



**Cheruiyot v Ethics & Anti-Corruption Commission; Makhanu (Interested Party) (Anti-Corruption and Economic Crime Petition 3 of 2022) [2022] KEHC 13059 (KLR) (Anti-Corruption and Economic Crimes) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13059 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIME PETITION 3 OF 2022**

**EN MAINA, J**

**SEPTEMBER 22, 2022**

**IN THE MATTER OF ARTICLE 20(1), 22(1), 165(3)(D)(II), 259,  
25(C) AND 50(4) OF THE CONSTITUTION OF KENYA, 2020**

**IN THE MATTER OF ARTICLES 28,31,32,43(1)(A), 33, 36  
AND 47 (1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS  
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**EVANS K. CHERUIYOT ..... PETITIONER**

**AND**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... RESPONDENT**

**AND**

**TITUS BARASA MAKHANU ..... INTERESTED PARTY**

**RULING**

**Introduction**

1. The Petitioner/Applicant is a legal officer at Kenya Medical Supplies Authority currently under investigation by the Ethics and Anti-Corruption Commission (“the Respondent”) for allegations of soliciting a bribe from Titus Barasa Makhanu (“the Interested Party”). The Petitioner/Applicant has filed a Notice of Motion Application dated May 20, 2022 seeking leave to amend the Petition and Notice of Motion Application dated April 28, 2022.



2. The Application is made under Rules 18 and 19 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013* (also known as Mutunga Rules) and is made on the following grounds stated on the face of it:
  - a. The respondent’s involvement in taking the video and audio recordings was brought to the petitioner’s attention only upon service of the respondent’s replying affidavit on 18<sup>th</sup> May 2022.
  - b. The respondent’s carrying out or involvement in the investigations only aggravates the petitioner’s grievances that resulted in the filing of the petition: (1) the respondent was involved in the misconduct of the interested party to illegally retain and illegally distribute audio and video recordings obtained by the respondent to the applicant and the applicant’s employer in contravention of section 33(1) of the *Anti-Corruption and Economic Crimes Act* No. 3 of 2003 thus interfering with the investigations, (2) the respondent’s involvement in the entrapping of the petitioner and (3) bias, discrimination and unfairness by the respondent in conducting the investigations.
  - c. The amendment sought is for purposes of determining the real question in controversy between the parties.
  - d. The amendment sought is not to add or substitute the complainant’s grievance for a new one.
  - e. The amendment is sought genuinely and in good faith.”
3. Further grounds are stated on the supporting affidavit and supplementary affidavit dated June 30, 2022 and include that the Applicant is aggrieved by the Respondent’s failure to investigate the Interested Party for an offence under Section 5(1) of the *Bribery Act* despite the evidence obtained by the respondent establishing the elements of such offence.
4. The Applicant contends that the investigations by the Respondent are biased against him as they have concluded that the recordings establish an offence under Section 6(1) of the *Bribery Act* yet they do not establish an offence against the Interested Party under Section 5(1) of the *Bribery Act*. That this reveals bias, discrimination, and unfairness in the investigations in contravention of the principles of natural justice, fair trial, and fair administration of justice. Lastly, the Interested Party’s gross misconduct goes to the root of the investigations and it is necessary that leave to amend the pleadings be granted for the court to determine the real question in controversy between the parties. He referred to a copy of the draft amended Petition and Notice of Motion in the annexures to the affidavit.

### **The Responses by the Respondent and Interested Party**

5. The Respondent opposed the Application vide a replying affidavit sworn on June 29, 2022 by John Nyagara an Investigation Officer.
6. The Respondent contends that the Application offends Order 8 Rule 7(2) of the *Civil Procedure Rules* 2010; That the Applicant failed to cite the correct law hence the court is not properly seized of the matter and further that the proposed amendments are an afterthought as they are premised on the Commission’s replying affidavit to the Petition and should be struck out. The Respondent also contends that the amendments also depart from the Petition and raise a new cause of action, being abuse of power, bias, and discrimination and that the application is devoid of merit and should be dismissed with costs.



7. On his part the Interested Party opposes the Application through its Notice of Preliminary Objection and Grounds of Opposition both dated June 20, 2022. The Preliminary Objection states that the Notice of Motion is not a pleading and hence is incapable of being amended and that the Applicant has improperly invoked the jurisdiction of this court thus rendering it incapable of granting the orders he seeks.
8. In his grounds of opposition, the Interested Party raises issue with both the form and the substance of the amendments. He contends that the amendments have not been underlined in red ink as required by the rules; that the amendments are frivolous and prejudicial to the Respondent's case and further that he did not entrap the Applicant since the Applicant himself demanded a Kshs. 1,000,000 bribe. He also states that there was no complaint against the Interested Party on account of offences under Section 5(1) of the Bribery Act requiring investigation by the Respondent. Lastly, the Interested Party contends that the proposed amendments, if allowed, would vary or introduce a new cause of action based on allegations of biases, discrimination, and unfair investigations different from the initial one that alleged usurpation and arrogation of its exclusive investigatory powers.

