



**Nyendwe v Clerk, Nairobi City County Assembly & 3 others; Nairobi
City County Assembly (Interested Party) (Petition E020 of 2023)
[2023] KEHC 2535 (KLR) (Constitutional and Human Rights) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2535 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E020 OF 2023
HI ONG'UDI, J
MARCH 29, 2023**

BETWEEN

LEONARD NYENDWE PETITIONER

AND

THE CLERK, NAIROBI CITY COUNTY ASSEMBLY 1ST RESPONDENT

THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY 2ND RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY 3RD RESPONDENT

HON. JOHNSON SAKAJA 4TH RESPONDENT

AND

NAIROBI CITY COUNTY ASSEMBLY INTERESTED PARTY

RULING

1. The Petitioner/Applicant filed the Notice of Motion dated 26th January 2023 under Rules 17(b) & 18 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice Rules 2013](#) seeking the following orders:
 - i. This Honourable Court be pleased to grant leave to amend the Petition filed herewith and dated 23rd January, 2023.
 - ii. In alternative to prayer (a) above, and in the interest of time and expediency, the Amended Petition annexed herewith be deemed to be amended with the leave of Court and be admitted as duly amended.



- iii. Costs of this Application be in the cause.
- iv. Any other remedy that the Court deems fit and just.
2. The application is supported by the grounds on its face plus the sworn affidavit of Leonard Nyendwe of even date. The main ground for the request to amend the petition is in respect of events that took place after the filing of the petition but have a bearing on the fair determination of the petition.
3. The deponent has averred that the amendment seeks to incorporate changes in respect to the Supplementary Appropriation Bill Gazette Number 1 of 2023 including the enactment of the Nairobi City County Supplementary Appropriation Act 2023. It's his averment that the amendment sought has been made in good faith, timeously and will not prejudice the parties herein in anyway. He annexed to his affidavit the draft amended Petition (LN-1).
4. The speaker of the Nairobi City County assembly Kennedy Okeyo Ngondi the 2nd respondent filed a replying affidavit sworn on 3rd February 2023. He averred that the petition sought to be amended is in itself a nullity in law. That the bill sought to be challenged was already law when the petition was filed. Further that the legislature process was adhered to in the enactment, of the said law.
5. He has deponed that the intended amendment is introducing a new cause of action and has therefore not met the threshold for such an application. He sought for its dismissal.
6. The 3rd respondent through Bryan Khaemba, Kamau Kamau advocates filed the following grounds of opposition dated 7th February 2023.
 - i. The entire application for leave to amend the petition is without merit, wholly incompetent and is for dismissal.
 - ii. The proposed amendments fundamentally alter the substratum of the petition and introduce an entirely different cause of action which should be raised in a new petition.
 - iii. The proposed amendments will muddy the issues in controversy before the court and prejudice the 3rd respondent's position through delay in resolution of the dispute.
 - iv. There is no new material or evidence that was not in possession or knowledge of the Petitioner when they filed the petition since the filing was done after he Nairobi City County Supplementary Appropriations Bill 2023 had been enacted into law.
 - v. Assent of the bill into law was in the public domain at the time of filing the petition and the application is simply meant to cure the petitioner's lack of due diligence.
 - vi. Consequently, the application for leave to amend the petition should be dismissed with costs.

Parties submissions

7. The Petitioner/Applicant's submissions dated 8th February 2023 were filed by Shwanya & co. advocates. Counsel pointed out that only one issue arises for determination. The issue is whether the Applicant is entitled to the orders sought. He submitted that Rule 18 of the "[*Mutunga Rules*](#)" allows for amendment of pleadings with leave of the Court. It is his submission that amendments to pleadings should not be denied unless they are so frivolous and would not assist the Court arrive at a proper determination of the suit.



8. Counsel referred to the case of *Institute for Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR where the Court held that:

“The power of amendment makes the function of the Court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.

Rule 18 of the Rules clearly stipulates that the Court may permit an amendment at any stage of the proceedings. The Court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendments can be allowed without an injustice to the other side.”

9. He contends that the amendment seeks to add a prayer declaring the Supplementary Appropriation Bill (Act) unconstitutional as it violates various Articles of the *Constitution*. That contrary to the 2nd respondent’s argument that the amendment will raise a fresh cause of action, the amendment sought arises from issues already in the petition. He adds that he should not be prevented from amending the petition since the 2nd respondent will have an opportunity to adduce evidence. He dismissed the 2nd respondent’s argument that the proposed amendment cannot rebut the presumption that legislations and regulations are constitutional.
10. He submitted that the presumption is that statutes enacted by the legislature are constitutional unless the law is clearly unconstitutional or a fundamental right is implicated. Reference was made to the cases of: (i) *Olum & another v Attorney General* [2002] 2 EA. 508, (ii) *Salvatori Abuki & another v. Attorney General Constitutional Petition No. 2 of 1997* (Uganda at Kampala), (iii) *Murang’a Bar Operators & another v. Minister for State for Provincial Administration & Internal Security & 2 others* [2011] eKLR.

The 2nd Respondent’s submissions

11. The 2nd Respondent filed his submissions dated 13th February 2023 through Otieno OKeyo & co advocates, Counsel reiterated the averments in the replying affidavit and submitted that this petition was a nullity ab initio and cannot be resuscitated by the proposed amendments. He relied on the case of *Cheraik Management Limited v. National Hospital Security Fund Board of Trustees & another*, [2012] eKLR where Odunga J (as he then was) held:

“...that whereas amended pleadings are conclusive as to the issues in dispute, the mere fact that a pleading is amended does not validate a suit which was rendered invalid ab initio.”

