



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

PETITION NO.1 OF 2015

GERISHOM L. MAJANJA APPLICANT

VERSUS

WYCLIFFE OPARANYA

THE SPEAKER OF THE COUNTY ASSEMBLY

OF KAKAMEGA COUNTY.....RESPONDENT

RULING

Gerishom L. Manjanja, (the applicant), has moved this court by way of a chamber summons application dated 25th May 2015 brought under **Order XXXIX rule 2(1)** of the Civil Procedure Rules seeking orders, - that the applicant's application be dispensed with in the first instance (SIC); that immediate injunction against the Governor, Kakamega County Government and the County Assembly from investing any public funds in business ventures under any circumstances including buying shares in Mumias Company until a County Government Comprehensive Investment Laws has been enacted, the said injunction should include any retroactive and/or conversion of funds paid earlier for investment; that the petitioner seeks leave to amend the petition and such leave be given; that the respondent be served immediately; that the applicant's application be heard *interpartes*; that any further orders be made as the honourable court may deem just in the circumstances.

The application is based on the grounds appearing on the face of the chamber summons and is also supported by the affidavit of the applicant sworn on 25th May 2015 on which he has attached the version of the intended amended petition.

The applicant, in a nutshell, has a grievance with the manner in which the respondents have invested some money which he says violates the Public Finance Management Act by availing money to Mumias Sugar Company Ltd. The applicant would like the respondents restrained from making such investments until some comprehensive County Government Investment Laws are in place. He thus prays for an injunction and leave to amend his petition saying that he is acting for the benefit of the public.

The application is opposed. Both respondents have filed grounds of opposition to the chamber summons. The application came up for hearing on 16th September, 2015 and on that day the applicant appeared in person, the 1st respondent was represented by **Miss Achieng** while **Mr Fwaya** appeared for the 2nd respondent. The applicant moved this application and pleaded with the court to grant the orders sought saying that the devolution system of governance is complex and as a result people in leadership take

advantage of the system by taking actions without following relevant county laws which should be done through public participation. According to the applicant, public investment has to do with equity and the only way it can be achieved is through public participation.

The applicant further submitted that the respondents allegedly gave Kshs. Two Hundred Million (Kshs.200,000,000/-) to Mumias Sugar Co. Ltd under a County Assembly Resolution which is not a law thus denying the public an opportunity to decide on such an investment. He wants such investments stopped until a comprehensive investment law is put in place by the County Government of Kakamega. On the issue of amendment to his petition, he said that this is a less costly avenue as opposed to a fresh petition. He therefore prayed for the grant of his application.

Miss Achieng, learned counsel for the 1st respondent opposed the application and submitted that this being a constitutional petition the applicant should have filed a Notice of Motion pursuant to The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 rather than through a chamber summons. According to counsel, the application for injunction does not meet the threshold for granting injunctions. She further submitted that the prayer for leave to amend the petition is not justified and asked that the application be dismissed with costs.

Mr Fwaya, learned counsel for the 2nd respondent on his part, submitted that the prayer for injunction sought to restrain the County Assembly which is independent of the 2nd respondent, cannot be granted since even in the absence of the speaker, the County Assembly activities can proceed. The learned counsel contended that the prayer for injunction as framed, seeks to stop acts that have already taken place. Counsel argued that the applicant had sought an injunction through an application dated 5th February 2015 which was heard and dismissed in a ruling delivered on 12th March, 2015. The issues in the previous application and those in the present one are similar hence the application is *res judicata*. According to counsel, the investment complained of is a function of the County Assembly as envisaged by **section 145** of the Public Finance Management Act, (2012), and as such, the applicant seems to want to stop the County Assembly from performing those functions. And in performing its functions the County Assembly has not broken any existing law. Counsel concluded that point by saying that the applicant had not met the conditions for granting an injunction namely a *prima facie* case and has not shown what loss he will suffer, if any.

Regarding the prayer for leave to amend the petition, counsel submitted that there was no new evidence to warrant grant of the leave sought and that the application is based on speculation without concrete facts and therefore the application lacks merit. He prayed that the application be dismissed with costs.

In deciding this application, I will deal with the prayer for leave to amend first. The applicant has sought leave to amend his petition and has annexed to the application what can be said to be a draft amended petition: In seeking leave (together with an injunction) the applicant has approached the court by way of a chamber summons. This is improper and counsel for the 1st respondent has quite rightly pointed out that the application should have been by way of a Notice of Motion.

The general power of the court to grant leave to amend is discretionary and that power is provided for in **Order 8 rule 5(1)** of the Civil Procedure Rules, (2010). Under the marginal Head note "General power to amend" **Order 8 rule 5(1)** provides as follows:-

"For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party, order any document to be amended in such a manner as it directs and on such terms as to costs or otherwise as are just."

