



**Gidion v Amollo & 10 others; Commission for Integration and National Cohesion & 2 others (Interested Parties) (Petition E079 of 2023)  
[2023] KEHC 2475 (KLR) (Constitutional and Human Rights) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2475 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E079 OF 2023**

**HI ONG'UDI, J**

**MARCH 27, 2023**

**BETWEEN**

**HON MIKE SONKO MBUVI GIDION ..... PETITIONER**

**AND**

**ODINGA RAILA AMOLLO ..... 1<sup>ST</sup> RESPONDENT**

**MUSYOKA KALONZO STEPHEN ..... 2<sup>ND</sup> RESPONDENT**

**JEREMIAH KIONI ..... 3<sup>RD</sup> RESPONDENT**

**MARTHA WANGARI KARUA ..... 4<sup>TH</sup> RESPONDENT**

**EUGENE LUDOVIC WAMALWA ..... 5<sup>TH</sup> RESPONDENT**

**AZIMIO LA UMOJA ONE KENYA COALITION ..... 6<sup>TH</sup> RESPONDENT**

**WIPER DEMOCRATIC PARTY ..... 7<sup>TH</sup> RESPONDENT**

**GEORGE LUCHIRI WAJACKOYA ..... 8<sup>TH</sup> RESPONDENT**

**WYCLIFFE AMBETSA OPARANYA ..... 9<sup>TH</sup> RESPONDENT**

**THE CABINET SECRETARY MINISTRY OF INTERIOR AND  
COORDINATION OF NATIONAL GOVERNMENT ..... 10<sup>TH</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 11<sup>TH</sup> RESPONDENT**

**AND**

**COMMISSION FOR INTEGRATION AND NATIONAL  
COHESION ..... INTERESTED PARTY**

**GOVERNOR, NAIROBI CITY COUNTY ..... INTERESTED PARTY**



**RULING**

1. By way of a Notice of Motion dated March 20, 2023, the petitioner seeks to amend his petition dated March 17, 2023 and the Notice of Motion of even date. He seeks orders that:
  - i. Spent;
  - ii. This honourable Court be pleased to grant leave to the petitioner to amend:
    - a. The petition herein dated March 17, 2023 in terms of the draft amended petition annexed to the petitioner’s affidavit in support hereof, marked as exhibit “MS 1”.
    - b. The Notice of Motion herein dated March 17, 2023 in terms of the amended notice of motion, annexed to the petitioner’s affidavit in support hereof marked as exhibit “MS 2”.
  - iii. Upon the making of the order hereof in terms of Prayer 2 herein, the said amended petition and amended notice of motion be deemed as duly filed and to be served upon the respondents upon such terms as this honourable court may determine.
  - iv. The applicant’s affidavit in support of the annexed application be admitted in evidence to support the amended notice of motion and amended petition herein.
  - v. The costs be in the cause.
2. The application was supported by the petitioner’s affidavit of even date and the grounds on the face of the application summarized as follows that:
  - i. Following the 20<sup>th</sup> March 2023 unlawful public demonstrations, the 1<sup>st</sup> respondent informed the public that the demonstrations would be carried out weekly from 27<sup>th</sup> March 2023 and every Monday thereafter.
  - ii. The 1<sup>st</sup> respondent’s utterances have created tensions across Kenya, threatening the stability of Kenya and economic rival. This is since the persons who purport to exercise the right under Article 37 of the *Constitution* have consistently engaged in acts of hooliganism, anarchy, arson, unruly conduct and general gratuitous violence which the 1<sup>st</sup> to 9<sup>th</sup> respondents are not held liable for under Section 5 of *Public Order Act*.
  - iii. The 1<sup>st</sup> respondent’s actions are in violation of the principle of patriotism under Article 10(2) (a) of the *Constitution*.
  - iv. Outside the *Public Order Act*, Kenya does not have a readily enforceable public demonstrations or picketing legislative framework save for the Penal Code. As such the possibility of multiplicity of picketing and demonstrations in various areas other than Nairobi will undermine the objectives of the *Public Order Act* due to the limited government resources.
  - v. No demonstrable prejudice will be suffered by the respondents if the sought prayers are granted.



### **The Respondents' case**

3. The 1<sup>st</sup> – 8<sup>th</sup> and 10<sup>th</sup> - 11<sup>th</sup> respondents' did not file any responses to the application. The 9<sup>th</sup> respondent in opposition to the application filed the following grounds of opposition dated March 23, 2023:
  - i. The application dated March 20, 2023 is unmerited and constitutes an abuse of the process of the Court.
  - ii. The petition and notice of motion dated March 17, 2023 has been overtaken by events.
  - iii. The amendments to the petition are vain and do not serve any purpose since the petition has been overtaken by events as there were no unlawful; demonstrations nor public holiday on March 20, 2023.
  - iv. The amendments sought offend the rules on amendment of pleadings as they bring about a new case that would change the cause of action into one of a substantially different nature which could more conveniently be subject of a fresh action.
  - v. The nature of amendments sought is tantamount to a fresh petition being sneaked in the court record without following the due procedure.
  - vi. The amendments sought introduce a premature case as the petitioner has not demonstrated that the announced demonstrations are in contravention of Article 37 of the Constitution and Section 5 of the Public Order Act or other written law.
  - vii. The amendments sought have changed the application in its entirety and thus not amenable to amendment but withdrawal.
  - viii. The application lacks merit and should be dismissed with costs.

