



Kwale International Sugar Company Limited v Kenya Bureau of Standards & 5 others (Petition 226 of 2018) [2023] KEHC 21945 (KLR) (22 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21945 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION 226 OF 2018**

OA SEWE, J

AUGUST 22, 2023

IN THE MATTER: ARTICLES 2(1) & (2), 3(1), 10, 19, 20, 22, 23(1) & (3), 27(1), 35, 40, 46,47(1) &(2), 48, 50(1), 159 AND 258(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER: THE STANDARDS ACT 496 OF THE LAWS OF KENYA

AND

**IN THE MATTER: THE KENYA REVENUE
AUTHORITY ACT NO. 2 OF 1995 LAWS OF KENYA**

AND

**IN THE MATTER: SECTIONS 3, 4(1) (2), (3) (A) (B) (D) & (G), (4), 6,
7(1) (A) & (2) OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

AND

**IN THE MATTER: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLES 2, 3(1), 10, 19, 20, 21, 22, 23(1) & (3),
27(1), 35, 40, 46, 47, 48 AND 50(1) OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

KWALE INTERNATIONAL SUGAR COMPANY LIMITED PETITIONER

AND

KENYA BUREAU OF STANDARDS 1ST RESPONDENT

KENYA REVENUE AUTHORITY 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

MINISTRY OF TRADE 4TH RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS 5TH RESPONDENT



RULING

- (1) Before the Court for determination is the Notice of Motion dated March 2, 2023. It was filed by the petitioner, Kwale International Sugar Company Limited, under Rules 18 and 19 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (otherwise known as “the Mutunga Rules”) for orders that:
 - (a) Leave be granted to the petitioner to amend the Petition dated September 18, 2018 as proposed in the annexed draft Amended Petition.
 - (b) The costs of the application be in the cause.
- (2) The application was premised on the grounds that, although the Petition was heard by Hon. Justice Ogola and a judgment issued on November 7, 2019, that judgment was overturned on appeal in Civil Appeal No. 2 of 2020 *Kenya Bureau of Standards v Kwale International Sugar & 4 others*, whereupon the Court of Appeal set aside the entire proceedings and directed that the Petition be heard afresh by another judge. The petitioner further averred that there have been various factual developments between the time the Petition was filed and the date of the judgment of the Court of Appeal; and that it is necessary to plead the same to enable the court effectively and fairly determine all the issues in dispute between the parties. The petitioner added that no prejudice will be suffered by the respondents as they will have an opportunity to respond to the Amended Petition and challenge the evidence adduced.
- (3) The application was supported by the affidavit of Benson Nzuka Musili, sworn on March 2, 2023 in which the aforementioned grounds were restated. In essence, the petitioner averred that it is in the interest of justice that the Petition be amended along the lines proposed in the draft Amended Petition annexed to the Supporting Affidavit; and that none of the parties will be prejudiced by the proposed amendments as they will have an opportunity to respond to the Amended Petition and the evidence in support.
- (4) The application was opposed by the 1st Respondent, Kenya Bureau of Standard (KEBS), vide the Replying Affidavit sworn on April 28, 2023 by its Regional Manager, Coast Region, Mr. Charles Musee. He averred, inter alia, that after the delivery of the judgment by the High Court on November 7, 2019, the petitioners proceeded to file another suit Mombasa Civil Suit No. 1 of 2020 Kwale International Sugar Limited v Kenya Bureau of Standards and sought general damages, special damages of USD 75,952,863, exemplary damages plus costs and interest. The civil suit is still pending hearing and determination.
- (5) He further averred that, in the meantime, the 1st respondent’s appeal against the judgement dated November 7, 2019 was heard and determined on July 29, 2022 in the 1st respondent’s favour in that the Court of Appeal allowed the appeal, set aside the entire proceedings of the High Court and remitted the Petition back to the High Court for re-trial by a judge.
- (6) At paragraph 17 of the Replying Affidavit, Mr. Musee set out the following reasons for opposing the application for amendment:
 - (a) That the amendments, especially those relating to the factual premise of the Petition, are intended to fill gaps in the Petition that were exposed by the respondents in their responses and submissions and which the trial court initially purported to fill by collecting evidence on behalf of the petitioner;



