



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 134 OF 2019**

**HUMANITY ACTION KNOWLEDGE INTEGRITY**

**IN AFRICA TRUST (HAKI AFRICA) & 19 OTHERS.....PETITIONERS**

**VERSUS**

**THE HON ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE MINISTRY OF INTERIOR AND**

**COORDINATION OF NATIONAL GOVERNMENT .....2<sup>ND</sup> RESPONDENT**

**THE SPEAKER OF THE NATIONAL ASSEMBLY..... 3<sup>RD</sup> RESPONDENT**

**THE NATIONAL COUNTER TERRORISM**

**CENTRE (NCTC)..... 4<sup>TH</sup> RESPONDENT**

**AND**

**KENYA NATIONAL COMMISSION ON**

**HUMAN RIGHTS (KNHCR)..... 1<sup>ST</sup> INTERESTED PARTY**

**NON-GOVERNMENTAL ORGANIZATIONS**

**CO-ORDINATION BOARD (NGO BOARD)..... 2<sup>ND</sup> INTERESTED PARTY**

**KATIBA INSTITUTE.....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

1. The Petition herein dated 16<sup>th</sup> August, 2019 prays for the following orders: -

***1. This Honourable Court do grant Conservatory orders suspending Section 40 c (1) of the Prevention of Terrorism Act, 2012***

***2. This Honourable Court do grant a declaration that Section 40 c (1) of the Prevention of Terrorism Act 2012 is unconstitutional.***

***3. Costs of this Petition.***

***4. Any other relief that this Honourable Court may deem just and fair to grant under the circumstances of this Petition.***

2. On 7<sup>th</sup> October, 2019, when the Application dated 16<sup>th</sup> August 2019 came up for hearing the same was marked as withdrawn and Court

made the following directions:-

- i) Petitioner's to file and serve their submissions to the Petition within 14 days from the said date.
- ii) The Respondent and the Interested Parties to file and serve their submissions and their responses to the Petition within 14 days of service by the Petitioners.
- iii) The submissions to be highlighted on 19<sup>th</sup> November, 2019.

3. However, on 19<sup>th</sup> November, 2019 when the Petition was coming up for hearing, the Petitioners sought the leave of court to amend the Petition and court granted them the leave to file a formal application for amendment of the Petition. The same was filed and is dated **20<sup>th</sup> November, 2019**. This is the Notice of Motion before the Court. It prays for the following orders:

- a) *This Honourable Court be pleased to certify the matter as urgent.*
- b) *(This Court) Grant the Petitioners/Applicants leave to amend its Petition in terms of the attached draft amended Petition.*

4. The 1<sup>st</sup> Respondent in response to the Application filed a Grounds of Opposition dated 27<sup>th</sup> January, 2020.

5. The matter came up for hearing on 29<sup>th</sup> January, 2020:-

6. Mr. Aboubakar Counsel for the Petitioner, submitted that the Application seeks leave to emend the Petition to include one ground that demonstrates the unconstitutionality of the law seeking to be expunged, and that the same merely quotes the actual amendments by the National Assembly. Counsel submitted that the process leading to the amendment in Parliament was unconstitutional and illegal as it ought not to have been brought by an Omnibus Statute. Counsel submitted that the proposed amendments herein are not introducing any new facts but further legal argument, and does not change the nature of the Petition. Mr. Aboubakar further submitted that the amendment ought to be allowed as it is in the best interest of Justice in accordance with Article 259(2)(d) of the Constitution and will accord all parties before Court to engage on the merits of the Petition. Counsel submitted that amendments can be done at any time before Judgment, and that the Petitioners have come to court in time and that no prejudice will be occasioned to the Respondents.

7. Mr. Nyonje, learned Counsel for the 1<sup>st</sup> Interested Party supported the application for amendment. Mr. Nyaberi Learned Counsel for the 3<sup>rd</sup> Interested Party also supported the Application and relied on Section 100 of the Civil Procedure Rules which allows the court to freely amend proceedings as well as Rule 18 of the Mutunga Rules. Counsel submitted that the proposed amendment does not raise any new issues, grounds or cause of action and should be allowed.

8. Mr. Nguyo, learned Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents submitted that the purpose of the proposed amendment is to introduce a new cause of action and as such they are opposed to the application. Counsel submitted that the Petitioner was challenging Section 40 of the said Act but now through the amendment are challenging Section 40 (a)(b) and (c) thereof. Counsel submitted that the only remedy for the Petitioner is to abandon the current Petition and file a new one; that a Petition should not be mutilated by amendments as the impugned law should be clear on the face of the Application.

9. Counsel further submitted that it is not in public interest to allow amendment as it impedes on the government's fight against terrorism. Finally Mr. Nguyo submitted that there is no disclosure of the other Petitioners in the proposed draft, stating that this was a very casual way of handling a Petition and as such the Application ought to be dismissed.

10. Mr. Kuyoni Learned Counsel for the 3<sup>rd</sup> Respondent submitted that they opposed the Application for Amendment of the Petition. Counsel relied on Rule 19 of the Mutunga Rules, stating that the amendment changes the entire character of the Petition and introduces a new cause of action, and that the 3<sup>rd</sup> Respondent will be greatly prejudiced if the amendment is allowed.

#### **Determination**

11. I have carefully considered the application and the submissions by Counsel. The only issue for determination is whether the amendment should be allowed. *Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereafter "the Mutunga Rules")* should be the starting point for purposes of the instant application.

12. The Rule allows parties to amend their pleadings, and in particular, the Petition, with leave of the Court at any stage of the proceedings. Amendment of petitions once filed can only be done with the permission of the court. Additionally, the permission and consequent amendment may be granted and made respectively at any time or stage of the proceedings. Rule 18 of the Mutunga Rules stipulates as follows:

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

13. It is trite law that an amendment ought to be allowed as long as the same is not frivolous or occasions prejudice to the opposing Party. The 1<sup>st</sup> to 4<sup>th</sup> Respondents submitted that the proposed amendments, if allowed would introduce a new cause of action. In as much as the court is always wary of amendments which introduce new or inconsistent causes of action, the court must equally always seek to avoid multiplicity of suits. I am guided by the decision in the case of **The Institute for Social Accountability & Another vs. Parliament of Kenya & Two Others HCCP No 71 of 2013 [2014] eKLR** where the court held as follows:

*“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] 2 EA.”*

14. In considering the facts and circumstances of this case, it is my view that the proposed amendments were made in good faith, and that allowing the same would assist the court to conclusively deal with all matters raised in the Petition herein. I also hold the view that the Respondents will not be unduly prejudiced given that there is still opportunity to respond specifically to the amendments. Eventually, the ends of justice would be achieved either way with the Petitioner having the opportunity to wholly put its case across and the Respondents having the opportunity to respond to the same.

15. The upshot is that the application before the court dated 20<sup>th</sup> November, 2019 for amendment of the petition is merited. The same is allowed as prayed with costs in the cause.

Orders accordingly.

**Dated, Signed and Delivered at Mombasa this 29<sup>th</sup> day of April,**

**2020.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Aboubakar/Ms. Ochoo for the Applicants

Mr. Nyaberi for the 3<sup>rd</sup> Interested Party

Mr. Kaunda - Court Assistant