The court has a wider discretion to allow or not, an application for leave to amend pleadings but that discretion will be exercised to meet the ends of justice.

However, the applicant having filed a constitutional petition, he should have approached the court by way

of a Notice of Motion as provided for under **rule 19** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. That notwithstanding, it is imperative that I consider the substance of the application rather than apply the restrictive procedural technicalities that will tend to hinder the course of justice. The Overriding Objective, now incorporated in the Civil Procedure Act and even the Rules governing constitutional petitions under **Article 22** of the Constitution, enjoin courts to dispense proportionate, substantive and equitable justice. This is what **Article 159** of the Constitution envisages.

The issue of amendment of pleadings is not new and ample authority exists on this point. As a general rule, courts will normally allow a party to amend his pleadings at any stage of proceeding if such an amendment will not occasion injustice or prejudice to the other party. See **Eastern Bakery vs Castelino [1958] EA 461** and **Kenya Commercial Bank vs Kenyatta National Hospital & Another 2003 2 EA**. This being a constitutional petition that the applicant seeks to amend, **Rule 18** of the Constitution of Kenya (Protection of Rights and fundamental Freedoms) Practice and Procedure Rules, 2013 comes into play and it provides as follows:-

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

Applying this rule in the case of **The Institute for Social Accountability and Another vs Parliament of Kenya and 2 others, Petition No.71 of 2013**, the court stated:-

“Rule 18 of the Rules clearly stipulates that the court may permit an amendment at any stage of the proceedings. The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy as to avoid multiplicity of suits provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.”

In the context of the above reasoning, can it be said that the amendment sought by the applicant will cause injustice or prejudice to the respondents? Well, the applicant says that he did not wish to file another suit which would have occasioned multiplicity of suits as the reason for seeking to amend his petition. I do not see how the respondents will be prejudiced if leave is granted to the applicant to amend his petition. They will have an opportunity to respond to the amended petition. The purpose of an amendment should be to ensure that the case or dispute between the parties is conclusively determined and for that reason, if that be the object of the application, an amendment ought to be allowed. Bearing that in mind I am of the view that the ends of justice will be better served if the amendment is allowed.

Turning to the question of injunction, the record shows that the applicant had sought an injunction to restrain the 1st respondent from preparing a request for release of Kshs.300 million to Mumias Sugar Company Ltd and the 2nd respondent from sanctioning that request. After a full hearing of the application, the court (Mrima J.) dismissed that application on 12th March, 2015. What is before court now is a second application for injunction.

It is important to state here that the applicant has not yet amended his petition and the draft amended petition (which is yet to be filed) cannot be an anchor for grant of an injunction. It is not yet a pleading but an indented pleading and therefore cannot be the basis of an application for injunction, as it is in this case. The applicant has sought leave to amend his petition, he at the same time cannot purport to seek an order of injunction. It is not clear at this stage on which petition he relies. If his application is based on the original petition, the court (Mrima, J.) made a determination of that application and it cannot be a basis for seeking conservatory orders again. This is because, in a comprehensive ruling, the learned Judge dealt with the issue of conservatory orders and found the application unmeritorious. In attempting to file another application seeking more or less similar orders, the applicant is only trying his luck but obviously such an application is not well founded and may very well be *res-judicata*.

I have perused the draft amended petition but I am not satisfied that the issues raised therein can be a

basis for granting a conservatory order. The County Government has already released money to Mumias Sugar Company Ltd and as to whether this was done in accordance with the Public Finance Management Act (2012) or indeed the Constitution, is a matter that will be decided once the petition is heard.

The applicant also seeks to have conservatory orders issued retrospectively but I do not think this can be the case. Conservatory orders are in the form of an injunction. They are normally issued towards maintaining a particular state of affairs. Just like injunctions, they can be positive or negative. Positive when directing a party to do or perform a certain act and negative when they seek to prevent a party from performing a certain act.

In the case of the applicant, the money has already been released based on his own admission and should further funds be released, the only issue that will have to be determined is whether that was lawful. I have also noted from the record that the applicant was directed to prepare the petition for hearing with a view to having it heard promptly but upto now that has not happened.

For the foregoing reasons I do not find sufficient grounds for allowing the prayer for injunction or conservatory orders. Consequently the application dated 25th May 2015 succeeds only in part and I make the following orders:-

- 1. Leave be and is hereby granted to the applicant to amend his petition. An amended petition shall be filed and served within fifteen (15) days from the date hereof.**
- 2. The respondents shall file their responses to the amended petition, if need be, within fifteen (15) days from the date of service of the amended petition, after which the petition shall be fixed for directions.**
- 3. The prayer for injunction is declined.**
- 4. Costs of the application shall abide by the result of the main petition.**

Dated and delivered at Kakamega this 28th day of September, 2015.

E.C. MWITA

J U D G E