#### **Submissions of the Petitioner/Applicant**

9. The Applicant relied on his written submissions dated June 30, 2022. He submitted that the law is that generally amendments ought to be freely allowed to allow the court to determine the real issue in controversy and avoid duplicity of suits. He also asserts that the issues in controversy arise from the Respondent's and Interested Party's various unconstitutional and illegal misconducts (sic).

#### **Submissions of the Respondent**

10. The Respondent while relying on its written submissions dated July 7, 2022 urged a preliminary objection to the Application on the grounds that the Applicant's Supplementary affidavit dated June 30, 2022 was unprocedural for having been filed without leave of court. That the said affidavit introduced an Amended Petition with further amendments and was, therefore, an abuse of the court process. They urged that the supplementary affidavit be struck out. On the merits of the application the Respondent submitted that the Application offends the provisions of Order 8 Rule 7(2) of the Civil Procedure Rules 2012 by failing to underline additions and strike out deletions in red ink, which is a procedural substantive requirement that cannot be remedied by Article 159(2) (d) of the Constitution. That the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 are not exhaustive and ought to be read together with the Civil Procedure Rules. Reliance was placed on the case of Jaldesa Tuke Debelo v IEBC and another [2015] eKLR cited in Ann Wanjunu v Mwihaki Waruiru & 2 others [2018] eKLR and Law Society of Kenya v Center for Human Rights & Democracy & 12 others [2014] eKLR.
11. Learned Counsel for the Respondent further submitted that the amendments raise a new cause of action that alters the character of the Petition to the prejudice of the Respondent; That the Petitioner's case initially was that the Interested Party had procured video recordings without the supervision of the Respondent. That once the Respondent had filed its replying affidavit dated May 16, 2022, the Petitioner discovered that the Respondent had done its independent investigations, and based on that revelation, the Petitioner now seeks to amend his Petition to introduce a new cause of action of abuse of power, bias, and discrimination which is impermissible. To buttress this submission counsel relied on the case of Abdul Karim Khan v Mohamed Roshan (1965) EA 289 cited with approval in the case of Catherine Koriko & 3 others v Evaline Rosa [2020] eKLR. Counsel urged this court to disallow the proposed amendments and dismiss the Petitioner's Application.



## Submissions of the interested party

12. The Interested Party filed written submissions dated July 24, 2022 in which he adopted the submissions of the Respondent. He however added that the Applicant's prayer to amend the Notice of Motion dated 28<sup>th</sup> April 2022 should be dismissed because this court's jurisdiction to grant the order has been wrongly invoked. The interested party submitted that an application is incapable of being amended as it is not a pleading and the rules of amendment under Rule 18 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#) 2013 and Order 8 Rule of the [Civil Procedure Rules](#) apply to pleadings only. He cited the case of *Jecinta Wanjiru Muiruri v Jane Wangare Mwangi & another* [2006] eKLR and *Kooba Kenya Limited v County Government of Mombasa* [2020] eKLR and urged the court to dismiss the application.

Issues for determination

- i) Whether the application dated May 20, 2022 is properly before this court
- ii) Whether the application has merit.

## Analysis and Determination

13. The procedure for instituting, hearing and determination of constitutional petitions is governed by the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013. Rule 10(1) thereof provides that such applications shall be brought by way of a petition. Rule 18 of the rules provides for amendment of pleadings and it states: -

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

14. The procedure for bringing applications under the Rules is set out in Rule 19 which states: -

“ 19. A formal application under these rules shall be by Notice of Motion set out in Form D in the schedule and may be supported by an affidavit.”

15. Amendment of pleadings having been expressly provided for in the Rules the argument that the jurisdiction of this court has not been properly invoked hence the application is not properly before this court, has no basis. Neither does the argument by the Interested Party that this court cannot invoke any other procedure save for that provided in the [Civil Procedure Rules](#) as that is what is provided for in the *Practice Directions for this court*. My reason for so saying is that Practice Direction No. 11 of the said Practice Directions expressly recognizes that there may be other special practice and procedure of court provided for in other rules, such as the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#) 2013 and hence the use of the phrase “subject to” in the practice direction. The same states:-

“ 11. Subject to any special practice and procedure of court provided for in other rules, parties are enjoined to comply with the requirements, time limits and deadlines when filing pleadings, witness statements and documents as set out under the Civil Procedure Rules 2010 in particular. (Emphasis mine)

16. The [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#) 2013 are in my view a simple and complete code in matters constitutional petitions and are what govern those applications/petitions in all the courts including this court. My argument is fortified by



Rule 3(1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* 2013 as the same states that all proceedings made under Article 22 of *the Constitution* shall be made under those Rules. It states: -

“3(1) These rules shall apply to all proceedings made under Article 22 of *the Constitution*.”

