



Kimeu & 3285 others v Kenya Pipeline Company & another (Environment & Land Petition 9, 8 & 12 of 2019 (Consolidated)) [2023] KEELC 17534 (KLR) (17 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17534 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND PETITION 9, 8 & 12 OF 2019 (CONSOLIDATED)
CA OCHIENG, J
MAY 17, 2023**

BETWEEN

MUINDI KIMEU & 3285 OTHERS PETITIONER

AND

KENYA PIPELINE COMPANY 1ST RESPONDENT

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 2ND
RESPONDENT**

RULING

1. What is before Court for determination is the Petitioners' Notice of Motion dated 7th December, 2021 brought pursuant to Rules 5, 18 and 19 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013. The application is also premised upon the provisions of Articles 22 (3) (d) and 159 (2) (d) of the *Constitution*.
2. The Petitioners seek issuance of the following orders: -
 - a. That Water Resources Authority do carry fresh Hydrogeological Assessment Study to determine the current Environmental status of allegedly polluted environment before the hearing of this Petition.
 - b. That this Honourable Court do grant the Petitioners leave to further amend the consolidated Petition herein.
 - c. That costs of the application be in the cause.
3. The Application is premised on grounds on the face of it and supported by the Affidavit of Muindi Kimeu sworn on 7th December, 2021. In support of the first prayer, some of the pertinent grounds are that following Court Summons, Water Resources Authority (WRA) filed two affidavits attaching the underground and surface water results up to the month of June 2021 together



- with a comprehensive hydrogeological assessment study report done on October, 2019. That the comprehensive hydrogeological study of WRA of 2019 indicates that the surface groundwater is still polluted. That in the 2nd Respondent's replying affidavit sworn on 6th October, 2020 by Zaphania O. Ouma, it is admitted that the clean-up process is still ongoing.
4. It was further averred that the 1st Respondent's hydrogeological assessment final report of February, 2021 indicates that the environment is far from remediated. That the 1st Respondent has not forwarded the said final report of February, 2021 to WRA as per Condition No. 4 of the 2nd Respondent's Restoration Order to facilitate a comparative report to be undertaken by WRA. That WRA being a semi-autonomous government agency have a statutory mandate in the regulation and protection of water resources from adverse impacts. That the final report of WRA is paramount for the determination of the Petition and WRA having previously admitted their willingness to assist the Court, the production of their final report is necessary.
 5. The thrust of the second prayer is that leave to amend Annexure A, B and D is necessary because many of the names appended therein were computer generated and there are corresponding errors of spelling. Some of the names are also shared and thus it is necessary that their identity numbers be indicated in addition to the village names. As for the minors who share names, it is proposed that their names also be accordingly amended to reflect their full names. That under the prayer for loss of income and crops, the Petitioners inadvertently omitted to exhibit supporting documents in regard to ownership of land. It was averred that the proposed amendments are necessary for the determination of the fundamental issues in the Petition and that the Respondents will not be prejudiced.
 6. Opposing the application, the 1st Respondent filed a Replying Affidavit sworn by Elizabeth Rop on 6th March, 2023. It was averred that the Water Resources Authority is not a party to this Petition and therefore no orders can be issued directed at them. It was also averred that the Petitioners have not adduced any evidence that they requested WRA to carry out a fresh hydrogeological assessment study and the request was declined so as to move the Court to issue the orders sought. That issuing the said Orders against WRA would be infringing on their rights to natural justice.
 7. The 1st Respondent argued that the Petitioners had not annexed a draft reamended Petition to the application. Further, without the said draft reamended Petition, the 1st Respondent was unable to decipher what the Petitioners sought to amend. It insisted that the application is frivolous, incompetent and it ought to be dismissed with costs.
 8. In a further affidavit sworn by Muindi Kimeu on 16th March, 2023, the deponent annexed the draft "Annexure A" illustrating the nature and extent of the intended amendments. He also annexed draft "Annexure D" illustrating the nature and extent of the intended crop matrix loss amendment.
 9. The 2nd Respondent did not file any response to oppose the instant application.
 10. The application was canvassed by way of written submissions.
 11. Only the Petitioners filed submissions which are dated 16th March, 2023, in which they withdrew Prayer (a) of the instant application.
 12. On Prayer (b), the Petitioners submitted that Rule 18 of the *Mutunga Rules of Procedure and Practice*, provides for the amendment of pleadings at any stage of proceedings with the leave of Court. Further, that the Rule vests wide discretion to grant the orders sought if the Court is satisfied that there was a bona fide mistake or error and that the amendment is necessary for the determination of the matter in dispute. They argued that the amendment sought would not be prejudicial to the Respondents as it



did not introduce new issues or a new cause of action. To buttress their averments, they relied on the case of *Lewar Ventures Limited v Equity Bank (Kenya) Limited* [2022] eKLR.

13. Upon consideration of the instant application, respective affidavits and the Petitioners' submissions, the only issue for determination is whether the Petitioners are entitled to leave to amend their Petition.
14. Rule 18 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 is the governing law guiding the amendment of constitutional petitions. It provides as follows:-
18. 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 principles that govern the exercise of such discretion were elucidated by the Court of Appeal in *Central Kenya Ltd v Trust Bank Ltd* [2000] 2 EA 365 (CAK) where it was held as follows:-

“The amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided

- (i) there had been no undue delay,
- (ii) no new or inconsistent cause of action was introduced,
- (iii) no vested interest or accrued legal right was affected, and
- (iv) the amendment could be allowed without injustice to the other side. Accordingly, all amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder did not result in prejudice or injustice to the other party that could not be properly compensated for in costs; *Beoco Ltd v Alfa Laval Co Ltd* [1994] 4 ALL ER 464 adopted.”

16. While in the case of *Institute For Social Accountability & Another v Parliament Of Kenya & 3 Others* [2014] eKLR, the Court aptly held as follows:-

"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] 2EA.

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.”

17. The Petitioners aver that the proposed amendments herein as demonstrated in the attached draft “Annexure A” and “Annexure D” seek to elaborate the actual identities of the affected persons. Further, as demonstrated in the draft annexures, the amendments sought will help to eliminate any duplication of names and remove names without proper identification. They explain that this will aid the course of justice in addition to assisting the Court to determine who suffered a violation of the fundamental rights and the extent of such violation.
18. Upon perusal of the draft amendments while associating ourselves with the decisions cited above, we are of the view that the proposed amendments do not alter the substance of the dispute herein nor raise a new cause of action. We opine that this Court is concerned with the determination of whether or not there was an infringement of the Petitioners’ Constitutional rights by the Respondents. It is our considered view that the amendment sought will actually aid this court in the expeditious disposal of this case in accordance with Article 159 (2) of *Constitution*.
19. In the circumstance, we find prayers (b) and (c) merited and will allow them. We further direct that the Petitioners do file and serve the reamended Petition within two (2) days from the date hereof, after which the Respondents can file and answer to the reamended Petition in two (2) days if need be.

DATED, SIGNED AND DELIVERED AT MAKUENI THIS 17TH DAY OF MAY, 2023.

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CHRISTINE OCHIENG
JUDGE

.....
THERESA MURIGI
JUDGE

.....
ANNET NYUKURI
JUDGE