- (b) The amendments sought to be introduced particularly on the reliefs for damages are intended to fill the gap exposed by the 1st respondent that they had neither been pleaded nor proved and therefore intended to steal a march on the respondents;
 - (c) The amendments are intended to panel-beat the Petition in view of the two judgments, one by this Court and the other by the Court of Appeal; and the site visits and the evidence collected by the trial court; and therefore that the 1st respondent will be highly prejudiced thereby;
 - (d) The intended amendments particularly on the reliefs and the damages are subject of another suit, namely, Mombasa High Court Civil Suit No. 1 of 2020: *Kwale International Sugar Company Limited v Kenya Bureau of Standards*, and introducing them in this Petition will be sub-judice and may result in two conflicting judgments on the same subject matter;
 - (e) The intended amendments particularly on the reliefs and the damages are the subject of another suit, namely Mombasa High Court Civil Suit No. 1 of 2020: *Kwale International Sugar Company Limited v Kenya Bureau of Standards*, and introducing them in this Petition will be improper use of scarce judicial time and an abuse of the process of this Court; and,
 - (f) The intended amendments on both the factual premise and the reliefs sought have the effect of changing the character and expanding the scope of the Petition beyond that which the Court of Appeal remitted back to the High Court for re-trial which poses grave prejudice to the 1st respondent.
- (7) Thus, it was the contention of the 1st respondent that the application for amendment is not only an afterthought, but is also caught up by the doctrine of laches. The affiant posited that the application is merely intended to deny the 1st respondent of its accrued defence under Section 227 of the *East African Community Customs Management Act*, 2004 (EACCMA). In support of the 1st respondent's averments several documents were annexed to the Replying Affidavit, including the draft Amended Petition, the judgment of the Court of Appeal in Mombasa Civil Appeal No. 2 of 2020: *Kenya Bureau of Standards v Kwale Internantional Sugar Company Ltd & Others*, and the pleadings filed in Mombasa High Court *Civil Case No. 1 of 2020*.
- (8) In response to the 1st respondent's averments, the petitioner filed a Supplementary Affidavit sworn by Mr. Benson Nzuka Musili on 12th May 2023 and denied that the petitioner is out to change the nature of its Petition. He reiterated the petitioner's stance that its intention is only to bring forward its entire case as far as the constitutional violations go. In the same vein Mr. Musili denied that the reliefs sought herein are sub judice in *Mombasa HCCC No. 1 of 2020*. He pointed out that in this matter, the petitioner is seeking general and special damages for violation of constitutional rights, while in the civil case it seeks damages for breach of common law and statutory duty of care.
- (9) Mr. Musili further deposed that the Court of Appeal remitted the case to the High Court for re-trial; and that there is nothing in the judgment of the Court of Appeal that limited the re-trial to the pleadings or material already on record. He added that the defence under Section 227 of *EACCMA* which the 1st respondent says it will lose, is not available to it in the first place; and that even if it was available, it can still be taken up during the hearing of the Petition as amended. Mr. Musili also refuted the allegations that the petitioner is guilty of laches, contending that the period between 7th November 2019 and 29th July 2022 was unavailable for any amendments as the matter was pending appeal. He reiterated his earlier assertion that there is no prejudice that the 1st respondent will suffer which cannot be ameliorated by an award of costs.



- (10) The application was canvassed by way of written submissions, pursuant to the directions given herein on 21st March 2023. Thus, Prof. Ojienda, assisted by Mr. Kongere and Ms. Awuor, filed written submissions dated 12th May 2023. He proposed a single issue for determination, namely whether leave to amend the Petition should be granted. Counsel submitted that the power to allow amendments is donated to the Court by virtue of Rules 18 of the Mutunga Rules; and therefore the Court has the discretion to grant the orders sought. He relied on Kenline Agencies Ltd v Housing Finance Company of Kenya & Another [2007] eKLR and Mombasa Cement Limited v Speaker of the National Assembly & 2 Others [2016] eKLR as to the applicable principles.
- (11) Prof. Ojienda submitted that, when the Court of Appeal remitted the case back to the High Court for a re-trial, it put the parties back to the position they were in before the first trial took place; and therefore either party has the right to amend their pleadings or lead additional evidence other than what they had filed at the beginning. He accordingly posited that any defence under Section 227 of the EACCMA would still be available to the 1st respondent. Counsel asserted that the petitioner's cause of action remains the same; and that the purpose of amendment is to ensure that the true state of the fact which the parties really and finally intend to rely on are brought to the fore for effectual determination. Thus, Prof. Ojienda prayed that the Notice of Motion dated 2nd March 2023 be allowed with costs.
- (12) On behalf of the 1st respondent, Mr. Wekesa relied on his written submissions dated 10th May 2023. He reiterated the posturing that the proposed amendments are intended to panel-beat the Petition in view of the two existing judgments and the site visit by the trial court. He relied on Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR and Coffee Board of Kenya v Thika Coffee Mills Limited & 2 Others [2014] eKLR in which the applicable principles were restated. Counsel then proceeded to make submissions under the following broad heads:
- (a) That there is inordinate delay in bringing the amendment;
 - (b) The proposed amendments are the subject of an existing suit before this Court;
 - (c) The proposed amendments introducing a claim for damages against the 1st respondent are statute barred; and
 - (d) That the amendments seek to substantially change the character and nature of the original suit.
- (13) Counsel developed his arguments around the themes aforementioned and relied on various authorities in support of his submissions, which I shall revert to shortly. He consequently prayed for the dismissal of the application and for the matter to be set down for hearing at the earliest date.
- (14) I have given careful consideration to the petitioner's application, the averments in the Supporting and Supplementary Affidavits as well as the response thereto filed by the 1st respondent. I have likewise paid attention to the written submissions filed by learned counsel on behalf of the parties and the authorities relied on by them. There is no gainsaying that the discretion to grant leave to amend pleading is indeed a wide one. But it is also trite that the discretion is not intended to be exercised whimsically or capriciously. Hence, Rule 18 of the Mutunga Rules states:
- “A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court.”
- (15) The rationale for amendment of pleadings need not be belaboured; it is so that the Court can then effectively and effectually determine the issues in controversy between the parties to the suit. In



Nyamodi Ochieng Nyamogo v Kenya Posts and Telecommunication Corporation [2007] eKLR, for instance, it was held that:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between the parties is conducted not on false hypothesis of the facts already claimed but rather on the basis of the true state of facts or relief or remedy which the parties really and finally intend to rely on or to claim.”