### **The Parties submissions**

4. The application was argued orally. Mr Kinyanjui, Counsel for the petitioner on March 24, 2023 while submitting in Court, stated that the petitioner's averments and evidence in his affidavit had not been controverted by the respondents. Moreover that the respondents would not suffer any prejudice if the amendments were allowed.
5. He noted that the amendments were based on the rule of law being upheld owing to the additional pronouncements that were made by the respondents on March 20, 2023. As such, he noted that the petitioner sought the protection of the right under Article 24(1)(d) of the Constitution for the non-participating persons in the demonstrations. He further emphasized that the provisions of Section 53(3)(e) of Public Order Act ought to be complied with during demonstrations. Likewise, he contended that the provisions of Article 37 of the Constitution were not open – ended.
6. Mr. Ng'eno, Counsel for the 9<sup>th</sup> respondent in response submitted that the case had been overtaken by events. He asserted further that there were no illegal demonstrations as alleged. He pointed out that the amendments sought to bring about a new case which is substantially different from the original case. In view of this, he argued that the sought amendments offended the principles of amendment of pleadings. He also pointed out that the amendments deal with events yet to occur hence a pre-mature matter. He therefore submitted that the petitioner ought to have withdrawn the pleadings and filed a new suit.



## Analysis and determination

7. I have analyzed the instant case and perused the pleadings of the parties as submitted. Further, I have considered the issues underscored in the Notice of Motion dated March 20, 2023 and as a result find that the only issue that arises for determination is:

Whether the petitioner should be granted leave to file the amended petition

8. The law on the amendment of constitutional petitions is settled both in law and precedent. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, famously referred to as ‘The Mutunga Rules’ provides that a petition can be amended in line with Rule 18, which provides as follows:

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

9. The aforementioned rule in my opinion divulges that such an amendment is not spontaneous neither is it automatic. The Court must examine the factors of each case to ascertain whether the set principles have been adhered to and in its discretion proceed to make a determination.
10. The three judge bench addressing the question of amendment of pleadings and factors to be considered noted as follows in the case of *Institute For Social Accountability & Another v Parliament Of Kenya & 3 others* [2014] eKLR:

- “ 17. The issue of amendment of pleadings is not novel and has been the subject of numerous court decisions, the common denominator being that as a general principle, courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. See generally *Eastern Bakery v Castelino* (1958) EA 461 ; *Ochieng and Others v First National Bank Of Chicago* CA Civil Appeal Number 149 of 1991, *Kenyatta National Hospital v Kenya Commercial Bank Ltd & Another* [2003] 2 EA.
18. The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. 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.
19. 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 amendment can be allowed without an injustice to the other side.”



11. Additionally the Court of Appeal while offering guidance and wisdom on the principles to be considered in the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR reiterated their position in their earlier decision. They opined as follows:

“The law on amendment of pleading.....was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows:-

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that 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 Limitation Acts.(Emphasis mine)”

12. 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* will 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.”

13. The petitioner urged this Court to allow the application in light of the recent developments following the events that occurred on March 20, 2023. He stressed that the respondents would not suffer any prejudice if leave was granted to effect the amendments. The 9<sup>th</sup> respondent on the other hand, argued that the petitioner sought to introduce a new claim. He underscored that the sought amendments were based on a premature case and the suitable recourse was withdrawal of the petition as it had been overtaken by events.
14. To answer this question a brief comparative analysis of the case is vital to set out the facts. It is summarized as follows:

### **The Petition dated March 17, 2023**

15. The bone of contention in the petition revolved around the 1<sup>st</sup> respondent's declaration on March 13, 2023 at a public Rally in Siaya County that March 20, 2023 was a public holiday contrary to Article 9(3)(4) and (5) of the *Constitution*. Further is the 1<sup>st</sup> respondent's alleged utterances against the President of Kenya in violation of Article 33(2)(d)(i) of the *Constitution*. Likewise, the 1<sup>st</sup> respondent's



declaration on March 16, 2023 at Mazembe Grounds, Nakuru that March 20, 2023 would be the day of public demonstration.

