



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC PETITION CASE NO. 4 OF 2019

IN THE MATTER OF ARTICLES 19, 22, 23, 40,47, 50 & 64 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF GOVERNMENT LANDS ACTS AND THE TRUST LANDS ACT

IN THE MATTER OF CONTRAVENTION OF RIGHTS OF REGISTERED PROPRIETOR

IN THE MATTER OF PURPORTED SUSPENSION OF DEVELOPMENT APPROVAL

NANCY WANGARI KIMANI APPLICANT

-VERSUS-

COUNTY EXECUTIVE MEMBER – LANDS, HOUSING, PHYSICAL

PLANNING AND URBANIZATION..... 1ST RESPONDENT

COUNTY GOVERNMENT OF NYERI2ND RESPONDENT

RULING

1. By the Notice of Motion dated 23rd July, 2021, Nancy Wangari Kimani (*the Defendant*) prays for an order that this Court be pleased to grant herself leave to amend the Petition herein in terms of the draft amended Petition attached to the application.

2. The Motion which is supported by an affidavit sworn by the Petitioner is premised on the grounds:

- (a) That the Petitioner needs to make the correct prayers applicable to this Petition including a prayer for special damages;
- (b) That it is in the interest of justice that the Petitioner be allowed to amend her Petition herein; and
- (c) That the Respondents will not be prejudiced if the amendments sought are allowed.

3. The County Executive Committee Member, Lands Housing, Physical Planning and Urbanisation (*the 1st Respondent*) as well as the County Government of Nyeri (*the 2nd Respondent*) are opposed to the application. In their Joint Grounds of Opposition dated 11th November 2021, the Respondents oppose the application on some seven (7) grounds listed therein as follows:

1. That the application has been brought late in the day and is an afterthought the Court having given directions on the disposal of the Petition by way of written submissions on 30th September, 2020 and reiterated on 14th July, 2021.
2. That the Petition sought to be amended and dated 23rd October, 2019, does not comply with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 Rule 10(2)(g) which requires that the Petition shall disclose the reliefs sought by the Petitioner.
3. That the basis of the intended amendments is hinged on a claim for special damages but the draft amended Petition incorporates 7 other prayers materially different from special damages and which the Petitioner/Applicant has not laid any basis either in the body of the application or in the supporting affidavit to the application.

4. That the amendments sought will substantially change the character of the Petition and the application as filed is akin to the Petitioner's filing a fresh cause of action contrary to the law and applicable procedure of amendment of pleadings.

5. That the petition sought to be amended is fatally defective in view of the Ruling of this Court delivered on 30th September, 2020 at paragraphs 24, 25 and 26 thereof where the court *inter alia* held that "It is common ground that the issues at hand in this matter was about Physical Planning and Land Use Planning Act ... the Petitioner ought to have followed and exhausted the alternative mechanism provided by Parliament under the Physical and Land Use Planning Act before engaging the Court."

6. That as such, the amendments seek to reframe the Petitioners case from one seeking final Judicial Review orders of certiorari and prohibition as sought by the Petitioner in the application dated 23rd October 2019 filed alongside the Petition, to one seeking declaratory and injunctive orders hence the application constitutes an abuse of the Court Process thus must fail.

7. That the application is not brought in good faith as the amendments seek to deprive the Respondents their defence and which is prejudicial as the Petition offended **Order 53 Rule 1 of the Civil Procedure Rules and Section 32(4) and (5) of the Physical and Land Use Planning Act** as espoused in the Ruling of 30th September 2020 in this matter.

4. I have carefully perused and considered the Petitioner's application as well as the Ground of Opposition filed by the Respondents.

5. As was stated **Central Bank of Kenya Limited -vs- Trust Bank Ltd (2000) EALR 356:**

"The guiding principles in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no injustice if the other party can be compensated by an appropriate award of costs for any expense, delay or bother occasioned to him. The main concern is that it be in the interest of justice that the amendments sought be permitted in order that the real question in controversy between the parties be determined."

6. In the matter before me, the Petitioner contends that the application before the Court is informed by the need to make the correct prayers applicable to the Petition including a prayer for special damages. The Respondents on the other hand asserts *inter alia*, that the application has been brought too late in the day and that the amendments sought will substantially change the character of the Petition and is hence akin to the Petitioner filing a fresh cause of action.

7. As it were, the power of the court to allow amendments is intended to determine the true substantive merits of the case. In this respect, I have had occasion to look at the draft Amended Petition and it is clear to me that the prayers sought to be introduced substantially arise from the same cause of action that gave rise to the Petition currently before the Court.

8. That power to allow amendments can be exercised by the Court at any stage of the proceedings. In the matter before me, the hearing of the Petition is yet to commence and it was not even clear to me from the pleadings on record if the Respondents have filed an Answer to the Petition. If they have done so, it was clear to me that they will not only have a chance to appropriately amend the same in answer to the new issues raised by the Petitioner but they will also have a chance to cross-examine the Petitioner thereon.

9. Arising from the foregoing, I was not persuaded that the Respondents stand to suffer any prejudice if the Prayers sought in the application before me dated 23rd July, 2021 are allowed. Accordingly I allow the application and grant leave to the Petitioner to file and serve the Amended Petition within 14 days from today.

10. The Respondents shall have 14 days thereafter to file a response to the Petition and if they have done so, to amend their response where necessary.

11. The costs of this application shall be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 27TH DAY OF JANUARY, 2022

In the presence of:

Mr. Kimondo for the Petitioner

No appearance for the Respondents

Court assistant - Mugambi

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J. O. OLOLA

JUDGE