded on the premise that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are the custodians of the constitutive documents which the petitioner had no access.
104. The petitioner’s submission on carrying on of business in Kenya by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents is supported by the 10<sup>th</sup> Interested Party who urges that companies have virtue offices and the Respondents objection would immunise international corporations from local employment disputes.
105. Notably, the petitioner has not demonstrated whether the two respondents carry on business as a single entity or differently.
106. Contrary to the petitioner’s submission that the burden of proof was on the respondents to demonstrate that they did not carry on business in Kenya and guided the operative provisions of law, and the mantra that he who alleges must prove, the court is persuaded that the burden of proof lies upon the petitioner to show that the respondents indeed carry on business in Kenya after due compliance with the provisions of Part XXXVII of the *Companies Act*.
107. The argument that the respondents may have used different names is unpersuasive to the court as names are traceable. Relatedly, the course of registration under a new name, the law requires the name of the entity in its country of origin for records. In addition, foreign registered companies are required to establish and maintain a registered office and must file financial statements with the Registrar among other requirement.
108. Finally, the law requires the Registrar to establish and maintain a Foreign Companies Register which is open to inspection by interested persons during normal business hours of the Registrar.
109. In sum, having asserted and maintained that the respondents do indeed carry on business in Kenya, it was the duty of the petitioner to prove that the two companies had registered offices in Kenya and were indeed carrying on business in compliance with the provisions of the *Companies Act, 2015*.



110. Although the petitioner submitted that it served the petition upon the firm of Anjarwalla & Khanna LLP as an agent of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, the law firm did not enter appearance or file a response but reserved the documents to the law firm of Kaplan and Stratton which is contesting service.
111. It is unclear to the court why the petitioner did not serve the 2<sup>nd</sup> and 3<sup>rd</sup> respondents yet he maintains that they carry on business in Kenya and concomitantly submitted that they were incorporated in the United States of America and Ireland respectively.
112. The respondents are not local companies and can only trade in Kenya by being compliant with the provisions of Part XXXVII of the *Companies Act* which the petitioner is unable to establish. This would have been the avenue for the court to assume jurisdiction over the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. In its absence, it would appear that the companies have not been domesticated as the bulk of the documents attached to the petition are printed from the internet and lack proper authentication and do not reveal the actual legal status of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in Kenya.
113. It is not in dispute that the applicants entered appearance on May 30, 2022 under protest for purposes of filing the instant notice of motion and not respond to the petition.
114. In the circumstances, the court is not satisfied that it has assumed jurisdiction over the applicants.
115. Finally, is the non-compliance with the requirements of the order 5 rule 21 of the *Civil Procedure Rules, 2010* fatal to the petitioner's claim against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents?
116. A cursory examination of the documents on record reveal that the Claimant was employed by the 1<sup>st</sup> respondent and not the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as senior counsel, Mr Ojiambo submitted in court. However, the petitioner submitted that he had evidence to demonstrate that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were parties to the contract of employment as well which is a matter of evidence.
117. The crucial question is whether the petitioner's case against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents should be dismissed at this stage for want of proper service. While striking out the petition against the 2<sup>nd</sup> and 3<sup>rd</sup> 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.
119. In the instance case, the court is persuaded that it is only fair that the petitioner be accorded an opportunity to comply with order 5 rule 21 of the *Civil Procedure Rules, 2010* as regards service upon the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
120. Although the firm of Anjarwalla & Khanna LLP accepted service on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, the acceptance did not obviate compliance with order 5 rule 21 of the *Civil Procedure Rules*.
121. For all the reasons set out in the foregoing, it is the finding of the court that it would be inopportune for the court to strike out the petition against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents at this stage.
122. Consequently, the notice of motion application dated May 30, 2022 is disallowed.
123. Costs shall be in the cause.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2023

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on March 15, 2020 and subsequent directions of April 21, 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with order 21 rule 1 of the [Civil Procedure Rules](#), which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by article 159(2)(d) of the [Constitution](#) which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under article 48 of the [Constitution](#) and the provisions of section 1B of the [Civil Procedure Act](#) (chapter 21 of the laws of Kenya) which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

