



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI**

(NAIROBI LAW COURTS)

Petition 156 of 2006

IN THE MATTER OF: SECTION 84(1) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER SECTION 75 AND 80 OF THE CONSTITUTION OF KENYA**

BETWEEN

INTOIL LIMITED 1ST PETITIONER

TECAFLEY LIMITED 2ND PETITIONER

AND

THE PERMANENT SECRETARY, MINISTRY OF ENERGY...1ST RESPONDENT

THE MINISTRY OF ENERGY.....2ND RESPONDENT

THE MINISTRY FOR TRADE & INDUSTRY.....3RD RESPONDENT

KENYA PETROLEUM REFINERIES LTD.....4TH RESPONDENT

RULING

The application before court is the Chamber Summons dated 30th June 2008 filed in court on the 4th July, 2008. The application is brought under sections 3A and 100 of the Civil Procedure Act and orders 1 Rule 10(2), VIA Rule 3, 5 and 8 of the Civil Procedure Rules. The Petitioners are seeking the following orders:-

1. THAT the Honourable Attorney General be joined as the 5th Respondent herein.
2. THAT the Petitioners be granted leave to amend their petition in terms of the draft amended petition annexed hereto.

The grounds upon which the petitioners rely are:-

- (a) This Petition cannot be effectively and completely adjudicated upon without joining the Attorney General as a respondent.
- (b) That by virtue of the adverse effects of the Legal Notices, the Minister of Finance erred in permitting the promulgation thereof. The said Minister's acts or omission are therefore in issue and the Attorney General ought to be enjoined in these proceedings.
- (c) That the presence of the Attorney General is crucial as it will enable this court to inter-alia determine whether the Minister of Finance's failure to review the market structure and control unwarranted concentration of economic power, has forced the Petitioners to incur a guaranteed loss to the benefit of the 4th Respondent and other private individuals.
- (d) That the presence of the Attorney General is necessary in order to enable this court to fully and finally determine all questions or issues connected or necessary arising in this petition.
- (e) There have been substantial changes in the law applicable to this dispute. It is therefore necessary that the petition be amended to prevent it being rendered an academic exercise and to avoid multiplicity of suits.
- (f) No prejudice or injustice will be occasioned to the Respondents if the said amendments are allowed.
- (g) That the intended amendments are necessary for the purpose of enabling this Honourable Court to finally and effectively determine the real issues in dispute between the parties.
- (h) It is the interest of justice to allow the intended amendment.
- (i) The application for amendment has been made timeously.

The Petitioners have also relied on the affidavits of **AHMED RUTA ABDIRAHMAN and PETER MURIGI NJIRWA** sworn on the 30th June 2008 and filed in court on the 4th July, 2008.

The application was opposed by the Respondents. The Senior Litigation Counsel at the Attorney General Chambers filed the grounds of opposition dated 27th October, 2008 on behalf of the 1st, 2nd and 3rd Respondents while the 4th Respondent file its grounds of opposition dated 28th October, 2008 on the same date. The grounds of opposition filed by the 1st, 2nd and 3rd respondents are as follows:-

- (i) The intended joinder of the Attorney General as a party is not necessary to facilitate the effectual and complete adjudication of any and/or all of the real constitutional issues in controversy or arising from the petition.
- (ii) The proposed amendments are not necessary for the determination of the suit, and will result in prejudice and/or injustice to the Respondents herein as:-
 - (a) The amendments do not in any manner or form clarify the position put forward by the petitioners in the petition, and indeed only serve to further cloud the real questions in controversy.
 - (b) The petitioners seek to introduce a new cause of action based on the newly enacted Energy Act No 12 of 2006 which repealed the Petroleum Act as well as Trade Licensing Act, Cap 497 Laws of Kenya under which the legal notices they seek to impugn were made.
 - (c) The petition has, to a large extent, been overtaken by events through the enactment of the Energy Act No 12 of 2006 and which cannot be cured through amendment.
- (iii) The application is an abuse of the court's process as the petitioners, through their proposed amendments, seeks to use the constitutional mandate of this Honourable Court as a general substitution

for the normal proceedings for invoking judicial control of administrative action under the Energy Act No.12 of 2006.

