



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC PETITION NO. 10 OF 2014

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER
ARTICLES 23 (3), 27(1), (2), (3), 47(1), 50(1), 258(1) CONSTITUTION OF KENYA**

AND

**LN.117/2013 – CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

PAUL KIRAITHE MPIUKI.....PETITIONER

VERSUS

LAND ADJUDICATION AND SETTLEMENT

OFFICER IGEMBE.....1ST RESPONDENT

DEPUTY COUNTY COMMISSIONER

IGEMBE SOUTH SUB-COUNTY.....2ND RESPONDENT

FELIX KIMATHI KIRAITHE.....3RD RESPONDENT

JOHN BOSCO NJIRU NJAGI.....4TH RESPONDENT

RULING

1. The court is asked to grant leave to amend the petition dated 24.4.2014 and allow the attached draft amended petition as duly filed and served. The grounds of the application are contained in the supporting affidavit of Andrew Ouma sworn on 21.1.2022. The said grounds are that there is need to capture salient issues which have arisen subsequent to the filing of the petition which were inadvertently left out and that there will be no prejudice occasioned to the respondents.

2. The application is opposed by the 3rd respondent through grounds of opposition dated 7.2.2022. The 1st ground is that the 3rd respondent is a private citizen lacking any quasi-judicial executive or administrative powers or responsibilities of a state organ capable of infringing, threatening or violating the constitutional rights and freedoms of the petitioner.

3. The second ground is that the substantive proceedings are in the nature of judicial review disguised as a constitutional petition and that no amendment could cure a fatally defective petition.

4. Third, ground is that the amendment is aimed at circumventing and or denying the respondents an accrued defence of limitation by claiming new issues have arisen eight years after the petition was filed.

5. **Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013** provides, a party may amend its pleadings with leave of court at any stage of the proceedings.

6. The general rule is that an amendment to proceedings must be allowed as a matter of course and right especially where the real purpose is to bring on board the real question in controversy or seeks to correct of a defect or error in the pleading. Under **Order 8 Rule 5 of the Civil Procedure Rules**, the discretion to allow or not to allow an amendment squarely lies with the court.

7. In *Africa Trust (Haki Africa) & 19 others –vs- Attorney General & 3 others [2020] eKLR, the court citing with approval Eastern Bakery –vs- Castelino [1958] EA 461* it was held a court may disallow amendments if they would change the cause of action into one of a substantially different character or which would prejudice the rights of the opposite party.

8. In order to grant leave to amend, the court has to look at the purpose and the intent of the amendment and whether any prejudice will be occasioned to the opposite party, which could not be compensated by way of costs.

9. In *Institute for Social Accountability & Another –vs- Parliament of Kenya & 3 others [2014] eKLR*, the court held the object of an amendment was to enable parties to alter their pleadings so as to ensure that the litigation between them was conducted not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed but rather on the basis of the true state of the facts which the parties really on finally intend to rely on.

10. The court took the view it will normally allow necessary amendments so as to enable the determination of the real questions in controversy or to avoid a multiplicity of suits provided there had been no undue delay, or where no new or inconsistent cause of action was introduced, and no vested interest or accrued legal rights was affected and that the amendment could be allowed without an injustice to the other side.

11. In *Elijah Kipngeno Arap Bii –vs- Kenya Commercial Bank Limited [2013] eKLR*, the court outlined the principles of amendment of pleadings in terms of **Section 100 of the Civil Procedure Act and Order 8 Rule 3 of the Civil Procedure Rules** as ;to enable the court to determine the true substantive merits of the case, the amendments should be timeously applied for; power to so amend can be exercised by the court at any stage including appeal stage; that as a general rule, however late the amendment is sought or made, it should be allowed if made in good faith, provided costs can compensate the other party; 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 petitioner will not be allowed to reframe his case or claim if by an amendment of the plaint, the defendant would be deprived of his right to rely on **Limitation of Action Act**.

12. In this matter the reasons given for the late amendment which are being sought are that some salient issues arose after the filing of the petition and or were inadvertently left out during the initial filing.

13. Looking at the proposed amendments, it is obvious the applicant has completely replaced word by word every part of the original petition. So both the form, contents, structure, frame and substance of the original petition has been replaced with a new one.

14. In *James Marienga Obonyo & 2 others –vs- Suna West National Government Constituency Development Fund Committee & another [2021] Eklr*, Wendoh J. guided by the reasoning in *Elijah Bii and Institute of Social Accountability (supra)* held, the introduction of the new prayer, facts, and issues inconsistent with the original petition amounted to a new cause of action.

15. In this suit, the petitioner has completely reworked the petition particularly after the replying affidavit to the original petition and the report dated 6.4.2021 filed in court by the 1st respondent. This is also being done eight years down the line. The delay is not explained at all. To allow such an amendment at this stage would not only be prejudicial to the respondents but also contrary to principles alluded above on amendments.

16. In the premises, I find the application lacking merits. The same is dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30TH DAY OF MARCH, 2022

In presence of:

Kaunyangi for Kaumbi for 3rd respondent

Kieti for 1st & 2nd respondents

HON. C.K. NZILI

ELC JUDGE