



**Sauti Communications Limited v Communications Authority Of Kenya  
(Appeal 2 of 2021) [2022] KECMAT 1092 (KLR) (6 May 2022) (Ruling)**

Neutral citation: [2022] KECMAT 1092 (KLR.)

**REPUBLIC OF KENYA  
IN THE COMMUNICATION AND MULTIMEDIA APPEALS TRIBUNAL  
APPEAL 2 OF 2021  
ROSEMARY KURIA, CHAIR  
MAY 6, 2022**

**BETWEEN**

**SAUTI COMMUNICATIONS LIMITED ..... APPELLANT**

**AND**

**COMMUNICATIONS AUTHORITY OF KENYA ..... RESPONDENT**

**RULING**

1. This is a ruling in respect of the Appellant's application dated 18<sup>th</sup> February 2022 in which it prays for the following orders:-
  - a. That the Proposed Intended Interested Party (sic) be joined as a party to these proceedings.
  - b. That subject to prayer 1 above, the Appellant be allowed to amend the Memorandum of Appeal dated 5<sup>th</sup> May 2021 and filed in the Honourable Tribunal on the 11<sup>th</sup> May 2021 as per the draft annexed hereto.
  - c. That the Amended Memorandum of Appeal annexed hereto be treated as the Appellants Amended Memorandum of Appeal and the same be deemed as having been duly filed upon payment of the requisite fee.
  - d. That the Respondent and the Interested Party be at liberty to amend and or file their respective Responses within seven (7) days thereafter if they so wish.
  - e. That the costs of this application be costs in the Appeal.
2. The application is supported by the affidavit of Musili Nzambi sworn on 18<sup>th</sup> February 2022. The Respondent opposes the application and relies on a replying affidavit sworn by Tom Olwero on 2<sup>nd</sup> March 2022. The Appellant subsequently filed a further affidavit sworn by Mr. Nzambi on 15<sup>th</sup> March 2022. The Intended Interested Party, Telemain Company Limited, hereinafter referred to as Telemain was served with the application but did not file any response.



3. It is deposed on behalf of the Appellant that this application is made regarding the decision made by the Respondent on 12<sup>th</sup> April 2022 revoking the licence to radio broadcasting frequency spectrum 91.0 MHz (hereinafter referred to as the frequency) and repossessing the same. Mr. Nzambi further deposes on 11<sup>th</sup> February 2022, the Respondent tendered evidence before the tribunal to the effect that the frequency had been assigned to Telemain. Consequently, he deposes, it is necessary to join Telemain as an interested party to these proceedings and in the interest of justice for the tribunal to allow amendment of the memorandum of appeal in terms of the annexed draft.
4. It is also deposed that the presence of the interested party in the appeal is necessary for the just, proportionate, effectual and complete adjudication of the dispute bearing in mind that the proposed interested party is allegedly in possession of the frequency that the Respondent revoked unfairly. The Appellant further deposes that the joinder of the proposed interested party will allow the tribunal to determine the real matters in controversy on their merits. Further, the proposed amendments arise out of the same facts in respect of which reliefs are sought and do not in any way alter the evidence, introduce a new cause of action or prejudice the Respondent.
5. In the Respondents replying affidavit, it is deposed that the fact that the frequency had been assigned to Telemain was disclosed by the Respondent in Republic v. Communications Authority of Kenya ex parte Sauti Communications Limited Nairobi High Court Judicial Review Application No. 89 of 2020 hereinafter referred to as the JR case. This, the Respondent deposes, was done through Peter Njoroge Ngige's affidavit sworn on 7<sup>th</sup> July 2020 and that the court in JR case duly noted the disclosure in its judgment dated 12<sup>th</sup> March 2021.
6. The Respondent further deposes the Appellant neglected to address the assignment of the frequency to Telemain within the JR case. The deponent also says that the assignment of the frequency to Telemain was a decision made on 29<sup>th</sup> April 2020 which was separate and distinct from the one of the repossession made on 12<sup>th</sup> April 2020 which is the subject of this appeal. Further, the Respondent deposes that the order in the JR case allowing the Appellant to file an appeal out of time was in respect of the decision made on 12<sup>th</sup> April 2020, and does not apply to the decision of 29<sup>th</sup> April 2020. As a result, any appeal in respect thereof would be time barred. Finally, the Respondent deposes that the proposed amendment would have the effect of making Telemain a substantive respondent in the proceedings in that the amended appeal seeks to revoke its rights to the frequency assigned to it by the Respondent.
7. Both the Appellant and the Respondent have filed written submissions to buttress their respective positions.
8. In its submissions, the Appellant urges that it is not in dispute that Telemain is currently the holder of the frequency, and that this is a fact that came to light on 11<sup>th</sup> February 2022, when the Respondent tendered documentary evidence thereto. The Appellant argues that the said documentary evidence was not supplied to the superior court in the JR case. The Appellant then cites Black's law which defines an interested party as one who has a recognizable stake and therefore a standing in a matter. Similarly, the Appellant relies on Rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which defines an interested party as a person or an 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
9. The Appellant also cites Francis Kariuki Muruatetu & Another v. Republic & 5 Others (2016) eKLR, in which an interested party was defined as one who will be affected by the decision of the court and feels that his interest will not be well articulated unless he appears in the proceedings and champions his cause. The Appellant also relies on Meme v. R1EA 124, where the High Court found that a party could