(iv) No multiplicity of suits would result if the application is dismissed, as the subject matter of the suit, specifically the legal notices they seek to impugn have since been repealed and the petition as it stands is a mere shell without any substantive foundation to stand on.

The 4th Respondent's grounds of opposition are as follows:-

1. The provisions of the Energy Act, No 12 of 2008 cannot be applied retrospectively.
2. The constitutional court's jurisdiction only extends to breaches of the constitution the Honourable court cannot be called upon to decide alleged conflicts or contradictions between the legal notices and the Energy Act or Restrictive Trade Practices, Monopolies and Price Control Act.
3. The application is an abuse of this Honourable court.

The parties herein filed written submissions. The Petitioners contend that the law on amendment of pleadings is set out under Order VIA Rule 5 of the Civil Procedure Rules which provides:-

“An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts as a cause of action in respect of which relief has been claimed in the suit by the party applying for leave to make the amendment.”

The Petitioners contend that the test to be satisfied before leave to amend is granted is whether the proposed amendment arise out of the same facts or substantially the same facts as a cause of action in respect of which a relief has already been claimed. The Petitioners submit that their application meets the aforesaid test for the following reasons:-

- (a) The proposal to enjoin the Attorney General as the 5th Respondent arises out of his failure to act in order to prevent the enactment of the impugned legal Notices which have the effect of violating the letter and spirit of the Restrictive Trade, Practices, Monopolies and Price control Act. The Petitioners have already claimed relief with respect to the said Legal Notices.
- (b) Challenging the validity of the impugned legal Notices for being inconsistent with the Energy Act arises from the same facts which the petitioners have sought different relief in their petition.

The Petitioners further contend that there is nexus between the original claim and the proposed claim and the amendment sought should be allowed. The petitioners submit that the Respondents have not demonstrated the prejudice they stand to suffer if the amendment is allowed.

The Petitioners argue that this being a constitutional petition, order VIA of the Civil Procedure Rules should be read together with section 84 of the Constitution which guarantees a person the right to file a petition whenever there is an allegation of breach of any of the fundamental rights. The petitioners maintain that with the enactment of the Energy Act, they are faced with further breaches which they wish to highlight in their Petition by way of amendment. Thus, denying them leave to amend would in effect be denying the petitioners the right to access the court, a contravention of section 84 of the constitution. In the Case of *LABHSONS LIMITED v MANULA HAULERS LIMITED & ANOTHER, HCCC NO 204 OF 2003*, this court held inter alia:-

“Section 84 in our opinion guarantees the right to file a constitutional application if any of the fundamental rights set out in sections 70 to 83 of the Constitution has been, is being or is likely to be contravened or any of these provisions contravened. The filing of an application is itself a fundamental right under section 84 but the other rights to be protected are guaranteed by section 70 to 83 including the limitations to each right. Under section 84, there is no limitation to this

particular right in articulating the right to having access to the court except failure to adhere to the rules made under section 84(6).”

The Petitioners further submit that the repeal of a statute does not extinguish a cause of action or the right that had accrued to a party while the statute was in operation. Section 23(3)(e) of the Interpretation and General Provisions Act (Cap 2) provides:-

“where a written law repeals in part or in whole another written law, then unless a contrary intention appears, the repeal shall not affect an investigation, legal proceedings or remedy in respect of a right, privilege, obligations, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.”

The Petitioners have contended that a court of law is enjoined to dispense substantive justice as opposed to giving undue consideration to the mode and/or manner in which a party has brought its application. In the case of *REPUBLIC v MINISTER FOR FINANCE & 2 OTHERS HCCC NO 6444 OF 2005*, the court rejected the argument by the Attorney General that the application was bad in law for mixing and/or combining judicial review remedies with constitutional law remedies. The court stated as follows:-

“The court rejects that view because the thrust of judicial review application is not to seek constitutional relief but judicial review mainly on the ground of the tax measures being allegedly ultra vires the VAT Act. The issue of retroactivity is also statutory in that s 28 of the Interpretation and General Provisions Act does not raise this and the Constitution does also frown upon penalties being retroactive... Every court is supposed to exercise its jurisdiction in accordance with the Constitution and these are issues of law even in judicial review and must be seen from this stand point. A court of law cannot countenance taking any unconstitutional position in law regardless how the application is brought to court.”

