



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 177 OF 2015
BETWEEN
MOMBASA CEMENT LIMITED.....PETITIONER
AND
SPEAKER OF THE NATIONAL ASSEMBLY.....1ST RESPONDENT
HON.ATTORNEY – GENERAL.....2ND RESPONDENT
AND
NATIONAL LAND COMMISSION.....INTERESTED PARTY

RULING

1. The Petitioner’s Notice of Motion dated 19th April 2016 seeks this court’s permission to amend the Petition filed herein on 30 April 2015. The Motion is predicated on the ground that there have been substantial developments relating to the substratum of the Petition which necessitate the amendments sought.
2. The application for leave to amend is mutely supported by the Interested Party.
3. By way of background, the original claim by the Petitioner was mainly to the effect that the 1st Respondent had no rights to legally or otherwise to review grants and disposition of public land with a view to establishing their propriety or legality as this was the sole and exclusive mandate of the Interested Party. The Petitioner then contended that the 1st Respondent was not only violating the Constitution by usurping the powers and functions of the Interested Party but was also transgressing in not according the Petitioner fair administrative action which was bound to lead to a violation of the Petitioner’s right to property.
4. The Petition was opposed by the Respondents vide a Replying Affidavit sworn on 8th July 2015. The Respondents also now oppose the application for amendment of the Petition.
5. The Respondents state that the amendments sought to be made have the potential of prompting a completely new cause of action different from the current one. The Respondents also contend that the original claim is effectively moot. Additionally, the Respondents also opposed the application on the basis that there had been inordinate delay in filing the same.
6. Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereafter “the Mutunga Rules”) should be the starting point for

purposes of the instant application.

7. The Rule allows parties to amend their pleadings and in particular the Petition, with leave of the Court at any stage of the proceedings. Amendment of petitions once filed can only be done with the permission of the court. Additionally, the permission and consequent amendment may be granted and made respectively at any time or stage of the proceedings. 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.”

8. The brief question I need to grapple with is whether I should exercise my discretion in favour of the Petitioner , it being appreciated that the permission is not to be automatically granted.
9. 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.
10. 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 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]

11. I am still duly guided and persuaded. The same test and principles though made in the context of ordinary civil litigation ,apply with even force to constitutional petitions: see **The Institute for Social Accountability & Another vs. Parliament of Kenya & Two Others HCCP No 71 of 2013 [2014]eKLR** where 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.”

12. The Respondents in the instant case state that the application was brought after an unreasonable delay. The Petitioner thinks otherwise. Even though the time lost prior to the filing of an application for amendment is relevant, the guiding line ought really be the stage at which the proceedings stand at the time the application is filed and heard. This is so as to enable the court to consider whether the respondent may be unduly prejudiced. The mere fact of delay alone, unless the delay is inordinate, should not be the sole determinant. The nature of the intended amendment and whether it is necessary for purposes of determining all issues in controversy are some of the other factors to be taken into consideration.
13. In the instant case, the resolution by the 1st Respondent’s committee, that prompted the Petitioner into seeking to amend its pleadings, was adopted in November 2015. It is unclear when the Petitioner became aware of the same. The application for leave to amend the petition was however filed some four or so months later. I am not satisfied that the delay was so inordinate as to automatically divest this court of its discretion to consider whether to grant leave or not.
14. The Respondents also contended that the intended amendments would, if allowed, completely vary the cause of action. While it is true that the court is always wary of amendments which introduce new or inconsistent causes of action, it is also equally true that the court must always seek to avoid multiplicity of suits. Thus new causes of action may actually be introduced and added by way of amendment to the already existing cause(s) of action if it would be appropriate to have a joinder of the causes of action and try them simultaneously. In short, an application for leave to amend ought not be defeated by reason only that a new cause of action is being introduced unless it is a cause of action that can definitely not stand by reason of want of jurisdiction or limitation of the action.
15. I would in the instant case hold a different view from the Respondent in so far as the contention as to a new cause of action being introduced is concerned.
16. The petition originally challenged the Respondents’ powers to review the legality of land titles generally and in particular the Petitioner’s titles. The resolution which prompted the application for amendment and which resolution the Petitioner now seeks to impugn, in my view, was a culmination of the process that was originally being challenged by the Petitioner. I am unable to discern that a new cause of action distinct from the original one has been crafted or created. Rather it is the same cause of action that has been and is being stretched. The core question in the petition would still remain the same.
17. In the totality of the facts and circumstances of this case, I am satisfied that the proposed amendments were made in good faith and that allowing the same would assist the court to conclusively deal with all matters in controversy or so related. I also hold the view that the Respondents will not be unduly prejudiced given that there is still opportunity to respond specifically to the amendments. Eventually, the ends of justice would be achieved either way with the Petitioner having the opportunity to wholly put its case across and the Respondents conversely having the opportunity to prepare and defend the same.
18. In the result, I allow the application dated 19 April 2016. I make the following orders specifically:
 - a. The Petitioner is hereby granted leave to file and serve the amended petition upon the Respondents and the Interested Party within seven (7) days from the date hereof.
 - b. The Respondents and the Interested Party shall thereafter be at liberty to file their responses or additional responses or amend any filed responses and serve the same within a period of seven days following the service of the amended petition.
 - c. The costs of the application shall be paid by the Petitioner to the Respondents.

Dated, signed and delivered at Nairobi this 31st day May, 2016

J.L.ONGUTO

JUDGE