be enjoined in a case to settle completely all questions therein, to protect a party who would otherwise be adversely affected in law and to prevent a likely course of proliferated litigation. The Appellant submits that according to the foregoing authorities, Telemain qualifies to be an interested party, has an identifiable stake in the appeal and its joinder will allow the tribunal to determine the dispute herein effectively and completely.

10. In its submissions, the Respondent urges that the Appellant approached the High Court in the JR case with respect to the Respondent's decision of 12<sup>th</sup> April 2020, which communicated immediate repossession of the frequency. The Respondent submits that said decision was specifically directed at the Appellant and did not mention Telemain. The Respondent urges that its reason for the repossession was that the Appellant had not complied with the conditions of assignment of the frequency, and that Telemain is not a necessary party in the determination of whether the Appellant had so complied.
11. Further, the Respondent submits that joining Telemain to this appeal will broaden the scope of this appeal to the decision of 29<sup>th</sup> April 2020 assigning the frequency to Telemain, which is not the subject of the current appeal. The Respondent also urges that in the proposed amendment, the Appellant seeks substantive relief which cannot be made against an interested party. In addition, the Respondent submits that the proposed substantive relief of revocation of assignment of frequency to Telemain is already time-barred. Finally, the Respondent urges that Telemain has not represented itself as a party interested in this appeal and that the Appellant cannot provoke the interest of a non-party.
12. We have considered the application, the affidavits and the submissions and have framed the following as the issues for our consideration:-

Does the proposed amendment to the memorandum of appeal introduce a new appeal or cause of action and if so, is the new appeal or cause of action properly before the tribunal?

The application before us seeks to have Telemain joined as an interested party and leave granted to amend the memorandum of appeal to include the following prayer:-

That the tribunal be pleased to revoke the assignment of the broadcasting radio frequency spectrum to the Interested Party by the Respondent.
13. The memorandum of appeal dated 5<sup>th</sup> May 2021 prays that the tribunal sets aside, dismisses, quashes and/or recalls the Respondent/s decision of 12<sup>th</sup> April 2020. Secondly, there is a prayer that the Respondent be compelled to assign the Appellant radio frequency 91.0 MHz. The Respondent responded to the appeal by saying that upon repossessing the frequency, it assigned it to Telemain on 29<sup>th</sup> April 2020, and by filing documents to that effect. We take it that the Appellant wants to amend the memorandum of appeal so that if we find that the repossession of the frequency was procedurally or substantively faulty, we can consider whether to revoke the assignment to Telemain within this appeal.
14. The Appellant says that it only discovered that the Respondent had assigned the frequency to Telemain in February 2022 when the Respondent filed the letter of assignment in its list of documents. The tribunal finds that this is not the case given that this information was contained in the affidavit of Peter Njoroge Ngige sworn in the JR case on 7<sup>th</sup> July 2020, and was in fact mentioned in JR case judgment of 12<sup>th</sup> March 2021. In any case, we agree with the Respondent that the decision to repossess the frequency and one to reassign the same were distinct from and independent of each other. The first was made on 12<sup>th</sup> April 2020 and took away frequency rights from the Appellant. The second was made on 29<sup>th</sup> April 2020 and donated frequency rights to Telemain.
15. In our view, the proposed amendment cannot be properly accommodated in this matter for two reasons. We have already alluded to the first, which is that we would be allowing two different appeals



to be heard together when we have not been moved to do so. Indeed, nowhere in the draft amended memorandum of appeal does the Appellant mention the second decision of 29<sup>th</sup> April 2020. While the tribunal must not pay undue regard to procedural technicalities, it must be moved to hear a matter and we are unable to accept the suggestion by the Appellant that the decision to assign the frequency has been subsumed in the decision to repossess it.

