



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCOM NO 350 OF 2016

(FORMERLY CONSTITUTIONAL AND HUMAN RIGHTS DIVISION PETITION NO. 369 OF 2016)

IN THE MATTER OF: ARTICLES 1, 2, 3(1), 4(2), 10,22,23,47,50(1),156,165,258 AND 259(1) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: USING THE CENTRAL BANK RATE (CBR), AND

NOT THE KENYA BANKS’ REFERENCE RATE(KBRR) ALSO SET BY THE CENTRAL BANK, AS THE APPLICABLE BASE RATE FOR CAPPING BANK INTEREST RATES

IN THE MATTER OF: THE ALLEGED THREATS TO AND VIOLATION OF ARTICLES 10,40,47 OF THE CONSTITUTION AND OF SECTION 33B (1)OF THE BANKING (AMENDED)ACT (NO 25 OF 2016)

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION

BETWEEN

OKIYA OMTATAH OKOITI..... PETITIONER

VERSUS

CENTRAL BANK OF KENYA.....FIRST RESPONDENT

KENYA BANKERS ASSOCIATION.....SECOND RESPONDENT

RULING

1. On 15th September 2016 the petitioner **Okiya Omtata Okoiti** orally sought to amend his petition. Learned counsels for the respondents while on the whole were not objecting to such an amendment intimated that such a request ought to be made by a formal application. The petitioner, however, first filed, in court, the amended petition then filed a Notice of Motion application, 17th September 2018. By that application he seeks the court “to admit the amended petition dated 10th September 2018 as having been amended, filed and served with the leave of the court.”

2. The second respondent through the affidavit of **Habil Olaka**, its Chief Executive opposes the application. The deponent stated that section 33B (1) of the Banking Act which is in the center to this petition, was deleted a new subsection inserted by section 64 of the Finance Act 2018 which came into force on 1st October 2018.

3. The 1st respondent’s opposition is by way of preliminary objection dated 3rd April 2019. The preliminary objections are as follows:

“1.The proposed Amended petition dated 10th September 2018 and the original petition dated 5th September 2016 deal with issues that have already been determined by the High Court (Tuiyott, Kamau & Ngetich JJ) in High Court Petition No. 413 of 2016, Boniface Oduor vs Attorney General & another Kenya Banker’s Association & 2 Others (Interested Parties) [2019] eKLR in the Judgment delivered on 14th March 2019.

2. THAT in light of the Judgment delivered on 14th March 2019 in High Court Petition No. 413 of 2016, Boniface Oduor vs Attorney General & another Kenya Banker's Association & 2 Others (Interested Parties) [2019] eKLR. Honourable court lacks jurisdiction to sit on appeal, review or set aside decision and findings of the High Court, a Court of coordinate of not same jurisdiction as sought by the petitioner/applicant.

3. THAT in any event the petitioner/applicant is guilty of laches and the issue raised in the petition as amended on 10th September 2018 are now overtaken by events and cannot form the subject of another determination of this Honourable court."

4. I have considered the application and the opposition mounted by the respondents against it. Amendments are governed by Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. That Rule provides:

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

5. I am cognisant of the fact that amendments are not automatic. In the case **Mombasa Cement Limited v Speaker of the National Assembly & 2 others (2016) eKLR** the court in discussing Rule 18 had this to say:

"The general rule when it comes to amendments of pleadings is that amendments ought to be freely allowed so long as they do not occasion any prejudice to the party facing them. The test whether or not to allow amendments is now relatively clear.

In the case of **Ann Muthoni Karanu vs La Nyavu Gardens Limited NBI ELC 181 of 2014 [2015]eKLR**, I stated as follows with regard to amendment of pleadings:

[9]...The test for amendment of pleadings was perfectly put in **Cobbold vs. Greenwich LBC 9th August, 1999 (unreported decision): referred to in the notes to the White Book (Civil Procedure 2003 Edn) Vol. 1. At paragraph 17.35. Peter Gibson LJ is stated to have said:**

"The overriding objective (of the Civil Procedure Rules) is that the court should deal with cases justly, that includes, so far as is practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party caused by the amendment can be compensated for in costs, and the public interest in the administration of justice is not significantly"

6. I am of the view that the issues raised by the respondent, that the law has changed or that the issues in this matter were determined in **Boniface Oduor v A.G (supra)** can adequately be addressed at the hearing of this matter. Additionally the delay in filing the amended petition is not so unreasonable to lead to disentitling the petitioner to the prayer sought. The application is merited.

7. The objection, raised by the petitioner, to **Habil Olaka** swearing the affidavit on behalf of the 2nd respondent without showing his authority to do so is not good law. This is what the court of appeal in the case **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**:

44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; **Bugerere Coffee Growers Ltd v Sebaduka & Anor (1970) 1 EA 147**. The court in that case held:-

"When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action."

45. To their credit, the appellant's Advocates have cited another authority from the Supreme Court of Uganda decided in April 2002, confirming that the principle enunciated in the **Bugerere case** has since been overruled by the Uganda Supreme court. The authority is **Tatu Naiga & Emporium vs. Virjee Brothers Ltd Civil Appeal No 8 of 2000**.

The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the **Bugerere case** was no longer good law as it had been overturned in the case of **United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998**. The latter case restated the law as follows:-

"... it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company."

The decision has since been applied in Kenyan courts, for example, in **Fubeco China Fushun v Naiposha Company Limited & 11 others [2014] eKLR**.

8. In the end in respect to the Notice of Motion dated 17th September 2018 I grant the following orders:

a. Leave is hereby granted to the petitioner to amend his petition and to that end his amendment petition filed in court on 20th

September 2018 is hereby deemed as though filed with the leave of the court.

b. The petitioner shall within 14 days serve the 3rd to 4th respondent and 1st to the 3rd interested parties with the amended petition.

c. At the reading of this Ruling a date will be given for parties to attend court for directions on the hearing of this petition.

d. The costs of the Notice of Motion dated 17th September and the preliminary objection dated 3rd April 2019 shall be in the cause.

9. Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 28th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **28th** day of **April, 2020**.

MARY KASANGO

JUDGE