



Huka & 2 others v County Assembly of Isiolo & another; Kenya Kwanza Coalition & 2 others (Interested Parties) (Constitutional Petition E009 of 2023) [2023] KEHC 21958 (KLR) (30 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21958 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CONSTITUTIONAL PETITION E009 OF 2023**

EM MURIITHI, J

AUGUST 30, 2023

IN THE MATTER OF ARTICLE 1, 2, 3, 10, 23, 38, 47, 48, 50, 108, 159, 232, 251 & 258 OF THE CONSTITUTION AND IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT 2015

BETWEEN

HON. NURA MOHAMMED HUKA 1ST APPLICANT

HON. MEJJA ABDULLAHI GOLICHA 2ND APPLICANT

HON. ABUBAKAR ABDI GODANA 3RD APPLICANT

AND

COUNTY ASSEMBLY OF ISIOLO 1ST RESPONDENT

THE SPEAKER COUNTY ASSEMBLY OF ISIOLO 2ND RESPONDENT

AND

KENYA KWANZA COALITION INTERESTED PARTY

HON. ABDINOOR DIMA JILO INTERESTED PARTY

HON. KAMILA WARSAME INTERESTED PARTY

RULING

1. The *locus classicus* on amendment of pleadings is the decision in *Eastern Bakery v. Castellino* (1958) EA 461 where the Court of Appeal for Eastern Africa held that –

“Amendments to pleadings sought before hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs.”



2. In regular civil suits, amendment of pleadings is provided for under Order 8 Rule 3 of the [Civil Procedure Rules](#) provides as follows:

3. [Order 8, rule 3.] Amendment of pleading with leave.

- (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
- (2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.
- (3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
- (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
- (5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

3. In constitutional litigation, Rule 18 of the Mutunga Rules gives unfettered discretion in plain words as follows:

“Amendment of pleadings.

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

4. In the face of the general and wide powers of amendment in Rule 18 of Legal Notice No 117 [The Constitution Of Kenya \(protection Of Rights And Fundamental Freedoms\) Practice And Procedure Rules, 2013](#) (the Mutunga Rules), it may be convenient to consider the related provisions on amendment under the [Civil Procedure Act](#) and Civil Procedure Rules in order to ascertain the rationale, scope and effect of amendment of pleadings. As set out in the rules, the object of the amendment is to ensure that the court determines the real dispute between the parties. See section 100 of the [Civil Procedure Act](#) -

“General power to amend



100. The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

and Order 8 Rule 3 (1) of the Civil Procedure Rules that “the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”

Issue for determination

5. The issue for determination is consequently, whether the proposed amendment here in is one that may be made without prejudice to the other side, which cannot be remedied by an award of costs.
6. An amendment which makes it impossible for the other party to properly to defend himself would also create a prejudice incapable of compensation by an award of costs because it takes away the party’s ability to seek and obtain a fair hearing.
7. Similarly, amendments which occasion prejudice to the other parties would be such as those that introduce a cause of action already adjudicated by, or pending before, other courts or tribunal which would offend public judicial policy on multiplicity of suits and avoidance of likely conflicting determinations by different courts and tribunals of competent jurisdiction; increase costs and cause delay in consequent applications for striking out on grounds of res judicata or stay for sub judice.
8. However, amendments which only cause a delay in the hearing and determination of the dispute, necessary for the other party(ies) to plead to the new materials, are clearly remediable in full by an award of costs.
9. The amendment cannot be opposed on the grounds of lack of merit of the cause of action, the proposition or the contention sought to be underpinned by the amendment. It is generally accepted that an arguable case which is the foundation of all judicial causes of action does not mean a case that must eventually succeed upon hearing and determination. The Court does not, therefore, at the stage of leave to amend look into the merits of the case of the applicant or arguments in support thereof.
10. However, the court must reject at the hearing any amendment or argument based on the matters which were the subject of the determination by the Tribunal in Meru Political Parties Tribunal Dispute No E001 of 2023 as such amendment would be to raise a foundation for an appeal from the Tribunal’s determination without filing a competent appeal, and may well be res judicata by virtue of any such decision of the tribunal.
11. Having seen the decision of the tribunal, this court takes the view that none of the matters raised before the Tribunal are res judicata as the tribunal struck out the Petition before it on the grounds of lack of jurisdiction without delving into the merits.

Orders

12. Accordingly, for the reasons set out above, the Court allows the application dated July 5, 2023 as follows:
 1. Leave to amend the Petition is granted to amend as proposed in the draft Amended Petition attached to the affidavit of Abubakar Abdi Godana sworn on July 5, 2023.
 2. The Amended Petition shall be filed within seven (7) days from the date hereof.



3. The Respondents shall in accordance with the law under Rule 15 of Legal Notice No 117 The Constitution}} Of Kenya (protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013 within fourteen 14 days of service of the Amended Petition amend their Responses to the Amended Petition.

4. Costs in the Cause.

13. The Petition shall be mentioned on September 20, 2023 for directions as to hearing.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF AUGUST, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES

Mr. Mwendani Advocate for the Petitioners.

Mr. Aluku with Mr. Lesaigor Advocates for the 1st Respondent.

Mr. E. Theuri with Ms. Kiunga Advocates for the 2nd Respondent.

