



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MIGORI**  
**CONSTITUTIONAL PETITION NO. 6 OF 2019**  
**IN THE MATTER OF ALLEGED INFRINGEMENT AND VIOLATION OF ARTICLES 22, 23,47,50**

**AND**

**IN THE MATTER OF ARTICLES 3, 22 & 25B OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE DISCRIMINATION, UNFAIR ADMINISTRATIVE  
ACTION AND IN VIOLATION OF THE BILL OF RIGHTS AND PROVISIONS OF  
THE CONSTITUTION AS THE SAME RELATE AND CONCERN THE APPLICANT**

**BETWEEN**

JAMES MARIENGA OBONYO.....1<sup>ST</sup> PETITIONER/APPLICANT  
PHILIP OGWARI MWABE.....2<sup>ND</sup> PETITIONER/APPLICANT  
JAOKO TOBIAS DEMBA.....3<sup>RD</sup> PETITIONER/APPLICANT

-VERSUS-

SUNA WEST NATIONAL GOVERNMENT  
CONSTITUENCY DEVELOPMENT FUND COMMITTEE.....1<sup>ST</sup> RESPONDENT  
NATIONAL GOVERNMENT CONSTITUENCY  
DEVELOPMENT FUND BOARD.....2<sup>ND</sup> RESPONDENT

**RULING**

1. The petitioners moved this court by way of a Notice of Motion Application dated 14/8/2020 and filed in court on 17/8/2020. Through the firm of Lugano & Lugano Co. Advocates they seek the following orders: -

- a) That the applicants’/petitioners be granted leave to amend the petition filed herewith and dated 14/8/2019.
- b) In the alternative to prayer (a) above, and in the interest of time and expediency, the amended petition annexed herewith be deemed to be amended with the leave of court and be admitted as duly amended.
- c) The Honourable Attorney General be enjoined to the petition as an interested party.
- d) Costs of this application be in the cause.

**e) Any other remedy that the court deems fit and just.**

2. The application is based on five (5) grounds appearing on the face thereof and is supported by the Supporting Affidavit of **Philip Ogwere Mwabe**, the 2<sup>nd</sup> petitioner, sworn on 14/8/2020 on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> petitioners.
3. The 2<sup>nd</sup> petitioner deponed that upon being served with the audit report by the 2<sup>nd</sup> respondent, he believes that it is prudent that the court should allow them to amend the petition as there are some issues which they would like to bring to court's attention in the interest of justice, this being a public interest litigation; that the petitioners wish to challenge the constitutionality of Section 56(2) of the National Government Constituencies Development Fund Act No. 30 of 2015(NG CDF Act) in so far as the impartiality of the 2<sup>nd</sup> respondent to forward complaints of criminal nature to the relevant government agencies is concerned hence the need for leave to enjoin the Honourable Attorney General as an interested party to this petition; that this application has not been brought with any inordinate delay and no prejudice will be occasioned upon the respondents in any way; that if the amendment allowed the Honourable Court will be able to come up with a just verdict as regards the petition; that the petitioners have annexed the amended petition and urge the court to allow the same and deem it to have been duly amended with the leave of court.
4. The application was opposed. The 1<sup>st</sup> respondent filed grounds of opposition through the firm of Omonde Kisera & Co. Advocates the grounds of opposition were as follows: -
  - i. That the petitioners are drawing this court into issues relating purely to the administration of the NG CDF ACT which are statute barred for this court vide Section 56 of the said Act, a matter which this court had confirmed in the 1<sup>st</sup> ruling herein.
  - ii. Audit queries and any evidence of financial impropriety or otherwise are matters falling squarely within the mandate of the Board created under the NG CDF ACT and cannot be matters capable of being relied upon to amend the petition.
  - iii. The petition is now over one year and the petitioners have but kept this court with applications at the expense of expediting the hearing and determination of the main petition as they seem to be more on a fishing spree a fact which confirms the personal and malicious intentions to use this petition for political expediency thereby abusing the process of this court.
  - iv. The intent to challenge the Constitutionality Section 56 of the NG CDF ACT is a pure afterthought and a delay tactic as even no evidence of compliance with the requirements of the Government Proceedings Act have been exhibited.
  - v. The petitioners have now replaced the 1<sup>st</sup> respondent with the NG CDF Committee without an order of this honourable court, a matter which confirms the confusion the petitioners have and confirms no merit in the application.
5. The application was canvassed by way of written submissions. The petitioners submitted on two issues of determination that is; whether the petitioners can seek leave of the court to amend the petition and whether the petitioners are entitled to the orders sought.
6. On the first issue, the petitioners submitted that Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter "**Mutunga Rules**") allows parties to amend their pleadings in particular petitions, with leave of court at any time of the proceedings. To further buttress this point, the petitioners relied on the case of **Mombasa Cement Limited v Speaker of the National Assembly & 2 Others (2016) eKLR** where the court allowed amendment of pleadings while relying on the case of **Cobbold v Greenwich LBC (unreported)**.
7. On the second issue, the petitioners reiterated that the law particularly Rule 18 of the Mutunga Rules entitles the petitioners to orders sought in their application dated 14/8/2020.
8. The respondents filed their submissions dated 26/11/2020 on 1/12/2020. They submitted on two issues: whether the petitioners should be granted leave to amend the petition dated 14/8/2019 and whether the application dated 14/8/2020 has merit and what are the orders commending themselves granting. On the first issue, the respondent submitted that the the prayer of the petitioners to challenge the Constitutionality of Section 56(2) of the National Government Constituencies Development Fund Act in so far as the impartiality of the 2<sup>nd</sup> respondent is concerned in forwarding complaints of criminal nature, is such that the honourable Attorney General must be enjoined as an interested party and that is a new matter which if allowed, will change the whole cause of action and will seriously prejudice the respondents; that the court in **Humanity Action Knowledge and Integrity in Africa (HAKI Africa) & 19 Others vs Attorney General & 3 Others (2020) eKLR**, relied on the case of **Eastern Bakery vs Castelino Civil Appeal No. 30 of (1985) EA 461** where it was held inter alia that the court may refuse to allow amendments if they would change the cause of action into one of a substantially different character or one which would prejudice the rights of the opposite party.
9. The respondents further submitted that the wide discretion to allow amendments should not be a blank cheque and that the amendments are being sought belatedly; that if the amendments are allowed, it would introduce a new cause of action and the respondents will be prejudiced. The respondents urged the court to dismiss the application dated 14/8/2020 with costs.
10. I have considered the petitioners' notice of motion application, the grounds of opposition and the rival submissions. The single issue for determination is whether the applicant is deserving of leave to amend his petition.
11. The law guiding amendment of Constitutional Petitions is **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter the Mutunga Rules)**. **Rule 18** provides that:-