He also referred to *Eastern Radio Services & another v. R. J. Patel t/a Tiny Tots & another* (1962) E.A 818.

12. Further and while relying on HCC No. 937 of 1986 *George Mbutia v. consolidated Bank Ltd & another* [2009] eKLR counsel argued that allowing the amendment would cause him hardship, injustice and prejudice. He thus urged the Court to disallow it.

The 3rd respondent’s submissions

13. The 3rd respondent’s submissions dated 7th February 2023 were filed by Bryan Khaemba, Kamau Kamau advocates. Counsel submitted that the Petitioner/Applicant was not bringing anything new



on the table. That at the time of filing the petition the Bill had already been enacted into an Act of the County assembly by the Governor. He had failed to avail to the Court a copy of the Act which is a public document.

14. Counsel further submitted that the Applicant is abusing the provision for amendment of pleadings since he rushed to Court before ascertaining the true position of the matter. Additionally that the proposed amendments would fundamentally alter the nature, character and extent of the dispute before the Court. He therefore submitted that the Applicant may only file a new suit to challenge the new Act.
15. I have noted that the 1st & 4th respondents and Interested Party did not file any responses nor submissions to the Notice of Motion dated 26th January 2023. The assumption is that they do not oppose the application.

Analysis and determination

16. I have considered the Notice of Motion, affidavits, grounds of opposition, submissions and cited decisions. The only issue I find falling for determination is whether the application is merited.

Rule 18 of the *Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules*. (“Mutunga Rules”)

“ 18. A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court.”

17. There is therefore no dispute that amendment of pleadings in this case “the petition” is available upon grant of leave by the Court. Leave may be granted by the Court after considering the circumstances. Grant of leave is therefore not automatic.
18. The petition herein was filed on 23rd January 2023, and the petition was referring to supplementary Appropriation Bill. When parties appeared before the Court on 24th January 2023 it emerged that the said Supplementary Appropriation Bill had been assented to on 23rd January 2023 and even gazetted on the same day. The petitioner appeared not clear on this. In view of this, the Court adjourned and fixed the matter for mention on 27th January 2023 for confirmation of the position.
19. This court was away on official duty on 27th January 2023 and the matter was mentioned before the Deputy Registrar, on the said date when counsel for the petitioner confirmed that the petition had been overtaken by events. Secondly that an application dated 26th January 2023 (which is the current application) had been filed.
20. The guiding principles in an application to amend pleadings were summarized in *St Patrick’s Hill School Limited v. Bank of Africa Kenya Limited* [2018] eKLR as follows:

“ 21. A wider footage on the same issue was given in a more recent case of *Ochieng & others v. First National Bank of Chicago* Civil Appeal Number 147 of 1991 the Court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings. The same is as follows:

- a. The power of the Court to allow amendments is intended to determine the true substantive merits of the case
- b. The amendments should be timeously applied for;



- c. Power to amend can be exercised by the Court at any stage of the proceedings.
- d. That 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 an amendment notwithstanding the expiry of the current period of limitation.”

21. Likewise, the Court in the case of *Rogers Mogaka Mogusu v. George Onyango Oloo & 2 others* [2014] eKLR noted as follows:

“ 14. ... I am of the view that the ends of justice will be achieved and the principles and values enunciated in Chapter Six of the *Constitution* with better be served if the amendment is allowed and the issues in contest dealt with wholly. At this point, this Court is not concerned with the substantive merits of the Petitioner’s case as those are matters that will be canvassed at the hearing and I am therefore satisfied that the amendment will help the Court conclusively determine the issue before it and declining the amendment at this stage may only lead to the filing of another suit and such an approach would negate the principles of Judicial authority enunciated in Article 159(2) of the *Constitution* that all suits should be expeditiously determined.”

22. A look at the original petition and the amended version reveals that the proposed amendment involves two things:

- i. Amending Supplementary Appropriation Bill Number 1 of 2023 to read Supplementary Appropriation Act Number 1 of 2023
- ii. Deletion and introduction of some prayers to fall in line with pleadings.

23. Applying the above principles to the facts before the Court I find that the present application squarely falls within the requirements set out in the said principles for the reasons that;

- i. The application was filed and served within 3 days of the change of events which was timeously.
- ii. The complaint raised by the Applicant has remained intact hence no prejudice will be caused to the respondents and interested party.
- iii. The matter is still fresh and its only important that everything is made clear to enable the respondents/interested party respond appropriately to the real matter at hand which is the supplementary Appropriation Act Number 1 of 2023 and not the Bill.

24. The above being the position I find merit in the Notice of Motion dated 26th January 2023 and I allow it on the following terms:

- i. The Petitioner/applicant is granted leave to amend his Petition.
- ii. The Amended Petition dated 26th January 2023 which has been duly served on the parties is hereby admitted as duly amended, and filed.



- iii. The Respondents and Interested Party are granted leave to file and serve an amended response (if need be) within ten (10) days from today's date.
- iv. To save on time and in expediting the matter the Court directs that it will move to hear the petition as the amended Notice of Motion has equally been overtaken by events. On that note the parties are hereby directed to file and exchange written submissions within 30 days, upon service of responses. The petitioner to have the first fifteen (15) days upon service of the responses.
- v. The petitioner is granted leave to file supplementary submissions (if need be) within 7 days upon service by the respondents and interested party.
- vi. Mention on 16th May 2023 to confirm compliance and further directions.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 29TH DAY OF MARCH, 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

