



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 30 OF 2018

BONIFACE LUM AMUNGA BIKO.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS...2ND RESPONDENT

NATIONAL BANK OF KENYA LIMITED.....3RD RESPONDENT

THE CAPITAL MARKETS AUTHORITY.....4TH RESPONDENT

RULING

1. This ruling is in respect to the application dated 19th June 2018 in which the applicant seeks leave to amend the petition. The application is supported by the applicant's affidavit dated 19th June 2018 in which he basically avers that there have been substantial developments relating to the substratum of the petition thereby necessitating amendments to the petition so as to reflect the correct position of the petitioner's claim.

2. The applicant states that the proposed amendments will not occasion any prejudice to the respondent or cause any harm on the public interest in the administration of justice. The court record does not show if the respondents filed any response to the application and even through counsel for the 3rd respondent Mr. Ochieng intimated to this court on 18th September 2018, that the 3rd respondent had filed Grounds of Opposition to the application, no such grounds were placed in the court file as I have already stated above.

3. Be that as it may, the application before me is an application made by the petitioner for leave to amend the petition. Courts have taken the general view that when it comes to amendment of pleadings, the same ought to be freely allowed as long as they do not occasion any prejudice to the parties against whom the applications are brought.

4. Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereafter "the Mutunga Rules") allows parties to amend their pleadings at any stage but with a caveat that the leave of the court must be sought and obtained before such amendment can be effected. The said 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.

5. The question that I need to grapple with is whether in the circumstances of this case I should exercise my discretion in favour of the Petitioner considering that leave to amend petition is not an automatic right of the applicant. In the case of **Ann Muthoni Karanu vs La Nyavu Gardens Limited** NBI ELC 181 of 2014 [2015]eKLR, the court 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 harmed”

[10] Also referred to and applied in the case of Maguire –v- Molin [2002] 4 All ER 325, 326, the above truly ought to be the appropriate and composite test for amendments of pleadings. I shall say no more on the test save to add that locally the same test was adopted and approved in the case of Central Kenya Ltd –v- Trust Bank Ltd [2002]2 EA 365. The Court of Appeal held that amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action and that a party should always be allowed to make such amendments as are necessary for determining the real issues in controversy or avoiding a multiplicity of suits. The court then went on to state that the amendments or joinder would be allowed provided (i) there had been no undue delay, (ii) that no vested interest or accrued right was affected and (iii) no injustice or prejudice would be occasioned to the other side that could not be properly compensated for in costs.

[11] Notwithstanding the Court of Appeal’s prolific holding and approach, it is apparent that the test is as was stated in Cobbold (supra) and the overriding consideration was whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation in costs. Perhaps, I may also add that going by the Cobbold test as expounded in Central Kenya Ltd –v- Trust Bank Ltd (ibid) the powers to order or allow amendments or joinder of parties is discretionary and very wide.” [Emphasis in the original]

6. Having regard to the principles espoused in the above cited case, though made in the context of an ordinary civil suit, I am persuaded that the same principles are applicable to constitutional petitions. In **The Institute for Social Accountability & Another vs. Parliament of Kenya & 2 Others** HCCP No 71 of 2013 [2014]eKLR the court stated as follows :

“[17] 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.”

7. In the instant case I note that the petition was filed on 26th January, 2018 barely since months before the filing of this application. It is therefore clear that there was no delay in filing the application such that the respondents will be disadvantaged in presenting their response. I have also perused the draft amended petition that was attached to the applicant’s supporting affidavit and I note that the proposed amendments relate to events that took place almost immediately after the filing of the petition in which case it is only fair and just that the petitioner is allowed to bring them to the fore if, in his view, they will have a bearing in the fair determination of the petition. I am of the humble view that the amendments will not completely vary the substratum of the petition or introduce new or inconsistent causes of action. I note that it is the same cause of action that has been expanded without altering the main questions in the petition.

8. In the circumstances of this case, I am satisfied that the proposed amendment is made in good faith and that allowing the application will assist the court to conclusively deal with all matters in controversy. I am of the humble view that the amendments will not prejudice the respondents, but will ensure that the ends of justice are met as the petitioner will be able to put across his whole case and the respondents will be given an opportunity to defend themselves.

9. Consequently, I allow the application dated 19th June 2018 and I make the following specific orders :

a) The petitioner is hereby granted leave to file and serve the amended petition upon the respondents within 14 days from the date hereof.

b) The respondent shall be at liberty to file their responses or additional responses or amend any filed responses and serve the same within 14 days from the date of service with the amended petition.

c) The costs of this application shall abide the outcome of the main petition.

Dated, signed and delivered in open court at Nairobi this 25th day of June 2019

W. A. OKWANY

JUDGE

In the presence of:

No appearance for the parties

Court Assistant - Ali