



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

PETITION NO. 51 OF 2016

**IN THE MATTER OF: ARTICLES 1, 2, 3, 19, 20, 21, 22, 23, 27, 28, 47, 159, 165 AND 259 OF THE CONSTITUTION OF KENYA
2010**

AND

**IN THE MATTER OF: VIOLATION OF SECTIONS 4, 5, 6 AND 12 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF
2015**

AND

**IN THE MATTER OF: VIOLATION OF THE MEMORANDUM AND ARTICLES OF ASSOCIATION OF NYALI GOLD &
COUNTRY CLUB LIMITED**

BETWEEN

SAMMY MWANGI KAMAU.....PETITIONER

VERSUS

1. THUSHARA DE SILVA

2. ALLAN MOLA

3. EDWIN MIANO

4. KELI MUINDI

5. JON STOKES

6. MATHEW GITHINJI

7. KEN MWIGE

8. PAULINE GACHIHI (sued in their individual capacities and in

their capacity as members of the Main Committee of NYALI

GOLF & COUNTRY CLUB LIMITED)

9. NYALI GOLF & COUNTRY CLUB LTD.....RESPONDENTS

RULING

The Applicant's Case1.

1. The Petitioner by Application dated 2nd July, 2017 seeks to amend his Petition for reasons that new issues have arisen and that it would be fair and just if the new issues are allowed as per the draft petition annexed to this Application, in order for the real issues of the controversy to be determined by this Court.

The Respondents' Case

2. The Respondents did not file any response to the Application dated 2nd July, 2018, but when the application came up for hearing counsel for the Respondents submitted that the Application had no merit since the dispute had been settled and what was remaining was the issue of costs.

Issues for Determination

(a) Whether Leave to amend should be granted.

3. Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides:

“18. A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court.”

In *Mwangi Wa Iria vs. Ethics and Anti-Corruption Commission & 3 others* [2018] eKLR the court held:

*“... 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. 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.”*

4. In *The Institute for Social Accountability & Another vs. Parliament of Kenya & Two Others* HCCP No 71 of 2013 [2014]eKLR the court stated as follows :

*“[17] The issue of amendment of pleadings is not novel and has been the subject of numerous court decisions, the common denominator being that as a general principle, courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. See generally *Eastern Bakery v Castelino* (1958) EA 461 ; *Ochieng and Others v First National Bank Of Chicago CA Civil Appeal Number 149 of 1991*, *Kenyatta National Hospital v Kenya Commercial Bank Ltd & Another* [2003] 2 EA.”*

5. The general rule is that amendment to pleadings can be allowed at any stage of proceedings. In the matter before the court, the Petitioner and the Respondents took time off to attempt a reconciliation which failed. Subsequently, the Petitioner changed his advocates, and upon the new advocates coming on record, they found a need to amend the petition. The application is not opposed by a response but on points of law. I have considered the same carefully.

6. It is my finding that the Petitioner's Application dated 2nd July, 2018 is merited since the amendments in the draft petition annexed to the Application are necessary for determining the real issues in controversy, and also in order to avoid a multiplicity of suits. Further, the Respondents have not demonstrated to this Court how they might be prejudiced if the Petitioner is granted leave to amend his petition.

7. The Amended Petition must be filed and served within 14 days of the date of this Ruling. The Respondents will be at liberty to file any or amended reply within 21 days of service of Amended Petition.

8. The costs of the application shall be in the cause.

Dated, Signed and Delivered at Mombasa this 13th day of November, 2018.

E. K. OGOLA

JUDGE

In the presence of:

No Appearance for either parties

Mr. Kaunda Court Assistant