



**Kabundu & 2 others v Mombasa County Government & 5 others;
Director of Public Prosecution & 4 others (Interested Parties) (Petition
195 of 2018) [2023] KEHC 22293 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22293 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION 195 OF 2018
OA SEWE, J
SEPTEMBER 19, 2023**

BETWEEN

**PARTICK KABUNDU 1ST PETITIONER
MUTUMA CALEB MWITI 2ND PETITIONER
CHICHI KIMANI 3RD PETITIONER**

AND

**MOMBASA COUNTY GOVERNMENT 1ST RESPONDENT
THE GOVERNOR, MOMBASA COUNTY 2ND RESPONDENT
MOMBASA COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT
THE CLERK, MOMBASA COUNTY 4TH RESPONDENT
COMMITTEE ON SECURITY AND ADMINISTRATION THROUGH
CHAIRPERSON, MOMBASA COUNTY ASSEMBLY 5TH RESPONDENT
COMMITTEE ON JUSTICE AND LEGAL AFFAIRS, THROUGH MOHAMED
AMIR, INSPECTORATE DIRECTOR 6TH RESPONDENT**

AND

**DIRECTOR OF PUBLIC PROSECUTION INTERESTED PARTY
THE ATTORNEY GENERAL INTERESTED PARTY
THE CHIEF MAGISTRATE, MOMBASA INTERESTED PARTY
THE INSPECTOR GENERAL, NATIONAL POLICE SERVICE INTERESTED
PARTY
THE MOMBASA LAW SOCIETY INTERESTED PARTY**



RULING

- (1) The notice of motion dated February 16, 2023 was filed herein on March 15, 2023 by the petitioners. They approached the court under article 159(2)(d) of *the Constitution* of Kenya, sections 1A, 1B, 3, 3A and 100 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya as well as Rules 8 and 18 of *the Constitution* of *Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (otherwise known as “the Mutunga Rules”) for orders that:
 - (a) Spent
 - (b) the petitioners be allowed to amend their Petition dated July 11, 2018 in terms of their annexed draft Petition;
 - (c) The respondents be allowed to amend their Responses, if need be;
 - (d) The annexed draft amended Petition be deemed as duly filed upon payment of the requisite fees;
 - (e) The costs of the application be provided for.
- (2) The application was premised on the grounds that the proposed amendments are intended to bring before the court the real matters in controversy between the parties herein so that the same can be determined on their true and substantive merits. The petitioners further averred that 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 petitioner’s knowledge subsequent to the filing of the Petition; and that no prejudice will be occasioned to the respondents by the proposed amendments as they arise out of the same facts or substantially the same facts in respect of which relief is claimed by the petitioners.
- (3) The application was supported by the affidavit of the 1st petitioner, Patrick Kabundu, sworn on 16th February 2023, in which the affiant deposed that the petitioners brought an application dated November 30, 2020 which is yet to be dealt with. They therefore propose to include a few of their prayers in the application in the Petition to enable the court dispose of the petition itself and thereby save the court’s time.
- (4) Mr. Kabundu further averred that the proposed amendments are intended to bring before the court the real matters in controversy between the parties so that the same can be determined on their merits. He added that the proposed amendments will not occasion any prejudice to the respondents; and that the application has been made without unreasonable delay. Annexed to the 1st petitioner’s affidavit is a draft Amended Petition marked Annexure PMK 1 depicting the proposed amendments at paragraphs 15 to 18 of their prayers.
- (5) The application was resisted by the respondents vide their Grounds of Opposition dated March 29, 2023. They accordingly contended that:
 - (a) The proposed amendments are an attempt by the applicant to steal a march on the respondents since the parties have filed their respective pleadings and submissions and the matter is awaiting final determination by the court.
 - (b) The proposed amendments contravene the well-known principle of law that litigation must come to an end.



