



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 12 OF 2017

IN THE MATTER OF: THE ALLEGED CONTRAVENTION

OF RIGHTS OF FUNDAMENTAL FREEDOMS UNDER

ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE COUNTY GOVERNMENT ACT 2012

AND

IN THE MATTER OF: PHYSICAL PLANNING ACT, CHAPTER OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015

KOوبا KENYA LIMITED.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF MOMBASA....RESPONDENT

RULING

The Application

1. By a Notice of Motion application dated 26th September, 2017 the Petitioner seeks the leave of this court to amend the petition on the terms of draft Amended Petition annexed to the application. The Applicant seeks an order that the draft amended petition be deemed duly filed. The Applicant also seeks that costs herein be provided for.
2. The application is premised on the grounds set out therein and is supported by affidavit sworn by Richard Bill on 26th September, 2017.
3. The Petitioner's case as pleaded and as submitted by its counsel Mr. Amoko is that there is a need to amend the petition to bring in issues of damages which were not envisaged at the time of filing the petition. Mr. Amoko provided extensive background to the application which is now on record especially on the construction of data centres which was the original business the Applicant intended to carry out in Mombasa. A carrier neutral data Colocation centre, such as the one the Petitioner sought to establish is important to multinationals, content providers, government and bank/financial customers who at present are forced to use centres located in Europe and elsewhere. The Petitioner having been a pioneer in the development of Data & Internet Infrastructure in East Africa for the last twenty five (25) years recognized this gap in the market and hence embarked on developing such a facility first in Mombasa with a view to constructing multiple such facilities across the East Africa Region.

At the time of developing the project there was only one other competitor likely to build a competing facility. The industry experts who looked at the project agreed that there was room for two competing data centres. However it would be critical that they both started

operations at or about the same time. If one were to start significantly ahead of the other then they would likely obtain an unassailable competitive advantage. Based on the agreed construction schedule of the contractors at the time that the interference by Mombasa County began the Petitioner's Data Centre would have been ready by end of June 2017. The competing data centre was scheduled for completion in April 2017 and would have begun operations in August 2017. The Petitioner filed the Petition on 17th February, 2017 seeking the following prayers:

- i. A Declaration that the Respondent has violated the Petitioner's rights under Article 47 of the Constitution;
- ii. An order compelling the Respondent to stamp and return the Petitioner's building plans;
- iii. An order compelling the Respondent to issue a Certificate of Approval;
- iv. An order for compensation for the amount of **US\$ 1,338,105** with respect to damages incurred;
- v. Such other and/or further relief as this Honourable Court may deem fit and just to grant; and
- vi. The costs of and occasioned by this Petition be provided for.

4. By a Judgment delivered on 13th April, 2017 this court *inter alia* found and held that the Respondent had violated the Petitioner's rights under Article 47 of the Constitution and made Orders compelling the Respondent to stamp and return the Petitioner's building plans and to issue a Certificate of Approval. The court found and held, *inter alia*:

“...The conduct of the Respondent herein is that of a party who does not care. Its conduct radiates an “I don't care” attitude which is not good for business, and is indeed a very old business practice.... The prudent thing for the Respondent to do would be to fast track the process so that the intended project can take off as soon as possible that investors are not unduly delayed from commencing commercial activities and recovering their investments as soon as possible. The Respondent is a government. It should not be seen as encouraging factors which unnecessarily slow down business and frustrate investors when there is no need for such.”

5. The Petitioner/Applicant's case is that on the issue of compensation, this Court made the Order that “*If need be, the parties to set a date for submissions on damages and compensation.*” The Petitioner's case is that as at the time of lodging the Petition herein, the Petitioner's claim for the damage it has sustained due to the Respondent's deliberate delay in stamping the building plans and issuance of the Certificate of Approval was in respect of operating expenses and lost revenue as pleaded in the Petition for the sum of **US\$ 1,338,105**.

6. The Applicant avers that despite this Court's Judgment on 13th April, 2017, the Respondent continued in its blatant disregard and defiance of this Court's Orders by failing to stamp the building plans and issue a Certificate of Approval. It was explicit in the Orders that the Respondent was directed to forthwith stamp and return the Petitioner's building plans and to issue a Certificate of Approval. Notwithstanding the foregoing, the Respondent through various correspondences unilaterally decided how it should comply with the said Order whilst placing unnecessary conditions on the Applicant. The Respondent only provided the building plans and Certificate of Approval on 18th July, 2017 which were received by the Applicant on 20th July, 2017 after the Petitioner had been forced to file an application for contempt and the court directed the Respondent to comply with his Orders within seven (7) days.

7. The Applicant's case is that had the Respondent acted timeously, construction would have commenced in October/December, 2016 and completed by June, 2017. The Petitioner had already lined up various investors as well as identified several customers. It had also negotiated contracts for the Project works.

8. It is the Applicant's case that unfortunately, during the delays caused by the Respondent, another party commenced and has concluded another data collocation centre in Mombasa which went live in August, 2017. The Project, being the first data centre in Mombasa, would have benefited from Early Mover Advantage, which will now be enjoyed by the said party. It will take the Petitioner approximately another year to return the Project back to operation by which time it will be a year behind the competitor.