The 1st, 2nd and the proposed 5th Respondents contend that the right to amend is not absolute and the issue is purely discretionary which should be exercised judicially as guided by the principles set out by the Court of Appeal in *CENTRAL KENYA LTD v APPEAL NO 222 OF 1998*. The said principles are that a party should be allowed to make such amendments:-

- (i) That are necessary for determining the real question in controversy.
- (ii) To avoid multiplicity of suits, provided there has been no undue delay.
- (iii) Only where no new or inconsistent cause of action is introduced i.e if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.
- (iv) That no vested interest or accrued legal rights is affected; and
- (v) So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.

The 1st, 2nd and proposed 5th Respondents submit that the petitioners now seek to introduce new causes of action not arising out of the same facts or substantially the same facts as the petition. They allege that the petitioners seek to introduce inconsistent causes of action:-

- (i) Based on the Energy Act No. 12 of 2006 as proposed in paragraphs 9,9A,9B,9C,10,11,11A,11B,11C,11D and 11E of the proposed amended petition.
- (ii) Based on the Articles 7,17(2) and 2092) of the Universal Declarations of Human Rights as proposed in paragraphs 8B(iii)(a) and (c) of the proposed amended petition.

The 1st, 2nd and proposed 5th Respondents have argued that the application is an abuse of the court's process as the petitioners, through some of these, proposed amendments, seek to use the constitutional mandate of this court as a general substitute for the normal proceedings for invoking not only judicial control of administrative action under the Energy Act No 12 but also their ill conceived private law claims for damages.

The aforesaid Respondents have further argued that the application is frivolous and founded on the notion that whenever there is a perceived failure by an organ of the Government or a public authority or public office to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals under the Constitution which is fallacious.

The 1st, 2nd and proposed 5th Respondent argue that they will be severely prejudiced beyond compensation in costs if called upon to mount a defence to several obscure and/or unrelated issues which ought to be the subject matter of different proceedings governed by different regimes of law.

The 4th Respondent contends that the petitioners have failed to explain why it is necessary to join the Attorney General when the allegations it is raising are made against the Minister of Finance.

The 4th Respondent further submits that the Constitution provides a mechanism for moving to court by way of a petition in the event that a party feels that his Constitutional rights have been breached. The petition herein is filed under Rules 11 and 12 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules and the Petition cannot include claims other than claims of contravention rights under sections 70 to 83 of the Constitution and a party cannot by way of a constitutional petition as a constitutional court to adjudicate upon grievances that arise from other statutes. The said Respondent argues that to allow the proposed amendment of the petition for purposes of including allegations and claims that are well provided for by the statute, would amount to a trivialization of this Honourable Court's constitutional jurisdiction.

The 4th Respondent further submits that the petitioners cannot be allowed to rely on the Energy Act retrospectively. The 4th Respondent has relied on the decision in the case of **KENYA BANKERS ASSOCIATION & OTHERS v MINISTER FOR FINANCE & ANOTHER (2002) KLR 61** where the court held:-

“In Kenya, in addition to a presumption that a statute cannot be made to apply *ex post facto*, there is a constitutional restraint upon retroactive legislation, allowing the courts to derogate from a legislation even if it is unequivocally expressed to operate retrospectively.”

Finally, the 4th Respondent contends that the petitioners have failed to lay out any basis to allow them to amend the petition and it is immaterial that the Respondents will not be prejudiced by the amendments.

We have carefully considered the application before us and the lengthy submissions by the counsel on record. The parties have passionately gone into real details of the petition and we would not want at this stage to look into the merits of the petition. The application before us is merely seeking leave to amend the petition and the concern of the court is whether the said application has merit or not. In our view the issues the court should address are as follows:-

1. Are the amendments sought necessary for determination of the real question(s) in controversy?
2. Whether failure to allow the amendment has the potential to cause a multiplicity of suits?
3. Whether there is serious prejudice or injustice occasioned to the Respondents?

