



REPUBLIC OF KENYA

IN THE COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. E032 OF 2021

IN THE MATTER OF ARTICLES 1, 2, 16593) (A) (B), 258, 259(1)(B)

OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF
INDIVIDUAL AS ENshrined UNDER ARTICLES 28, 31(C) AND 40(5) OF THE CONSTITUTION**

BETWEEN

FLORENCE MWIHAKI KAMANDE.....PETITIONER

VERSUS

MAISHA FLOUR LIMITED.....1ST RESPONDENT

TDF GROUP LIMITED.....2ND RESPONDENT

RULING

APPLICATION

1. The 2nd Respondent through an application dated 11th February 2021 seek the following orders:-

a) That the Honorable Court be pleased to order the addition of Barbuh Casting, as a third Party to these proceedings.

b) That leave do issue to the 2nd Respondent to serve upon the Third Party an appropriate notice attached to the affidavit of the Respondent in support of the application.

c) That costs of this application be in the cause.

2. The Application is premised on the grounds on the face of the application and supported by supporting affidavit by Jay Varia sworn on 11th February 2021.

PETITIONER'S RESPONSE

3. The Petitioner is opposed to the 2nd Respondent's application through her written submissions.

THE 1ST RESPONDENT'S RESPONSE

4. The 1st Respondent filed Replying Affidavit by Kamaldeep Singh sworn on 22nd February 2021 opposing the 2nd Respondent's application.

ANALYSIS AND DETERMINATION

5. I have carefully considered the 2nd Respondent's application, the response and rival submission and from the same only one issue arise for consideration:-

a) Whether the application meets the threshold to warrant granting of the same.

6. The 2nd Respondent in its application dated 11th February 2021 pray for two orders; namely first that the Court do order the addition of Baruh Casting as a third party to these proceedings and secondly the 2nd Respondent do serve upon the third party an appropriate notice attached to the affidavit of the Respondent in support of the application.

7. The application is brought pursuant to **Order 1 Rule 10, and 14 of Civil Procedure Rules.**

8. The guiding principle of third party Notice is contained in **Order 1 Rule 15(1) of the Civil Procedure Rules in** which it is provided:-

“(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)-

a) That he is entitled to contribution or indemnity; or

b) That he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

c) That any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

9. It is 2nd Respondent's contention that the issues raised in current Petition cannot be justly determined without the participation of the 3rd party. This is because, the 3rd Party herein was the agent of the Petitioner who negotiated the contract and further acted on her behalf in many other aspects. The 2nd Respondent never came in touch with the Petitioner at any given point except through the 3rd Party. Any actions carried out by the 2nd Respondent in account of the Petitioner through the 3rd Party was under the knowledge and belief that the latter acted with the consent and in the interest of the said Petitioner.

10. The 2nd Respondent further submit that from various communications between the 3rd Party and the 2nd Respondent, which are marked as TDF4 and 5 annexed to the supporting affidavit of one Jay Varia. Mover, invoices demanding payment as consideration for the use of the Petitioner's images were generated and forwarded by the 3rd Party and honoured accordingly by the 2nd Respondent.

11. It is further averred by the 2nd Respondent that in the event this Court finds breach of any right of the Petitioner then it would be so on the 3rd Party and not on either of the Respondents given the fact that the 1st Respondent is not privy to the said advertising contract, while the 2nd Respondent only acted on the representations made by the 3rd Party. It is therefore contended that as such the 3rd Party will have to indemnify the Petitioner on the damages if at all that she suffered as a result of its negligence.

12. The Petitioner submit that she filed a Constitutional Petition on 25th January 2021 concerning infringement of her rights under **Article 28, 31(c) and 40(5) of the Constitution.** The 2nd Respondent through its Replying affidavit intimated on enjoining a third party. The Petitioner is opposed to the application on the basis that the contract produced before this Court is between the 2nd Respondent and the Petitioner, signed in 2016 for a different matter which lapsed in December 2016.

13. The Petitioner position is that the contract made in 2016 between the 2nd Respondent and the Petitioner was to advertise NUVITA BISCUIT. It is averred by the Petitioners that the 2nd Respondent has not produced agreement entered into in 2020 because there is no such an agreement and if there is one, it is urged it has not been filed because the Petitioner was not asked for consent and there was no consent given to the 2nd Respondent.

14. In the instant application the 2nd Respondent has not shown or proved what the Petitioner is claiming is same as what the Respondent is claiming before this Court. The Petitioner contends the application has failed to disclose reasons for joinder of a third party in this Petition.

15. In the instant application, it has been demonstrated that the agreement was between the 2nd Respondent and the Petitioner, and which lapsed in 2018. The 2nd Respondent has not denied this nor has it denied not to have used the images of the Petitioner. It is therefore Petitioner's case that the application cannot succeed on the basis, that there was no contractual obligation as averred thereto, when advertisement for Maisha Unga was done, since the 2nd Respondent unlawfully breached its position as an advertising company by using the Petitioner's image without her consent.

16. A third party can be enjoined to a suit where it is demonstrated any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and requires to be determined not only as between

the plaintiff and the defendant but as between the plaintiff and the defendant and the third party or between any or either of them.

17. Under **Rule 5(d) (i) (ii) of the Mutunga Rules** it is provided that:-

“(5)(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.”

18. I find that the 2nd Respondent has not demonstrated that the third party is a necessity part to be enjoined in these proceedings as a party. The applicant has not disclosed any tangible reasons for joinder of the third party in the instant Petition.

19. The instant suit is a Constitutional Petition governed by **Mutunga Rules, 2013**, on matters of procedure. The 2nd Respondent has not demonstrated under what rule a third party can be joined in Constitutional Petitions. The 2nd Respondent has not met threshold for joinder of the third party in this Constitutional Petition. The Petitioner has not in her Petition made any allegations against the third party to warrant her to be enjoined in these proceedings. Nor is there any claim against the third party. I find that the 3rd Party is not a necessary party in these proceedings.

20. In view of the aforesaid I find no merits in the application dated 11th February 2021. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF NOVEMBER, 2021.

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J. A. MAKAU

JUDGE