



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Constitutional Reference 821 of 2008

IN THE MATTER OF

A CONSTITUTIONAL REFERENCE ON ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE BILL OF RIGHTS
BETWEEN

NELSON N. N. KABANGI
SAMUEL WANJOHI NJOGU
LILIAN WANJIRU KOMU
DAVID MUTHII MABUI

HON. DICKSON DANIEL KARABA.....APPLICANTS

VERSUS

THE HON. ATTORNEY GENERAL
THE ELECTORAL COMMISSION OF KENYA
JAMES KARIUKI GITAH

THE RETURNING OFFICER OF KIRINYAGA CENTRAL

HON. JOHN NGATA KARIUKI.....RESPONDENTS

RULING

The applicants filed a constitutional reference seeking various reliefs from the court arising out of the declaration by the defunct Electoral Commission of Kenya of Hon. John Ngata Kariuki (4th respondent) as the duly elected member of parliament of Kirinyaga Central Constituency in the general elections that were held on 27th December 2007. In essence, the applicants seek a declaration of the court to the effect that the said declaration of the 4th respondent as the duly elected member of parliament of the said constituency was null and void, and indeed a nullity. On 17th March 2010, the applicants filed an application seeking to invoke this court's inherent jurisdiction, **Sections 60(1), 84(1)(2)(6) of the Constitution Rules 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection Fundamental Rights and Freedoms of the Individual) High Court and Procedure Rules, 2006 and Sections 1A and 3A of the Civil Procedure Act** to enable them amend the originating notice of motion dated 22nd December 2008 that constitutes their constitutional reference to this court in terms of the proposed amended originating notice of motion. It is the applicants' case that the issues intended to be brought out more clearly and distinctly in the proposed amendments, would enable this court appreciate the applicants' case and further enable the applicants ventilate their case with clarity before this court. The applicants contend that no prejudice will be suffered by the respondents because the setting out of the matters in issue as proposed in the amendments would enable the respondents appropriately answer to the applicants' constitutional reference. The application is supported by the annexed affidavit of Hon. Dickson Daniel Karaba and other grounds stated on the face of the application.

The application is opposed. The respondents filed grounds in opposition to the application. In summary, they are of

the view that the proposed amendments to the originating notice of motion would serve no purpose because in the first place the applicants' case did not disclose any course of action under the Constitution. The respondents were of the view that this court will be wasting its resources in terms of judicial time by entertaining an application for amendment in regard to a suit which lacked a legal substratum. The respondents contend that the applicants' suit was so defective and legally untenable that no amendment would cure it. They were further of the view that the applicants were guilty of laches in that they had not brought the current application timeously. It was for the above reasons, among others, that the respondents urged the court to dismiss the applicants' application with costs.

Prior to the hearing of the application, counsel for the parties to this application agreed by consent to file written submissions to the application. The said counsel were given a chance to highlight the submissions orally before the court on 24th March 2010. We have read the pleadings filed by the parties herein in support of their respective opposing positions. We have also considered the submissions, both written and oral, made by the respective counsel herein. We have also had the benefit of the authorities cited to us in support and in opposition to the application. The issue for determination by this court is whether the applicants have made an appropriate case for this court to allow their application to amend their pleadings. This court is aware that the case before it is a constitutional reference. As appreciated by counsel in this application, the procedural rules made under the Chief Justice pursuant to **Sections 65(3) and 84(6) of the Constitution** in regard to constitutional references filed to this court i.e. The Constitution of Kenya (*Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of The Individual*) **High Court Practice and Procedure Rules, 2006**, does not specifically provide for the amendment of pleadings once a party has invoked the court's constitutional jurisdiction. However, we are of the view that this court has jurisdiction to allow any party before it to amend his pleadings provided that such amendment would serve the ends of justice and would not prejudice the opposing party.

We are of the considered view, that the principles that this court should apply in determining whether or not to allow an amendment of a pleading filed in a constitutional reference, shall be the principles that are taken into account when a court is considering an application to amendment in an ordinary civil suit. In that regard, the generally accepted rule is that the court will freely allow a party to a suit to amend his pleadings provided that the opposing party is not prejudiced. In many instances, courts have held that the opposing party's prejudice will be compensated by an award of costs (see **Kenya Cold Storage (1964) Limited vs. Overseas Food Services (Africa) Limited [1982] KLR 453**. The Court of Appeal in the case of **Central Kenya Limited vs. Trust Bank Limited & 4 others CA Civil Appeal No. 222 Of 1998** (unreported) held at page 3 of its judgment as follows:

“The settled rule with regard to amendment of pleadings has been concisely stated in Vol. 2 6th Ed. At P.2245, of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, in which the learned authors state:

“that a party is allowed to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.

And at page 2248, they continue to say that an amendment merely clarifying the position put forward in the plaint or written statement of defence must be allowed.”

At page 4 of the said judgment the court stated thus:

*“... Hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs (see, **Beoco Ltd vs. Alfa Laval Co. Ltd [1994] 4 ALL ER. 464**.)”*

It is therefore clear that unless there are such compelling reasons that would impact on the justice of the case, parties will be allowed to amend their pleadings without much ado provided the opposing party is given an opportunity to respond to the proposed amendments.

In the present application, it was apparent that the respondents objected to the proposed amendments basically on grounds of the competence of the entire constitutional reference. We have perused the draft amended originating notice of motion that is annexed to the application for amendment. We are satisfied that the proposed amendments intend to set out the law on which the constitutional reference is predicated. The proposed amendments would not prejudice the respondents. The

respondents will still have the opportunity to ventilate their objection to the entire constitutional reference after the intended amendments have been incorporated in the amended originating notice of motion. The respondents should hold their horses until when they will have the opportunity to challenge the constitutional reference filed by the applicants both on procedure and substance. Taking into consideration the applicable law, and the facts of this

case, we are inclined to allow the application by the applicants to amend the originating notice of motion.

In the premises therefore, the application by the applicants, filed on 17th March 2010 is hereby allowed. The applicants shall file and serve the amended originating notice of motion within seven (7) days of today's date. The respondents shall be at liberty to file responses to the amended originating motion within seven (7) days after service. Costs shall be in the cause.

DATED AT NAIROBI THIS 23RD DAY OF APRIL 2010.

A. MBOGHOLI MSAGHA
JUDGE

L. KIMARU
JUDGE

M. WARSAME
JUDGE