9. The Applicant's case is that the Respondent's intentional delay has had catastrophic effect on the Petitioner's Project ultimately leading to decision by investors that they are unable to continue with the project because of the actions of the Respondent which have led to unreasonable delays in commencement of the Project. The Project has lost its Early Mover Advantage and will no longer be viable such that the Petitioner has been forced to abandon the Project as a result.

10. The Applicant states that it having pleaded special damages at the time of filing the Petition and circumstances now having changed, it engaged an auditor who has computed the amounts invested to date and who's financial advisors have computed its total losses which include loss of future profits, sunk costs and other costs incurred to which it holds the Respondent wholly liable.

11. The investors have to date invested Kshs. 284,449,300 into the project and if no award of damages is made, the Project investors stand to lose their sunk costs on their investment in the sum of Kshs. 184,449,300, assuming that the Petitioner mitigates its loss by selling the Project land at Kshs. 100,000,000.

12. The Applicant's case is that the value of this investment would have been worth Kshs. 1,401,406,300 at the time that the Project would have been sold in 2021. The financial advisors have discounted this back to a current value in 2017 using a “Net Present Value Calculation” being an internationally recognized methodology for establishing the current value of future profits. It can fairly be said that the Petitioner's actual losses suffered are Kshs. 847,384,581 as well as site security during the period of the delay between November 2016 and August 2017

of the sum of Kshs. 1,190,160 (which continues to rise as the proceedings continue). The Applicants avers that the intended amendments in the Draft Amended Petition are necessary to allow this court to come to a just conclusion of this matter, and that it is in the interest of justice that the Petitioner be allowed to amend its Petition.

The Response

13. The application is opposed by the Respondent vide a Replying Affidavit deposed to by Jimmy Waliaula sworn on 6th March, 2018. The Respondent's case as pleaded and as submitted by its counsel Mr. Obinju is that the said application is vexatious, frivolous, misconceived and an outright abuse of process of this court and ought to peremptorily struck out with costs. The Respondent's case is that the court in making its final Judgment declared that the only issue left for determination was that of submissions on damages and compensation based on the pleaded amounts of US\$1,338,105. The court also remarked that once the Petitioner had been issued the necessary approvals (of which it was supplied with), the parties ought to lay the matter to rest. The Respondent states that in any event the sums claimed as special damages by the Petitioner are inflated and too remote to be proven before this court. GThe Respondent's case is that by filing this application, the Petitioner is attempting to steal a march on the Respondent as it is well settled that a party is only at liberty to amend its pleadings in the course of proceedings and not after Judgment is pronounced. The matter therefore as it stands is *res judicata* save for the issue of submissions on damages and compensation and accordingly no new issues/claims can be introduced. Further, the damages claimed by the petitioner for **Kshs, 847,384,581** as per the draft Amended Petition annexed as *RB4* in Mr. Bell's Affidavit are inflated, outrageous and too remote to be sufficiently proven in any court. The Respondent prayed that the application be dismissed with costs.

Determination

14. I have considered the application and submissions of counsel. I raise only one issue for determination, that is, whether the amendment should be allowed.

15. It is now a tradition of law and practice that amendments to pleadings should not be unduly denied unless the proposed amendment is so frivolous and would not help the court to arrive at a proper determination of the suit. It is also trite law now that to avoid a multiplicity of suits applications to amend pleadings should be granted so that all the issues pertaining to similar transactions may be resolved in one suit. In this matter, the Respondent has submitted that the application is frivolous and an abuse of the process of the court. That submission may be correct. However, the frivolity of a suit goes to its merits, and it can best be determined on evidence adduced. That cannot happen until the Applicant is allowed to amend pleadings and then tender evidence in court.

16. It must be understood also that granting leave to amend does not amount to determining the suit. The Applicant must still prove his case on the weight of evidence. On this parlance, it is always better practice to allow a party to amend pleadings, and then provide evidence to prove his case, than to decline leave to amend and cause a party to file another suit. In this particular case I am satisfied that the leave to amend if granted will serve greater purposes including limiting litigation and saving court time. It will also serve the end of justice should it help the parties to the sit to provide all the relevant information to enable this court reach a just decision.

17. This court hastens to note that in the Judgment of this court delivered on 13th April, 2017 on the petition, the court observed that there was a prayer for damages and compensation. The court however, was not able to decide on the issue since parties did not submit on the same. In regard to that issue the court observed at order No. (iv) as follows:

“(iv) If need be, the parties to set a date for submissions on damages and compensation.”

18. Clearly the court was alive to the inchoate nature of the process before the court. That order cannot be complied with unless and until the petition is amended. It appears to me that the current application to amend the petition arises partly from that order (iv) of the said Judgment.

19. In my view the application before the court for amendment of the petition is merited. The same is allowed as prayed with costs in the cause.

Orders accordingly.

Dated, Signed and Delivered in Mombasa this 3rd day of May,2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Obinja for Respondent

Mr. Onyango holding brief for Amollo for Petitioner

Mr. Kaunda Court Assistant