



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.117 OF 2020

SHADRACK WASILWA MBIRIRA & 5 OTHERS.....1ST PETITIONER

JAMIN CHEPTORUS KANGUGO.....2ND PETITIONER

ZEPHANIA KEMOBI CHEMWENO.....3RD PETITIONER

TOM WANAMBISI.....4TH PETITIONER

ALEX WAFUBWA MALIEKHE.....5TH PETITIONER

SAMSON KAMARICH LOITAMA (REPRESENTING POKOT

FARMERS CO-OPERATIVE UNION).....6TH PETITIONER

JOHNSON AKUNGA.....7TH PETITIONER

VERSUS

HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

CABINET SECRETARY NATIONAL TREASURY AND

NATIONAL PLANNING.....2ND RESPONDENT

CABINET SECRETARY MINISTRY OF AGRICULTURE

FISHERIES AND LIVESTOCK.....3RD RESPONDENT

AGRICULTURE AND FOOD AUTHORITY (AFA).....4TH RESPONDENT

NEW KENYA PLANTERS CO-OPERATIVE UNION...5TH RESPONDENT

RULING

PETITIONERS' APPLICATION

1. The Petitioners/Applicants through a Notice of Motion dated 15th April 2020 seek the following orders:-

a) Prayer 1 spent.

b) Prayer 2 spent

c) Leave be granted

i) To the Petitioners to amend the Petition as per the annexed draft.

ii) To the 1st Petitioner to file a supplementary Affidavit to the one sworn on 20th March 2020

2. The application is premised on the grounds on the face of the application.

3. The application is further based on the Supporting Affidavit by Shadrack Mbirira Wasilwa sworn on 14th April 2020 and annexures attached thereto.

THE 1ST, 2ND, AND 3RD RESPONDENTS RESPONSE

4. The 1st, 2nd and 3rd Respondents did not file any response to the Petitioners' Application dated 15th April 2020.

THE 4TH RESPONDENT'S RESPONSE

5. The 4th Respondent is opposed to the Application dated 15th April 2020 and relies on the grounds of opposition dated 12th May 2020 being as follows:-

a) That the Application is misconceived, lacks merit, frivolous, vexatious and abuse of the Court process.

b) That the application as sought is not tenable in law as the orders the 1st Petitioner is seeking to amend had been overtaken by the events since the licence had been issued to the 5th Respondent on 10th February 2020.

c) That the application as filed is an afterthought having been prompted by the Notice of Motion dated 6th April 2020 that was heard inter parties and the court delivered a Ruling on 7th May 2020 allowing the application with costs.

d) That the application as filed is akin to the Petitioners filing a fresh cause of action contrary to the law and applicable procedure on amendment of pleadings.

e) That in view of the above the applicant lacks a prima facie case against the Respondents to warrant the orders.

f) That this Application as a whole is an abuse of precious judicial time and it is the interests of justice and fairness that the instant application be dismissed with costs to the 4th Respondent.

THE 5TH RESPONDENT'S RESPONSE

6. The 5th Respondent is opposed to the Petitioners Application dated 15th April 2020 and relies on the Replying Affidavit by Henry Gichuhi Kinyua dated 5th May 2020.

7. The 5th Respondent contend that the application lacks merit; is frivolous, vexatious and an outright abuse of the court process. It is further stated the application and entire suit is incompetent, bad in law and fatally defective.

8. It is asserted that the application is not bonafide as it is prompted by the 5th Respondent's Application seeking the setting aside of the orders of 26th March 2020 on account of misleading the Court through material non-disclosure and misrepresentation. It is further contended the orders granted at the discretion of the Court cannot be amended at the instance of any party to the proceedings other than through review.

9. On issue of prayer for amendment, it is contended that whereas a party should ideally be allowed to amend their pleadings before they are closed; the proposed amendments if allowed will substantially change character of the Petition into a fresh action and as such should be denied.