16. In *Doune Farms v. Richard Soi & 4 Others* (2017) eKLR, the High Court dismissed an application by an interested party to be converted to a defendant and for the amendment of its defence and counterclaim saying in part:-

If I were to allow the present application, I would not only be imposing the applicant upon the Plaintiff as an additional defendant, I would also allow the introduction of a parallel claim in the nature of the proposed counterclaim, with new parties to it. Such a state of affairs would unjustly and unnecessarily muddle the Plaintiff's claim.

Similarly, we find that the proposed amendment to this appeal would, contrary to the Appellant's submission, introduce a parallel cause of action or appeal in this matter, and would unnecessarily muddle the just determination of the appeal from the Respondent's decision of 12<sup>th</sup> April 2020.

17. Secondly and equally important is the question of limitation. The Respondent's decision to assign the frequency to Telemain was made on 29<sup>th</sup> April 2020. The Appellant has never appealed from it, and has neither sought nor obtained leave to appeal out of time. Any proposed appeal is time-barred under section 102F of the *Kenya Information and Communications Act* which requires that appeals from the Respondent's decisions be made within 60 days. We find that no useful purpose will be served by allowing an amendment that is aimed at challenging said decision whose right of appeal therefrom expired on 29<sup>th</sup> June 2020, and which the Appellant has not in fact mentioned in its draft memorandum of appeal.

18. Has the Appellant made out a case for the joinder of Telemain as an interested party? From the material before us, the Appellant seeks to join Telemain as an interested party to ensure that the question of repossession and that of assignment of the frequency, which it presents as the real matters in controversy, are handled together. We have already found that the two questions cannot be justly and properly accommodated in this appeal. And even if they could, would Telemain have been an interested party properly so called? We think not. In the memorandum of appeal dated 5<sup>th</sup> May 2021, the Appellant's prayer 8(b) reads as follows:-

That the Respondent be compelled to assign the Appellant the radio frequency in question. In the draft amended memorandum of appeal, the Appellant adds the following prayer:- That the Tribunal be pleased to revoke the assignment of the radio broadcasting frequency spectrum to the Interested Party by the Respondent

19. We find as a fact that these prayers seek reliefs that affect the rights of Telemain directly and hence Telemain would have needed to be a substantive respondent. An interested party in the strict sense is a person who has a close connection to the subject matter yet not claiming any rights under it (See *Marigat Group Ranch & 3 Others v. Wesley Chepkoiment & 19 Others* (2014) eKLR. Precedent, included that cited by the Appellant itself, anticipates legal persons to represent themselves as interested in an action, and not to have parties in the action represent them as such. No doubt the tribunal could on its own motion add Telemain as a substantive respondent. However we should never act in vain, and given our finding on the first question, the application before us cannot be salvaged by allowing Telemain to become a substantive respondent instead of an interested party.



## DISSENT

20. The gist of the application before us is that it seeks to enjoin an interested party and amend the Memorandum of Appeal dated 5<sup>th</sup> May 2021. The intended interested party is Telemain Company Limited.
21. The Appellant/Applicant in this matter challenges the decision by the Respondent to repossess the frequency that was assigned to it, and issued to another party. It is evident from the Memorandum of Appeal that the Appellant seeks a prayer (c) compelling the Respondent to assign the Radio Broadcasting frequency spectrum in question.
22. The frequency in question is 91.0 MHz which has now been assigned to Telemain Company Limited, the intended interested party.
23. The Applicant wishes to have Telemain Company Limited enjoined in this appeal, and proposes a specific prayer against Telemain for the revocation of the frequency assigned to it.
24. The question that begs is whether Telemain Company Limited should be enjoined in this Appeal as an interested party.
25. The Supreme Court of Kenya in *Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 others*, Petition No. 12 of 2013 [2014] eKLR, observed an interested party as;

‘A party who has a recognizable stake (and therefore standing) in a matter....’

“[18] Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

26. In *Meme v. Republic* [2004] 1 EA 124; [2004] 1 KLR 637, the High Court observed that a party could be enjoined in a matter on the basis of certain considerations viz:

- “(i) joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) joinder to prevent a likely course of proliferated litigation.”