- (c) The applicant seeks to introduce new issues into the suit through the proposed amendments which will change the character of the suit.
 - (d) The proposed amendments are immaterial as they have no bearing on the suit.
 - (e) The proposed amendments will prejudice the respondents who have been defending the suit since 2018 and are desirous of having it concluded.
- (6) On behalf of the 1st interested party, Ms. Anyumba had no objection to leave being granted as prayed. Similarly, Mr. Wafula for the 5th interested party had nothing to say in respect of the petitioners' application. Accordingly, as between the petitioners and the respondents, directions were given on April 20, 2023 that the application be canvassed by way of written submissions.
- (7) In their written submissions dated April 24, 2023, the petitioners reiterated the factual basis of their Petition and emphasized the need to consolidate their prayers in their pending application dated November 30, 2020 with their prayers in the Petition so as to expedite the disposal of this matter. They relied on *Central Kenya Ltd v Trust Bank Ltd* [2000] 2 EA 365 to buttress their submission that the proposed amendments are necessary to enable the Court determine the real issues in controversy between the parties.
- (8) On the timing of the amendment, the petitioners relied, inter alia, on *St. Patrick's Hill School Ltd v Bank of Africa Kenya Limited* [2018] eKLR, in which it was held that the Court has inherent power under section 3A of the *Civil Procedure Act* to permit a party to amend his or her pleadings at any time before judgment. As to the purpose of amendment, the petitioner made reference to *Halsbury's Laws of England*, 4th Edition, Vol. 36(1) at paragraph 76, *Institute for Social Accountability & another v Parliament of Kenya and 3 others* [2014] eKLR and *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR and urged the Court to find that they have given sufficient cause as to why leave to amend should be granted.
- (9) On behalf of the respondents, Ms. Kisingo relied on her written submissions dated April 24, 2023. She essentially reiterated her Grounds of Opposition filed on April 11, 2023 and urged the view that the proposed amendments seek to introduce new issues that have no bearing on the Petition. She further urged the court to note that this Petition has been pending for over 5 years and that it is only fair that a final pronouncement be made on the basis of the issues raised in the Petition and the submissions already filed by the parties instead of a re-opening of it as proposed by the petitioners. Ms. Kisingo concluded her submissions by stating that it is a cardinal principal of law that litigation must come to an end and consequently urged for the dismissal of the application with costs.
10. I have given careful consideration to the petitioner's application, the averments in the supporting affidavit as well as the response thereto by way of Grounds of Opposition filed by the respondents. I have likewise paid attention to the written submissions filed by learned counsel on behalf of the parties and the authorities relied on by them. There is no gainsaying that the discretion to grant leave to amend pleading is indeed a wide one. It is only tethered by the requirement that the discretion be exercised judiciously, and not whimsically or capriciously. Hence, Rule 18 of the *Mutunga Rules* states:
- “A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court.”
- (11) The rationale for amendment of pleadings need is to enable the Court to effectively and effectually determine the real issues in controversy between the parties to the suit. Thus, in *Nyamodi Ochieng*



Nyamogo v Kenya Posts and Telecommunication Corporation [2007] eKLR, for instance, it was held that:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between the parties is conducted not on false hypothesis of the facts already claimed but rather on the basis of the true state of facts or relief or remedy which the parties really and finally intend to rely on or to claim.”

- (12) Similarly, in *Institute For Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR the above position was reiterated thus:

“The object of amendment of pleadings 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.”(see also *Central Kenya Ltd v Trust Bank Ltd* [2000] 2 EA 365

- (13) As pointed out herein above, the petitioners merely seek to expand their prayers to include the prayers set out in their pending application. They believe that, by so doing, the hearing and effectual determination of the Petition will be expedited. Since Rule 18 of the Mutunga Rules envisage amendments at any stage of the proceedings, the respondent’s assertion that the application is belated clearly lacks traction; so that, roundly considered, I see no particular reason for declining the petitioner’s request. It is well-intentioned and if any prayers are not supported by the evidence or the applicable law, the Court should be in a position to pronounce itself on it at the opportune time.

- (14) I am further convinced that no prejudice will be suffered by the respondents for which costs will not suffice as a remedy, granted that they will have an opportunity to amend their responses as well as adduce evidence in support thereof. Indeed, as aptly pointed out by Apaloo, JA in *Philip Chemwolo v Augustine Kubende* [1985] KLR 492, the duty of the Court is to do justice to the parties and not to punish them for their mistakes or omissions. The Learned Judge expressed his viewpoint thus:

“I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

- (15) In the result, I find merit in the petitioner’s application February 16, 2023. The same is hereby allowed and orders granted in the following terms:

- (a) That leave be and is hereby granted to the petitioners to amend their Petition in terms of the draft Amended Petition annexed to the Supporting Affidavit herein.
- (b) That the Amended Petition be filed and served within 14 days from the date hereof; with corresponding leave to the respondents to amend their responses within 14 days of service, if need be.
- (c) That the costs of the application to be in the cause.

Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19TH DAY OF
SEPTEMBER, 2023

OLGA SEWE

JUDGE