10. It is averred as pleaded under paragraph 13 of the supporting affidavit the Petitioners interest is Kshs.3 Billion Cherry Advance Revolving Fund which the 5th Respondent has been nominated as he administrator. It is stated unless driven by other ulterior motives; it beats logic why the Petitioners are also interested in the acquisition of licences by a state corporation from fellow government agencies as required by law in order to offer various controlled services in the Coffee section.

11. It is further stated that no evidence has been provided to show that the process was not followed in the acquisition of licences and no appreciation by the Petitioners that the 5th Respondent is a public and state Agency established for the benefit of general public, the economy in and targeting the small scale coffee farmer and estates that have for decades been exploited by the big private players in the coffee sector.

12. It is contended that the Licences being attacked had already been issued before the filing of the case; some as early as 10th February 2020 and much has been done on the strength of those licences such as milling, warehousing, agency and marketing.

13. It is the 5th Respondent's contention that it would be disastrous and highly prejudicial to stay licences already issued as contracts have already been signed between the 5th Respondent and individual farmers, estates and co-operatives and received more than 8500 bags of

coffee, milled the same and is already being marketed.

14. It is averred that the designation of an administrator of coffee Chery Advance Revolving fund by the Cabinet Secretary for Finance is not a matter of procurement but which agency of the national government is best placed to discharge the function. The Chery Advance Revolving Fund is a national fund that is new, separate and specific to the coffee subsector which the National Government has discretion to set up. It is further stated that it is far-fetched that the Petitioners can dictate that the Fund must be channeled through the commodities fund which has a broader objective and covers all crops.

15. The 5th Respondent prays the Petitioners application be dismissed.

ANALYSIS AND DETERMINATION

16. I have carefully considered the Petitioners application dated 15th April 2020, affidavit in support; the 4th Respondent's grounds of opposition and 5th Respondent's Replying Affidavit; parties rival submissions, and from the above there arises only one issue for consideration, thus:-

a) Whether the Petitioners have met the threshold to warrant granting the amendment of the Petition as per draft petition?

17. The Petitioners in the instant Petition, filed a Notice of Motion application dated 20th March 2020, that was heard ex-parte and orders granted on the 26th March 2020. A Notice of Motion dated 6th April 2020 by the 5th Respondent sought to set aside the conservatory orders of 26th March 2020 on various grounds and mainly that the orders had been overtaken by events. The application was subsequently heard inter-partes and a ruling delivered on 7th May 2020 allowing the application with costs by discharging and/or setting aside the ex parte orders.

18. The present application was filed while the Notice of Motion dated 6th April 2020 was pending determination.

19. The Petitioners contend unlike in the Civil Procedure Code, power to amend granted under **Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Otherwise referred to as "The Mutunga Rules")** does not have inhibitions. **Rule 18 of the Mutunga Rules** 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. The petitioners submit that even if the Court of Appeal's interpretation of the rules were to be applied on amendments under Civil Procedure Code, the general rule on amendment is that the amendment to pleadings should be allowed at any stage of the proceedings with the leave of the Court.

20. The Respondents urge that whereas a party should ideally be allowed to amend their pleadings, before they are done, the amendments proposed by the Applicant will substantially change the character of the Petition and the application as filed is akin to the Petitioners' filing a fresh cause of action contrary to the law and applicable procedure on amendment of pleadings.

21. The objection by the 4th Respondent and the 5th Respondent is that the proposed amendments if allowed, will substantially change the character of the Petition into a fresh action and should thus be denied. Their other grounds are based on merits of the case. The merits of the case should be noted is not considered at the stage of an application nor is it a consideration at the amendment stage. I am of the view that at such stage the court should to assert its efforts in considering the merits of the proposed amendment in allowing or rejecting an amendment as merits of any matter are supposed to be determined at the hearing of the suit.

