



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.96 OF 2014

BETWEEN

ROGERS MOGAKA MOGUSU.....1ST PETITIONER

AND

GEORGE ONYANGO OLOO.....1ST RESPONDENT

THE NATIONAL ALLIANCE2ND RESPONDENT

REGISTRAR OF POLITICAL PARTIES.....3RD RESPONDENT

RULING

1. Before me is an Application dated 16th July 2014 brought pursuant to the provisions of **Order 8** of the **Civil Procedure Rules, 2010**. It seeks orders that the Petitioner be granted leave to amend his Petition dated 3rd March 2014 and filed in Court on 4th March 2014, and also for an order to substitute the 3rd Respondent and join it as an Interested Party to the Petition.
2. I must state from the outset that this matter had almost come to an end and despite the clear directions made by this Court on 11th September, 2014 that Parties should file skeletal Submissions before hearing of the Petition, the Petitioner has not to date filed such Submissions.
3. Be that as it may, the grounds upon which the Application is premised are set out in the Application and also are repeated in the Affidavit of the Petitioner sworn on 16th July 2014 and they are as follows;

“(1) That the proposed amendments are intended to bring before this Honourable Court the real matters in controversy between the Parties herein so that the same are determined on their true and substantive merits.

(2) The proposed amendments are further necessitated by information relevant for the fair and just determination of the real questions in controversy in this suit which came to the 1st Petitioners/Applicant’s knowledge subsequent to the filing of the Petition.

(3) The time allowed under the Civil Procedure Act and Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice Procedure

Rules 2013 for amendment of Petition has not expired.

(4) The proposed amendments will not occasion any prejudice to the Respondents.

(5) The proposed amendments arise out of the same facts or substantially the same facts in respect of which relief is claimed by the Petitioner.

(6) It is therefore in the interest of justice that the Petitioner should be granted leave to amend its Petition filed herein.”

4. In order to fully understand the Petitioner’s Application, it is imperative to highlight the gist of his case. In his Petition dated 3rd March 2014 he claims that the 1st Respondent, George Onyango Oloo, who is the Secretary General of the 2nd Respondent, The National Alliance, a Political Party duly registered under the Kenyan law, has violated the provisions of **Articles 10, 232, 260** and **Chapter Six of the Constitution** as he has continued to discharge his responsibilities as the 2nd Respondent’s Secretary General despite his appointment as the Chairman of the Lake Basin Development Authority by the President vide Gazette Notice No. 15745. In his Petition he has therefore sought *inter alia* an order to the effect that this Court declares that a person who holds a public office shall also not hold office in a Political Party.
5. On the grounds reproduced above, he now principally seeks orders of the amendment of the Petition as prayed in the Application before me and I see no reason to reproduce the arguments made in that regard.

The 1st and 2nd Respondents Case

6. The Application is opposed. The 1st and 2nd Respondent filed the following Grounds of Objection dated 30th July 2014;

“(1) That the Application is tainted with mala fides, mischievous, bad in law and is an abuse of the Court process.

(2) That the Application by the Applicant is an afterthought purely intended to steal the match from the Respondents, and if the amendment sought is allowed, it will have the effect of depriving the Respondents of a defence open to them.

(3) That the Applicant’s only amendment is replacing the word State officer with Public officer after it was pointed out to him that the Respondent is not a State Officer but rather a Public Officer, as such, the same ought not to be allowed, as it seeks to introduce a new matter altogether.

(4) That the Application by the Petitioner is mischievous and arises out of the averments in the Respondent’s Replying Affidavit and not out of discovery of new facts or material.

(5) That the amendments sought are purely intended to belatedly cure the obvious defects in the Applicant’s Petition as highlighted in the Respondent’s Replying Affidavit and to defeat defences that have already accrued to the Respondent.

(6) That such amendment clearly illustrates that the Applicant, from the beginning, was not well seized of the claim he purports to pursue and is waiting on the Respondent to rebut his claim for him to make the necessary

amendments.

(7) That this Application is not made in good faith and if allowed will prejudice the Respondents greatly.

(8) That the Respondents stands to suffer immense prejudice beyond monetary compensation if the orders sought are granted.

(9) That the Applicant cannot on his own motion join an Interested Party to this suit. A Party can only be joined as an Interested Party to a suit upon that Party's Application to the Court to be joined as such, or by the Court on its own motion.

(10) That it is trite that leave to amend pleadings is ordinarily not denied unless the party applying is acting mala fide or if it is a device to abuse the process of the Court.

(11) That the Court should exercise its discretion judicially and judiciously and dismiss this Application with costs to the Respondent.”

