



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 443 OF 2012

TETRA PAK LIMITED.....APPLICANT/PETITIONER

VERSUS

THE KENYA REVENUE AUTHORITY.....RESPONDENT/RESPONDENT

RULING

1. The Petitioner, Tetra Pak Limited, is through the notice of motion application dated 10th December, 2019 seeking orders as follows:

“a) Spent

b) Leave be granted to the petitioner to amend the petition in terms of the amended petition annexed hereto.

c) The amended petition be deemed as duly filed.

d) Hellman Worldwide Logistics be joined as the second respondent to this petition.

e) The costs of this application be provided for.”

The application is supported by the grounds on its face and the supporting affidavit sworn on 11th December, 2019 by Daniel Njenga, the Petitioner’s Finance Director.

2. The Respondent, Kenya Revenue Authority, opposed the application through the replying affidavit of Violet Sabwa sworn on 4th February, 2020.

3. The advocates for the parties also filed and exchanged written submissions on the application.

4. I will consider the pleadings and submissions as I proceed to determine this application.

5. When the application came up for hearing on 14th October, 2020 counsel for the Petitioner submitted that the proposed amendment was aimed at achieving three things; capture the current factual position, introduce a second respondent and assist the court to fully determine the issues arising in the petition.

6. In opposing the application counsel for the Respondent submitted that the proposed amendment goes beyond the provisions of Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013 (“Mutunga Rules”). According to counsel all the issues raised in the original petition have been negotiated and the amount to be refunded agreed upon. Counsel is therefore of the view that the addition of a new respondent and the change of the interest rate on the amount claimed are new issues and the proposed amendments should not therefore be allowed.

7. Rule 18 of the Mutunga Rules guide the amendment of pleadings in constitutional petitions as follows:

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

8. In my view, the principles applicable to amendment of pleadings in civil cases are also applicable to amendment of pleadings in constitutional petitions. The law on amendment of pleadings was stated by the Court of Appeal in **Joseph Ochieng & 2 others v First**

National Bank of Chicago, Civil Appeal No.149 of 1991 as follows:

“...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.”

9. On my part, I summarized my understanding of the law on amendment of pleadings in **Merry Beach Limited v Barclays Bank of Kenya Limited & another [2018] eKLR** as follows:

“Various authorities will show that amendment of pleadings should be allowed if the amendment will assist the court to determine the real question in controversy. Such an amendment should not introduce new or inconsistent cause of action. The amendment should not occasion prejudice or injustice to the opposing party. It is also a principle of law that it cannot be said that prejudice can be occasioned where costs can provide adequate compensation. See Isaac Awuodo v Surgipharm Limited & another [2011] eKLR; Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR; Dolphin Transporters Limited v Bank of India Limited [2012] eKLR; and Lalji t/a Vakkep Building Contractors v Carousel Limited [1989] eKLR.”

10. The Respondent claims that the application should not be allowed because of its late filing and introduction of a new cause of action.

11. I have perused the proposed amended petition which is annexed to the Petitioner’s application. One of the proposed changes is the introduction of a second respondent. The Petitioner explains that the introduction of a second respondent has been necessitated by the Respondent’s allegation of fraud. According to the Petitioner it is only its agent, Hellmann Worldwide Logistics, which can answer the allegations of fraud made by the Respondent.

12. I indeed agree with the Petitioner that any claim of fraud attributable to the Petitioner’s agent can only be responded to by the agent. This position finds support in the decision of the Court of Appeal in **Total Kenya Limited v Kenya Revenue Authority [2018] eKLR** where it was stated that:

“In this case there is no doubt at all that the respondent in its replying affidavit to the motion brought to the fore, in great details and specificity the allegations of fraud. It should be noted that the proceedings were initiated by the appellant and not the respondent. It could only thus raise the issue of fraud in its replying affidavit. As already stated, the appellant did not controvert any of the assertions of fraud alleged against it by the respondent in the replying affidavit. The judge cannot therefore be faulted for finding that fraud had been proved. Interestingly the appellant did not bother to enjoin in the proceedings its agent who was in a better position to counter, if at all, the allegations of fraud attributed to it as the appellant by the respondent.”

13. Hellmann Worldwide Logistics is therefore a necessary party in this petition and its inclusion in the matter will assist the Court in determining the real questions in controversy.

14. The amendment of the rate of interest cannot be said to be a new issue. Counsel for the Respondent conceded during the hearing that the Petitioner had asked for interest in the original petition. The issue as to what rate of interest will be applicable is a matter to be addressed during the hearing of the petition. It cannot therefore be said that a new issue has been introduced.

15. The Petitioner explained that the delay in filing the application is reasonable as time started running from 15th September, 2019 when Bwonong’a J declined to dismiss the petition and allowed the Petitioner to prosecute its petition and application urgently.

16. On my part, I find that although the petition is old considering that it was filed in 2012, it cannot be said that the filing of the application for amendment was delayed considering the fact that the parties were engaged in negotiations all along and the amendment has been made necessary by the issues that emerged during the negotiations.

17. The Respondent did not demonstrate that it will suffer any prejudice if the amendment is allowed. Indeed, counsel for the Respondent only stressed that there was no need to allow an amendment of the petition since most of the issues had been settled during negotiations. It is, however, important to observe that the case belongs to the Petitioner and it should be given an opportunity to present all the grievances related to the issues at hand to the Court so that the issues can be settled once and for all without the necessitating the filing of another case.

18. In summary, I find the Petitioner’s notice of motion dated 10th December, 2019 merited and the same is allowed in the following terms:

(a) The Petitioner is allowed to amend his petition dated 28th September, 2012 in the terms of the draft amended petition dated 10th December, 2019 annexed to the application dated 10th December, 2019;

(b) The amended petition shall be deemed duly filed upon payment of the necessary court fees which should be done within 7 days from the date of the delivery of the ruling. The amended petition to be filed through the Judiciary E-filing System;

(c) Upon being served with the amended petition, the Respondent will, if need be, file and serve a response to the same within 14 days;

(d) Costs shall abide the outcome of the petition; and

(e) This being an old matter, the parties are directed to take a mention date for issuance of further directions on the date of the delivery of the ruling.

Dated, Signed and delivered virtually at Nairobi this 17th day of December, 2020.

W. Korir,

Judge of the High Court