27. In the same line of reasoning, the High Court, in *Judicial Service Commission v. Speaker of the National Assembly and Attorney General*, High Court Constitutional and Human Rights Division Petition No. 518 of 2013, 2013 [eKLR] (Odunga J.) has thus stated (paragraph 4):

“*The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012, defines an interested party as ‘a person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation’. From the foregoing it is clear that an interested party as opposed to an amicus curiae or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly



non-partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings.”

28. In this instant application, the applicant has demonstrated the identifiable stake, the frequency in question. This frequency belonged to the Applicant, it is now in possession by the Intended Interested Party (Telemain Company Limited). Can this tribunal make any finding without involving on the necessary stakeholders? Our answer is in the negative. Telemain Co Ltd ought to be enjoined and defend its position on the possession of the said frequency.

29. Joinder of parties is so as to ensure the full settlement of all the questions involved as was found in the case of *Meme V Republic* (supra). It is a waste of precious judicial time to have matters adjudicated piecemeal. The decision by the respondent to issue the frequency to Teleman Co Ltd is also a subject to this appeal, as the letter dated 12<sup>th</sup> April 2020 clearly stated that the frequency will be issued to a deserving party. The deserving party here is Teleman Co Ltd. It is therefore our humble view that there is no need to file a separate appeal to determine this interconnected issue.

One can argue that tribunals are specialized courts that were established in order to ensure that litigants access justice in an expeditious way. It would cause further delay to have these issues litigated and determined in a separate suit whereas the same are interrelated.

30. The presence of Telemain Co Ltd in this suit is necessary, so that all the issues in the suit may be settled, and that it is our view that if they are not enjoined, this tribunal may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another.

31. In *Skov Estate Limited & 5 others v Agricultural Development Corporation & another* [2015] eKLR the court stated that “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.”

32. On whether the interested party can be enjoined as a Respondent, our answer is in the positive. We are persuaded by the practice in our civil courts under Order 1 Rule 10 Sub rule 2 where the court may at any stage of the proceedings after application of parties or suo moto order for addition of a name of a person who ought to be a defendant or whose presence before the court may be necessary in settling and adjudication of all questions.

33. In *Civicon Limited vs. Kivuwatt Limited and 2 Others* [2015] eKLR in which the court observed as follows:

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the



practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

34. As such in the matter at hand since the interested party may on the face of it also be a Respondent and would be vital for the tribunal’s adjudication and settlement of the matter, the tribunal may then deny the application to enjoin Telemain Co Ltd as an interested party and on its own volition, suo moto, order that they be Respondents.

### **Amendment of the Memorandum of Appeal**

35. The amendment sought is equally necessary and we would have allowed the same. It is trite law that parties are at liberty to amend their pleadings at any stage. The case of Ochieng and Others v First National Bank of Chicago Civil Appeal Number 147 of 1991 sets out the principles to be followed which are still applicable:
- a. power of the court to allow amendments is intended to determine the true substantive merits of the case;
  - b. amendments should be timeously applied for;
  - c. power to amend can be exercised by the court at any stage of the proceedings;
  - d. as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;
  - e. The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.
36. The proposed amendments do not alter the nature of the matter before us, and even if it did the tribunal would still have the power to allow the amendment. We are guided by the case of Simonian v Johar, (1962) EA.336 (K.), where the court approved amendment to a plaint which raised new causes of action because they were not of a different character from or foreign to or inconsistent with the original cause of action but stemmed from the same transaction.
37. Our foregoing views are in the minority and hence the decision of the tribunal is that of the majority.

### **Final Orders**

38. The upshot is that, by a majority of 3 to 2, Hon Rosemary Kuria, Collins Wanderi and Damaris Nyabuti (majority), and Hon Ramadhani Mukira and Vivienne Atieno (dissenting), the Appellant’s application dated 18<sup>th</sup> February 2022 is dismissed with no order as to costs.

**Delivered virtually in the presence of the Honourable Members of this tribunal, Collins Wanderi, Vivienne Atieno, Damaris Nyabuti and Ramadhani Mukira**

**Dated this 6<sup>th</sup> day of May 2022**

**In the presence of**

Masika for the Appellant

Ms Mwangi for the Respondent



C/A Joy Kendi

**ROSEMARY KURIA - CHAIRPERSON - COMMUNICATIONS & MULTIMEDIA APPEALS  
TRIBUNAL**