16. For this reason, the petitioner sought the following summarized prayers : a declaration that the 1<sup>st</sup> respondent has no power to declare March 20, 2023 as a public holiday; that his utterances against the President constitute a violation of Article 131(1)( e) of *the Constitution*; a public apology be issued by the 1<sup>st</sup> respondent to the public for the utterances; a permanent injunction be issued against the 1<sup>st</sup> to 9<sup>th</sup> respondents from declaring March 20, 2023 as a public holiday; a declaration that that these respondents have no right to carry out demonstrations on 20<sup>th</sup> March 2023; directions to issue from the 10<sup>th</sup> respondent to the Inspector General of police to arrest the 1<sup>st</sup> to 9<sup>th</sup> respondents for declaring March 20, 2023 as a public holiday and that permanent injunction be issued restraining the 1<sup>st</sup> to 9<sup>th</sup> respondents from holding public demonstrations in Kenya without complying with the requirements of the *Public Order Act*.

### **The Amended Petition dated 20<sup>th</sup> March 2023**

17. The key areas of contention in the amended petition other than those in the petition were that there exists no open ended right to picket and demonstrate outside the prescription under Article 37 of the *Constitution* as read with Section 5 of the *Public Order Act*. In view of this, the amended petition seeks to stop the continual demonstrations as declared on March 20, 2023 and the anarchy, violence and mayhem that was witnessed causing closure of businesses across Kenya.
18. Owing to this, the petitioner seeks the following additional summarized reliefs: that the 1<sup>st</sup> respondent has no power to declare March 20, 2023 or any other day a public holiday; a declaration that the 1<sup>st</sup> to 9<sup>th</sup> respondents don't have an unlimited right to picket and demonstrate within Kenya; a permanent injunction be issued restraining the 1<sup>st</sup> to 9<sup>th</sup> respondents from holding any public gathering without complying with Section 5(1) of the *Public Order Act*, inciting people, hindering public service transportation, blocking roads and pathways, blocking entrances to premises and attending government offices in company of more than 2 persons; a permanent injunction be issued against the 1<sup>st</sup> to 9<sup>th</sup> respondents from violating other people's rights while demonstrating and a declaration that since the 1<sup>st</sup> respondent exhausted his right of appeal at the Supreme Court challenging the presidency of the President, he is estopped from contesting the validity and legitimacy of the President.
19. From the cited comparative summary, it is evident that the amended petition retains the essence of the petition. Additionally, the amendments seek to expound on the subject due to the new developments in the matter that could not have been contemplated at the time of filing the original petition. It is discernible that the petition's initial controversy was geared towards condemning and stopping the acts of the 1<sup>st</sup> to 9<sup>th</sup> respondents with reference to the planned public demonstrations for March 20, 2023. The amended petition in essence rides on this scope that has since been lengthened by the respondents to weekly demonstrations. I find that the proposed amendments do not introduce a new subject but rather seek to encapsulate the evolving nature of the subject matter.
20. It should be appreciated that Courts in determining whether to exercise their discretion in such applications ought to generally allow them unless they fail the test of prejudice caused to the other party. The 9<sup>th</sup> respondent in this matter besides stating that the amendments introduce new issues did not demonstrate the prejudice they would suffer if the amendments were allowed. In this regard the



Court in the case of *Ann Muthoni Karanu vs La Nyavu Gardens Limited* NBI ELC 181 of 2014 [2015] eKLR opined as follows:

“ [9]...The overriding objective (of the Civil Procedure Rules) is that the court should deal with cases justly, that includes, so far as is practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party caused by the amendment can be compensated for in costs, and the public interest in the administration of justice is not significantly harmed”

21. From the aforementioned discussion I am persuaded that the proposed amendments will not occasion any prejudice to the respondents as they do not change the substratum of the original petition. I find that allowing the proposed amendments to the petition will assist the Court to decisively deal with all matters in controversy and help make a definite determination whilst preventing multiplicity of suits. I am satisfied that the proposed amendments are necessary in the interest of the administration of justice.
22. The upshot of the foregoing and for the reasons set out above, I find that the Notice of Motion dated March 20, 2023 has merit and is hereby allowed and leave granted to amend the Petition and Notice of Motion both dated March 17, 2023.
23. The said amended pleadings (Petition and Notice of Motion both dated March 20, 2023) are hereby deemed as duly filed. The Petitioner’s Affidavit in support of the Notice of Motion dated March 20, 2023 is hereby admitted as evidence in support of the Amended Notice of Motion and Amended Petition. The same shall be served on the respondents and Interested Parties within 48 hours.
24. Responses to both the amended Petition and the amended Notice of Motion to be filed within 3 (three) days.
25. Mention on April 3, 2023 to confirm compliance and further directions on the hearing.

Orders accordingly

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 27<sup>TH</sup> DAY MARCH 2023 IN OPEN COURT AT MILIMANI NAIROBI.**

**H I Ong’udi**

**Judge of the High Court**