22. The Petitioners deny that the amendment would change the cause of action. In the case of **D.T. Dobie vs. Muchina (1982) KLR 1**; the word "**cause of action**" was defined to "**mean an act on the part of the Defendant which gives the plaintiff his cause of complaint**". In the instant Petition, the act that triggered the filing of the Petition was that of posting of "**The Public Finance Management Coffee Cherry Advance Management Coffee Cherry Advance Revolving Fund Regulations**" on 27th December 2019. This is stated in paragraph 8 of the Petition. I find within the amendment, nothing has changed, except the year from 2019 and 2020 because of the Regulation subsequent Gazettement. I find the correction of the year from 2019 to 2020 has not changed the parties, reliefs and the set of facts triggering the complaint remain the same.

23. In the case of **Sanyu International Limited v. Orientals commercial Bank Limited (2017) eKLR**, it was held that:-

"As we understand it, the amendments in question merely seek to contextualize the respondents claim as it relates to the various players so as to clarify and bring into clearer focus the issues in contention between the parties, and enable a court reach a determination on the issue in dispute. Such matters are yet to be placed before the trial court and it is not within or mandate to direct any of the parties as to the manner of conduct or presentation of their case."

24. The Respondents' on their part in support of their proposition rely on the case of **Merry Beach Limited vs. Barclays Bank of Kenya Limited & another in Malindi HCCC No. 5 of 2014** where the court restated the Court of Appeal decision in **Elijah Kipngeno Arap Bii (supra)** the law applicable to amendment of pleadings as stated in **Bullen & Leake & Jacob's** Precedents of Pleadings – 12th Edition and captured in the Court of Appeal decision in **Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991** thus:-

"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.” (Emphasis mine).

25. The Respondents further seek reliance in the case of ***Uchumi Supermarkets Ltd and another vs. Sidhi Investments Ltd Civil Appeal (Application) No. 192 of 2008*** where it was established that the Court should only grant leave to amend a Petition if the application seeking to amend is prompt and within reasonable time.

26. I have considered parties rival submissions and authorities and note there is general consensus that the power to amend is apparently unlimited, however late. The amendment sought, can be allowed, if made in the following manner:-

a) In good faith provided costs can compensate the other side

b) The proposed amendment must not be immaterial or useless or merely technical or intended to delay fair disposal of the matter.

c) If proposed amendments introduce new case or new grounds of defence it can also 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.

d) If the amendment of plaint would not deprive the defendant his right to rely on limitations Acts.

27. In the instant application I am not satisfied the amendment if allowed, will substantially change the character of the Petition into a fresh action nor change the cause of action. Nothing will change with the amendment except as regards the year. The power to amend is apparently unlimited save in exception circumstances. The prejudice that the Respondents may suffer may be compensated with costs. The Respondents have not demonstrated at any rate the prejudice that they would suffer if amendment is allowed. The Respondents will have an opportunity to file response to the amended petition, if amendment is allowed and as such no prejudice will be occasioned by allowing amendment of the Petition. **Article 159 (2)(d) of the Constitution** enjoins this Court in exercising Judicial authority to be guided by the principle that justice should be administered without undue regard to procedural technicalities. Further **Rule 8 of the Mutunga Rules** do not have any inhibitions in Court's exercise of its powers to grant leave to amend.

28. The upshot is that the Petitioners application dated 15th April 2020 is allowed in the following terms:-

a) Leave be and is HEREBY granted to the Petitioners to amend the petition as per annexed draft.

b) The amended Petition as per the annexed draft be filed and served within 10 days from the date of this ruling.

c) The 1st Petitioner is granted leave to file and serve supplementary affidavit to the one sworn on 20th March 2020 within the 7 days from the date of this ruling.

d) The Respondents are granted 15 days from the date of service with an amended Petition to file and serve their response to the same.

e) The 4th and 5th Respondents are awarded costs of the application.

Dated, signed and delivered at Nairobi this 12th day of November 2020.

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J .A. MAKAU

JUDGE