7. In their submissions, the 1st and 2nd Respondents contend that power to amend is discretionary in nature and cannot be invoked as a matter of right as argued by the Petitioner. In that regard reliance was placed on the case of *Kassam vs Bank of Baroda (2002) 1 KLR*.
8. Further, that amendments to pleadings are allowed if they do not occasion any prejudice or hardship to the Respondent but on the contrary, that the amendment sought by the Petitioner is prejudicial to the Respondents as it would compromise the Respondents case. In that regard they cited the cases of *Bright Chicks Uganda Ltd vs Dan Bahingire Ugandan Misc Application No.254 of 2011* and *Mowa Publishers Ltd & Anor vs Attorney General & Anor (1991) KLR 46* where the Courts held that amendments should not be used to prejudice a party.
9. They also claim that the issues sought to be introduced vide the amendments are issues that were well within the knowledge of the Petitioner and his advocates or ought to have been within their knowledge. That they are therefore seeking an amendment of the Petition to subvert the course of justice because the 1st and 2nd Respondent raised an objection that there was a difference between 'Public Officers' and 'State Officers' and that **Articles 77(2) and 260(2)** only apply to state officers and not public officers. They thus claim that it is mischievous and malicious for a party to await the opponent to state its case and then proceed to amend its case. That because such an action was an abuse of the Court process, the Application should be dismissed with costs.

Determination

10. The powers conferred upon the High Court by the provisions of **Order 8 Rule 5(1)** of the **Civil Procedure Rules** in civil proceedings cannot be disputed but the Applicant, having filed a Constitutional Petition, ought to have invoked the provisions of **Rule 8** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**. Having so said and noting that the issue for determination is clear and obvious to this Court, I will proceed and determine it without undue regard to that fact. In that context, 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 vs Castelino (1958) EA 461, Ochieng and Others vs First National Bank of Chicago Civil Appeal No. 149 of 1991 and Kenya Commercial Bank vs Kenyatta National Hospital & Another (2003) 2 EA*.

11. However this being a Constitutional Petition and as I have indicated above, the rules of procedure applicable are the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** (Hereinafter “the Rules”). In that regard, **Rule 18** of the **Rules** provides that, “*a party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court*”. As to the applicability of that Rule, in **The Institute for Social Accountability and Another vs Parliament of Kenya and 2 Others Petition No.71 of 2013**, the Court stated that;

“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 or to avoid a 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.”

12. I agree with the above reasoning and in that context, can it then be said in the present case that there will not be an injustice caused to the 1st and 2nd Respondents if the amendment is allowed? The said Respondents strenuously argued that the amendment would compromise their case which was hinged on the argument that the 1st Respondent is not a state officer so that the provisions of **Articles 260(2)** and **77(2)** of the **Constitution** do not apply. Is that a sufficient ground for denying an amendment as sought?

13. I do not think so. I say so because in the case of **The Institute for Social Accountability (supra)** the Court stated as follows as regards the purpose of amendments;

“The object of amendments is to enable the parties to alter their pleadings so as to ensure that the litigation between them is 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 and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”

14. Applying the above principles here, I am of the view that the ends of justice will be achieved and the principles and values enunciated in **Chapter Six** of the **Constitution** will better be served if the amendment is allowed and the issues in contest dealt with wholly. At this point, this Court is not concerned with the substantive merits of the Petitioner’s case as those are matters that will be canvassed at the hearing and I am therefore satisfied that the amendment will help the Court conclusively determine the issue before it and declining the amendment at this stage may only lead to the filing of another suit and such an approach would negate the principles of judicial authority enunciated in **Article 159(2)** of the **Constitution** that all suits should be expeditiously determined.

15. The other issue raised by the Respondents in opposing the amendment is that it seeks to join a proposed Interested Party which party has not sought to be enjoined in the proceedings.

16. My mind on that issue is clear. **Rule 5(d)(ii)** of the **Rules** allows this Court either upon application by a party or on its own motion, to order that the name of a party which ought to have been joined or whose presence before the Court may be necessary in order to enable the Court adjudicate upon and settle the matter, be added. The issue in the Petition is simply whether the 1st Respondent may hold office as the Secretary General of the 2nd Respondent while also holding an office in the Public Service. I think that the Registrar of Political Parties as a custodian of party records and details is a necessary party if that issue is to be properly determined.

17. I am therefore satisfied that the proposed amendments are necessary and the Respondents will have an opportunity to respond to the amended Petition or otherwise amend their responses, if

they so desire.

18.The upshot of my findings is that the Notice of Motion dated 16th July 2014 succeeds in the following terms;

- (1) That the Petitioner be and is hereby granted leave to amend its Petition filed herein on 4th March 2014.***
- (2) That the Amended Petition annexed hereto be treated as the Petitioners/Applicant's Petition and that the same be deemed as having been duly filed and served.***
- (3) That the 3rd Respondent be substituted as an Interested Party in the Petition.***
- (4) That the Respondents be at liberty to file a Reply to the Petition if it so wishes.***
- (5) That the costs of this Application be in the cause.***

19.Costs shall abide the outcome of the Petition.

20.Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Makolwal for 3rd Respondent

Mr. Wanjohi holding brief for Mr. Ahmednassir for 1st and 2nd Respondent

Petitioner present

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE

Further order

Hearing on 30/1/2015.

ISAAC LENAOLA

JUDGE