17. As to whether the Notice of Motion which really is an application for conservatory/interim orders, can be amended it has been argued that the same is not a pleading in law and hence it is incapable amendment. To this end the Interested Party cited Section 2 of the *Civil Procedure Act* and the case of *Jecinta Wanjiru Muiruri v Jane Wangare Mwangi & another* [2006] eKLR where the court stated as follows:-

“The defendants on being served with the draft amended Chamber Summons raised a Preliminary Objection dated July 4, 2006 by Notice dated July 4, 2006 and filed on July 10, 2006 on the ground that a Chamber summon is not a pleading before the eye of the law and it is therefore not capable of being amended. The amended Chamber summons by the Plaintiff dated February 28, 2006 is therefore a fatally defective application which is incompetent and no orders are capable of being issued on the basis of a fatally defective application that in law cannot lie.... But be it as it may, a defective Chamber Summons cannot be cured. The Only option open to the respondent is to withdraw the Chamber summons in its entirety and file a fresh one. The upshot of all this is that the defendant’s Preliminary objection is upheld and the plaintiff’s amended Chamber summons dated February 28, 2006 is struck out with costs to the defendant.”

18. My finding on this issue if that even were this court confined to the *Civil Procedure Rules*, as argued by the Interested Party, a Notice of Motion application would be capable of amendment under Section 100 of the *Civil Procedure Act* and Order 8 Rule 5 of the *Civil Procedure Rules* which provides for a general rule to amend proceedings as opposed to Order 8(1) Rule 1 and which provides for amendment to pleadings. Indeed, in the case of *Fredrick Mwangi Nyaga v Garam Investments and another* [2013] eKLR Havelock J was categorical that applications are not pleadings as defined by Section 2 of the Civil Procedure Rules and hence applications for amendments of a Notice of Motion should be made under Section 100 of the *Civil Procedure Act* and Order 8 Rule 5 of the *Civil Procedure Rules*. In the Learned Judge’s words with which I am in full agreement: -

“11. .... On my part, I consider this definition to be absolutely clear as to what amounts to a pleading and that is the process of instituting and defending a suit as provided for under the Rules. In my opinion, it does not include what may be termed interlocutory applications including chamber summonses and Notices of Motions. As a result, I do not consider that the Plaintiff herein can bring his application for amendments of the Notice of Motion dated June 4, 2013 under Order 8 rule 3 or indeed, rule 4. That leaves the general power to amend as envisaged not only in Section 100 of the *Civil Procedure Act* but also under Order 8 rule 5 ....

12. With respect, I do not consider that learned counsel for the 2nd Defendant has read the above provision entirely correctly. The second sentence after the word “or” allows the correction of any defect or error in any proceedings. In my view, a Notice of Motion is part of the proceedings of a suit. I do not consider that the power to amend a proceeding is confined solely for the purposes of determining the real question of controversy between parties. As



a consequence, I agree with counsel for the Plaintiff when he says that this provision of Order 8 Rule 5 allows this Court to consider an application for amendment to (in this case), the Plaintiff's Notice of Motion dated June 14, 2013. I believe that the decision of the Court of Appeal in the *Echaria v Echaria* case (supra) is binding upon this Court with the slight reservation that the application to amend the Notice of Motion before that Court was brought under the Court of Appeal Rules and not the Civil Procedure Rules. However, I do not consider that the provision under which the Application is brought would make any difference to my finding as above."

19. Generally, the principal consideration in an application for leave to amend ought not to be based on the form but on whether the amendment sought is necessary for the determination of the real issues in controversy in a suit and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs. Indeed, the courts have in the recent past allowed oral applications for amendment of applications and pleadings, bearing in mind the overarching responsibility to administer justice without undue regard to procedural technicalities. See the case of *Central Kenya Limited v Trust Bank limited* (2000)2 E.A 365 cited with approval in the case of *Diamond Trust Bank Kenya Limited v Invesco Assurance Company Limited & another* [2021] eKLR where it was held:-

"16. A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side."

20. From the foregoing findings, it is evident that the application is properly before court. The jurisdiction of this court is properly invoked and the preliminary objection has no merit. It is overruled.
21. The other issues raised was that the amendments do not meet the standard laid in the rules. On this I find that although the applicant has not underlined and deleted with red ink the parts which he seeks to amend those parts are clear as they appear in black which is the colour that scanned documents would read the e-filing platform although this can be improved. It would therefore be unjust to dismiss his application on that ground and the same is also overruled.
22. On the merits, looking at the proposed amendments as a whole, the substratum of the Petition and Application remain the same and it is that the Petitioner/Applicant is challenging the respondent's reliance on the audio-visual recordings of conversations between the Applicant and the Interested Party allegedly made between June 1, 2021 and September 17, 2021. I am unable to discern a new cause of action raised in the amendments as the core issues in the Petition and Application remain the same.
23. The proposed amendments are made in good faith, and allowing the amendments would assist the court in determining the real issues in controversy. It would also save judicial time as the Petitioner will have canvassed all issues in one petition. The Respondent and Interested Party have not demonstrated the prejudice they are likely to suffer should the amendments be allowed. If anything, they will be granted an opportunity to defend their case and file additional responses where needed. Accordingly, the application is allowed. The Amended Petition be filed and served within 14 days. The costs of the application be to the Respondent and the Interested Party. Orders accordingly.

**SIGNED, DATED AND DELIVERED VIRTUALLY THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2022**

**E N MAINA**



**JUDGE**

