



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**PETITION NO. 2 OF 2008**

**ISAAC KIPLAGAT KOECH ‘OGW’ ..... PETITIONER**  
**=VERSUS=**  
**THE ATTORNEY GENERAL ..... RESPONDENT**

**RULING**

This is an application by the Petitioner primarily for leave to amend his petition. The application is expressed to be brought under section 3 of the Civil Procedure Act, Order 8, Rules 3, 5 and 7 of the Civil Procedure Rules and Section 262 of the Constitution of Kenya. The application is grounded on the affidavit of **David Ngala**, counsel for the applicant and that of the applicant himself.

The applicant’s case is that he filed his petition way back in 2008 under the repealed Constitution and desires to rely on the provisions of the new Constitution – hence this application. Annexed to counsel’s affidavit is the proposed amended petition.

The application is opposed on the basis of Grounds of Opposition filed by counsel for the respondent. In the said grounds, it is contended that the application is defective, bad in law, misconceived and frivolous. It is specifically stated that section 262 of the new Constitution does not prescribe rights retrospectively and that the proposed amendments are statute barred under the Limitation of Actions Act.

When the application came up for hearing before me on 5<sup>th</sup> July, 2011, counsel agreed to file written submissions which were in place by 4<sup>th</sup> October, 2011. For the Petitioner, it is submitted that the applicant desires to plead provisions of the New Constitution which came into force on 27<sup>th</sup> August, 2010 and also quantify and further particularize his entitlements both of which, according to the applicant, are permitted by the law.

For the Respondent on the other hand, it is submitted, in the main, that the applicant has invoked the wrong provisions of the law; that the promulgation of the new Constitution is not a proper basis for seeking leave to amend given the transitional provisions thereof and that no basis has been demonstrated for an order granting leave to amend.

I have considered the application, the affidavit in support and Grounds of position and the submissions of counsel. Having done so, I take the following view of the matter. The submissions made clearly show that both counsel appreciating the primary purpose for seeking leave to amend. In **Eastern Bakery –vrs- Castelino [1958], E.A. 461**, the Court of Appeal held the as follows:-

**“ (a) Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. In this respect there is no injustice if the other side can be**

compensated by costs.

**(b) The Court will not refuse to allow amendment simply because it introduces a new case. However, there is no power to enable one distinct cause of action to be substituted for another nor to change by amendment the subject matter of the suit”**

And Rule 3 (2) and (5) of Order 8 of the Civil Procedure Rules allow amendments outside the period of limitation and which introduce a new cause of action.

The respondent has opted to oppose the applicant’s application on the basis of Grounds of Opposition and offered no affidavit evidence. He has not therefore demonstrated that he would be prejudiced by the proposed amendments beyond what is compensable by an award of costs. In my view, failure to invoke the relevant provisions of the law does not vitiate the application. Indeed, Order 2 Rule 14 of the Civil Procedure Rules (2010) prohibits such objection. In any event, the applicant has invoked orders 8 Rules 3, 5, and 7 of the Civil Procedure Rules which to my mind apply to this application. I say so, because, under section 2 of the Civil Procedure Act, “**suit**” means all civil proceedings commenced in any manner prescribed. It cannot be gainsaid that these proceedings are civil proceedings which have been commenced by way of a Petition. It is also significant that under the same section 2 of the Civil Procedure Act, pleadings include a petition.

In the premises, I do not find, as fatal, the failure to invoke the provisions of the repealed Constitution and the Rules made there under.

The respondent has also argued that the applicant has not demonstrated a deficiency in his petition which will be cured by the proposed amendment and that any deficiency alleged is not predicated on the new Constitution which is given as the primary basis for the application.

I have perused the proposed amendments. A substantial part thereof crystallizes the applicant’s claims for various entitlements. They may be amendments which would still have to be sought notwithstanding the promulgation of the new Constitution on 27th August, 2010. However, in my view, the proposed amendments clarify and particularizes the applicant’s claim. In Central **Kenya Ltd =vrs= Trust Bank Ltd [2000] 2 EA 365 (CAK)**, the Court of Appeal held as follows:-

**“The overriding consideration for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave ----- the policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them, the opposite side would be prejudiced or suffer injustices which cannot properly be compensated for in costs.”**

The Petitioner and his legal advisors know the case they desire to present before the court. They should be allowed to do so unless the other side maybe greatly prejudiced or may suffer such injustice as cannot properly be compensated for in costs.

As I have already found, the respondent has not demonstrated that such prejudice will be visited upon him should the leave sought be granted. I can on my own see no such prejudice.

In the result, there is no basis for refusing the Petitioner’s application. I allow the application dated 23<sup>rd</sup> February, 2011 in terms of prayers (b) and (c) thereof.

The Petitioner shall pay the respondent the costs of the application in any event.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS  
8<sup>TH</sup> DAY OF NOVEMBER, 2011.**

**F. AZANGALALA**  
**JUDGE**

**Read in the presence of:-**

**Mr. Kitur** holding brief for **Mr. Ngala** for the Petitioner.

**F. AZANGALALA**

**JUDGE**

**8/11/2011.**