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

12. The Rule clearly states for any amendment there has to be leave of court. For the court to allow the amendment, it has to first look into the intent and purpose of the amendment and whether any prejudice shall be suffered by the other party or parties in the dispute and if there will be prejudice can the prejudice be compensated by way of costs.

13. In **Institute For Social Accountability & another v Parliament of Kenya & 3 others [2014] eKLR** the court held:-

**“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.**

**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.”**

14. To add its voice, the Court of Appeal outlined the principles of amendment of pleadings in **Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR** as follows: -

**“The law on amendment of pleadings in terms of section 100 of the Civil Procedure Act and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob’s Precedents of Pleading - 12<sup>th</sup> 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.”**

15. The legal parameters governing the amendment of pleadings from the above cited decisions can be summed up as the amendment should be made timeously without undue delay; it should not introduce a new or inconsistency cause of action or issues; the application should not affect any vested interest or accrued legal right and it should not prejudice or cause injustice to the other party.

16. The petitioners’ case is that after they were served with the audit report by the 2<sup>nd</sup> respondent, they believe that there are issues therein which need to be dealt with by this court and they also wish to challenge the constitutionality of Section 56 (2) of the National Government Constituencies Development Fund Act (No. 30 of 2015) in so far as the impartiality of the 2<sup>nd</sup> respondent in regard to forwarding complaints of a criminal nature to the relevant authorities.

17. A reading of paragraphs 1.6, 2.3.7, 3.17, 3.18.3.19.3.20,3.21,3.22,4.2 and prayer 5 (f) of the amended petition reveals that the petitioners are not only alleging violation of their rights but also seek a declaration that Section 56 (2) of the National Government Constituencies Development Funds Act (No. 30 of 2015) (**hereinafter NG CDF Act**) is unconstitutional in so far as the impartiality of the 2<sup>nd</sup> respondent is involved in forwarding complaints of a criminal nature.

18. Reverting back to the gist and prayers of the original petition, the petitioners sought orders of mandamus directed to the 2<sup>nd</sup> respondent to compel them to hear and determine the petition filed before it expeditiously.

19. What the petitioners are now asking this court to do is compel the office of the 2<sup>nd</sup> respondent to expedite the hearing of the complaints before it while at the same time tie their hands by declaring that Section 56 of the NG CDF Act (No. 30 of 2015) unconstitutional in so far as the impartiality of the 2<sup>nd</sup> respondent is involved in hearing the petitions before it and forwarding the same to investigating authorities. This is a classical case of compelling a farmer to go and farm in the garden but at the same time declaring they are not entitled to farm in the garden.

In any event the applicants have not issued any notice to the Attorney General of their intention to sue the AG in accordance with Section 13A of the Government Proceedings Act.

20. The impartiality of the 2<sup>nd</sup> respondent is what the petitioners sought to remedy by compelling the 2<sup>nd</sup> respondent to undertake their public duty. The introduction of the prayer that Section 56 of the NG CDF Act be declared unconstitutional, is a new and inconsistent cause of action which cannot be determined at this point. The prayer of mandamus is still subsisting.

21. The petitioners make mention of a report which they were eventually served with, which in their opinion raised issues worth being determined by this court. The petitioners did not accord this court the opportunity to examine the report itself to satisfy itself that indeed

there are pertinent issues to be addressed by this court to the extent of declaring Section 56 of the NG CDF Act unconstitutional.

22. In the end, I find no merit in the application. I decline to grant the prayers a sought and the application dated 14/8/2020 is dismissed with no orders as to costs being Public interest litigation.

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 17<sup>TH</sup> DAY OF DECEMBER, 2021.**

**R. WENDOH**

**JUDGE**

**Ruling delivered in the presence of**

No appearance for the Petitioners.

Mr. Kisera Advocate for the Respondents.

**Nyauke** Court Assistant.