On the first issue, the parties herein have taken diametrically opposing views. We would not really wish to get into the merit of the petition to avoid apparent prejudice to either of the parties as the matter has not

been argued before the court. The amendments proposed by the Petitioners seem to have been prompted by the enactment of the Energy Act No 12 of 2006, a law that was non-existent at the time the petition herein was filed. The Petitioners believe that their case will be enriched by the proposed amendments and all the issues in controversy shall be squarely addressed. The Respondents are anxious that the petitioners are adding up new causes of action to those already existing. The anxiety raised by the Respondents is real but going by Order VI A Rule 5 which is aforementioned, the court has discretion to allow an amendment notwithstanding that it will in effect add or substitute a new cause of action, if the new cause of action arises out of the same facts as a cause of action in respect of which relief has already been claimed.

The petitioners had no role in the repealing of the Petroleum Act or the enactment of the Energy Act No 12 of 2006 and the amendments are sought timeously before the matter is heard. It would not be prudent to deny the petitioners a chance to prosecute or attend to their case the best way they know how especially going by the circumstances of this case. In the case of *BEATRICE EVERLINE ATIENO ABONGO v NATIONAL OIL CORPORATION H CCC NO 1268 OF 2004*, the court held inter alia:-

“A litigant is entitled to his day in court, no matter how hopeless his claim or defence may seem, so long as some life can be injected into it by amendment.”

We entirely concur with the above finding. The petitioners are entitled to their right to access the court and if in their view an amendment would make their case better, it is of no use to deny them such a chance as it may finally end up indirectly denying them the same right to access court to enforce their rights.

The second issue as to whether failure to allow the amendments can create a multiplicity of suits is one that may be obvious. If the application herein is dismissed, the petitioners still have the right to file other cases to enforce their perceived rights whether real or imaginary. For proper case management and in particular, the expeditious disposal of cases filed in court, it is extremely prudent to value the judicial time. If several causes of action can conveniently be tried together, it will save both time and costs for the parties and the courts should be geared towards such an end. In the said case of *BEATRICE EVERLINE ATIENO ABONGO'S Case*, the court further held:-

“It is really a matter of convenience and expediency. Would it be expedient to bring separate proceedings in respect to the constitutional issues? We think not. It would have involved more in terms of time and expense.”

If multiplicity of suits can be avoided, it will serve as a great tool for case management which is expedient and convenient to the parties as long as parties to the suit are not prejudiced. We also appreciate the decision cited by the Petitioners in the case of *REPUBLIC v MINISTER FOR FINANCE & 2 OTHERS H CCC NO 644 OF 2005*. As long as no law has been breached probably on the joinder of causes of action, the court should hear all the causes of action simultaneously if they arise from the same facts. The amendments sought are not an afterthought or some mistake caused by the negligence of the petitioners, indeed they have played no role. We have noted that the amendments arise from the same facts but have been occasioned by the new developments in repealing and enactment of some other laws.

The other reason why we should allow the intended amendment is that this being a constitutional matter we should take into account the fact that under s 84 this Court has been empowered to make such orders or issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the rights set out in s 70-83 (inclusive) of the Constitution. The intended or proposed amendments are clearly intended to assist the Court to determine the real issues and we would therefore be inclined to allow the amendment pursuant to this provision as well. In constitutional cases, the Court should allow any amendments which would allow the fullest articulation of fundamental rights and freedoms in order to give the reliefs suitable to any proven contravention or threatened contravention. The Courts discretion in this regard is unfettered.

Finally, on the issue of prejudice to the Respondents, none of the Respondents has really demonstrated

any prejudice that may be occasioned by allowing the amendments sought by the petitioners. We have noted that the proposed 5th Respondent is already on record defending the 1st, 2nd and 3rd Respondents and enjoining the Attorney General as a Respondent is like preaching to the already converted. The petition is still unheard and it would be in the interests of justice to allow the amendments so that all the issues in contention can be properly addressed once and for all to forestall offshoot suits which can be avoided by attending all the concerns of the Petitioners. Whether or not the subject matter consists of any constitutional issues, is a matter for the Court to determine on merit at the hearing.

In our view if the Respondents have been prejudiced which we doubt, such prejudice can be addressed by an appropriate order for costs. It would not be in the interests of justice to deny the Petitioners the orders sought in this instant application.

For the above reasons, we grant the application in terms of prayers 1 and 2. On the issue of costs, we award any thrown away costs to the Respondents in any event.

DATED and delivered at Nairobi this 22nd day of May 2009.

J G NYAMU

JUDGE

R. WENDOH

JUDGE