



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A

PETITION NO. 2 OF 2016

BETWEEN

MWANGI WA IRIA.....PETITIONER

AND

ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

CHIEF MAGISTRATES COURT,

MAKADARA LAW COURTS.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

RULING (NO. 2)

1. The petitioner craves *leave* to amend the *petition*. The notice of motion is dated 15th May 2018.
2. Subsequent to the filing of the petition, the Court of Appeal rendered judgment in *Michael Kamau & 12 others v EACC & 4 others* [2016] eKLR. The petitioner avers that the precedent will advance its case. He thus wishes to plead a fresh ground: that the Ethics and Anti-Corruption Commission (hereafter *the EACC*) was *not properly constituted* when its officers investigated him and obtained a search warrant.
3. In a synopsis, the amendments will demonstrate that the EACC acted *unlawfully* when it investigated the petitioner; raided his house; and, preferred criminal charges against him.
4. The motion is contested. The 1st respondent has filed *grounds of opposition* dated 2nd November 2017. The gravamen of the objection is that the proposed amendments are *belated*; and, they would alter the *nature and character* of the suit. Learned counsel also submitted that by the *time* the impugned warrant was issued, the board of the EACC was *properly* constituted.
5. The retort from the petitioner is that he is challenging the capacity of the board to carry out the *investigations* prior to the issue of the warrant.
6. The 2nd to 4th respondents did *not* file any reply. However, learned counsel for the 2nd to 4th respondents associated themselves fully with the submissions of the learned counsel for the 1st respondent.

7. The main petition is pending for hearing. I will refrain from commenting on the merits of the petition. The only live issue for determination is whether leave to amend should be granted.

8. Leave of the court is required by dint of Rule 18 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013*. The court has wide and unfettered discretion to allow amendments at any stage before judgment. The discretion must however be exercised *judiciously* to avoid unnecessary *prejudice* to the respondents.

9. The key rationale is to avoid multiplicity of suits; and, to allow the court to effectively and finally determine all the issues in the suit. See *Leroka v Middle Africa Finance Company Limited* [1990] KLR 549, *Eastern Bakery v Castelino* [1958] E.A. 461, *Kuloba v Oduol* [2001] 1 EA 101, *Unga Limited v Magina Limited* Nairobi, High Court Case 1250 of 1999 [2014] eKLR. See also the dictum of Madan JA (as he then was) in *D. T. Dobie & Company v Muchina* [1982] KLR 1.

10. The court is now enjoined by article 159 of the Constitution to do *substantial justice* to the parties. See *Harit Sheth Advocate v Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR, *Nicholas Salat v Independent Electoral and Boundaries Commission and 6 others*, Court of Appeal, Civil Appeal 228 of 2013 [2013] eKLR.

11. This motion was presented on 19th May 2017. The final judgment in *Michael Kamau & 12 others v EACC & 4 others* [2016] eKLR was rendered by the Court of Appeal on 14th July 2017. The High Court is a court of record. Following the ruling in this petition (Waweru J) on 17th February 2017, the petitioner “filed” an “amended petition” dated 23rd February 2017. He prays in the instant motion that that “amended petition” be deemed to be “duly filed”. I cannot then say the delay in seeking leave to amend the petition is *inordinate*.

12. The proposed amendments *buttress* the *legal arguments* by the petitioner in attacking the warrant or charge. True, they introduce a new tributary to the petition. But the *substratum* remains whether the conduct of the respondents was *lawful*.

13. Like I stated, none of the respondents filed a *replying affidavit* to the instant application. However, I have seen an earlier replying affidavit to the *petition* filed by *Francis Kamwara* (on behalf of the 1st respondent) on 10th May 2016. I cannot at this stage comment on whether the EACC board was *properly* constituted at the *time* of investigation; issue; or, execution of the impugned warrant. That will be the true province of the trial court.

14. The respondents will be entitled to amend their reply to the main petition. The hearing of the main petition has *not* commenced. I thus find that there is no *serious* prejudice to the respondents which cannot be remedied by *costs*.

15. In the interests of justice I grant *leave* to the petitioner to amend the petition in terms of the *annexed draft amended petition* dated 23rd February 2017. The amended petition *must* be filed and served within *14 days* of today’s date. The respondents will be at liberty to file any reply or amended reply within *21 days* of service with the amended petition.

16. The respondents shall have the *costs* of the motion.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG’A this 9th day of October 2018.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

No appearance by counsel for the petitioner.

Mr. Mogi holding brief for Ms. Ng'ethe for the 1st respondent instructed by the Ethics and Anti-Corruption Commission.

Ms. Otieno holding brief for Mr. Mutinda for the 2nd respondent instructed by the Office of the Director of Public Prosecutions.

Ms. Chilobe for the 3rd & 4th respondents instructed by the Hon. Attorney General.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.