- (16) Similarly, in *Institute For Social Accountability & Another v Parliament of Kenya & 3 Others* [2014] eKLR the above position was reiterated thus:

“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.”(see also *Kenline Agencies Ltd v Housing Finance Company of Kenya & Another* [2007] eKLR)

- (17) What, then, are the principles that guide the exercise of discretion in an application of this nature? In my considered view, the court is duty bound to approach the application, not from the prism of the *Civil Procedure Rules*, but the *Mutunga Rules*, which are, by their very nature intended to enhance access to justice by focusing on the substance rather than technicalities. Accordingly, I am persuaded by the position taken by Hon. Musyoka, J. in *Francis Angueyah Ominde & another v Vibiga County Executive Committee Members Finance Economic Planning and 3 others; Controller of Budget and 10 others (Interested Parties)* [2021] eKLR that:

“... it should be pointed out that the constitutional petitions are governed and regulated by the *Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules*, 2013, so far as procedures and processes are concerned. They are not subject to the *Civil Procedure Rules*, which governs processes that are brought under the *Civil Procedure Act*, Cap 21, Laws of Kenya. So far as procedure is concerned, the *Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules*, 2013 the *Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules*, 2013, captures the spirit of Article 159(2)(d) of the *Constitution*, which is an injunction against constitutional proceedings being hostage to technicalities of procedure, and which enjoins courts to protect and promote the principles of the *Constitution*. The focus is trained on substance rather than process. The *Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules*, 2013 are more flexible compared with the provisions of the *Civil Procedure Rules*...”

- (18) I am therefore persuaded to the view that when the Court of Appeal remitted this case back to the High Court for retrial, the parties were put back to the position in which they were when the suit was filed; and therefore the parties ought to be given the flexibility to clarify their pleadings and bring out the real issues in controversy for effectual determination. In the same vein, it cannot be said that the petitioner is guilty of laches when it is plain that the 1st respondent’s appeal was not determined until July 2022. In any event, it is now trite that there is no time limit when it comes to violation of



constitutional rights. Hence, in *Chief Land Registrar & 4 Others v Nathan Tirop Koeh & 4 Others* [2018] eKLR, for instance, the Court of Appeal held thus after reviewing the relevant case law:

“Guided and convinced of the sound jurisprudence that there is no time limit for filing a constitutional petition, we find the ground that the trial judge erred in failing to dismiss the Petition on account of delay, acquiescence and laches has no merit. Unless expressly stated in the *Constitution*, the period of limitation in the *Limitation of Actions Act* do not apply to violation of rights and freedoms guaranteed in the *Constitution*. The law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights. (See *Dominic Arony Amolo v Attorney General* Nairobi HC Misc. Civil Case No. 1184 of 2003 (O.S) (2010) eKLR; *Otieno Mak’Onyango v Attorney General & another* Nairobi HCCC No. 845 of 2003). In our view, subject to the limitations of Article 24 of the 2010 *Constitution*, fundamental rights and freedoms cannot be tied to the shackles of *Limitation of Actions Act*. However, each case is to be decided on its own merits...”

(19) Accordingly, the issue of laches is clearly untenable. In the same vein, although copious submissions were made by counsel for the 1st respondent that the proposed amendments are res judicata, it is my view that those arguments are premature, having been made on the basis of hypothesis rather than the actual pleadings on record because the Petition is, in fact, yet to be amended.

(20) I am further convinced that no prejudice will be suffered by the respondents for which costs will not suffice as a remedy granted that they will have an opportunity to amend their responses as well as adduce evidence in support thereof. Indeed, in *Eastern Bakery v Castelino* [1958] EA 461 it was held that:

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

(21) And, as aptly pointed out by Apaloo, JA in *Philip Chemwolo v Augustine Kubende* [1985] KLR 492, the duty of the Court is to do justice to the parties and not to punish them for their mistakes or omissions. The Learned Judge expressed his viewpoint thus:

“I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

(22) In the result, I find merit in the petitioner’s application 2nd March 2023. The same is hereby allowed and orders granted as prayed in the following terms:

- (a) That leave be and is hereby granted to the petitioner to amend its Petition in terms of the draft Amended Petition annexed to the Supporting Affidavit herein.
- (b) That the Amended Petition be filed and served within 14 days from the date hereof; with corresponding leave to the respondents to amend their responses, if need be.
- (c) That the costs of the application to be in the cause.

Orders accordingly.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF AUGUST,
2023**

OLGA SEWE

JUDGE

