



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.500 OF 2013

BETWEEN

ZIPPORAH SERONEY.....1ST PETITIONER
MARGARET CHEPKOSGEI.....2ND PETITIONERi
ROSE JEMUTAI.....3RD PETITIONER
FLORENCE CHEPCHIRCHIR SERONEY.....4TH PETITIONER
DAVID KIPKEMBOI SERONEY.....5TH PETITIONER
CHRISTINE CHEPKORIR SERONEY.....6TH PETITIONER

AND

DANIEL TOROITICH ARAP MOI.....1ST RESPONDENT
ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Introduction

1. Before me is a Notice of Motion application dated 3rd May 2016, in which the Petitioners seek leave to amend their Petition dated 17th October 2013.

Factual background

2. The Petitioners filed a Petition against the 1st and 2nd Respondents, where they allege that the arrest and later false imprisonment of the 1st Petitioner’s deceased husband, within Parliament, and his subsequent detention without trial, were unlawful actions of agents of Government and were also as a result of the 1st Respondent’s abuse of office. In addition, the Petitioners allege that the actions of the Respondents violated their constitutional right to dignity, freedom from torture, inhuman and degrading treatment under **Article 29** of the **Constitution of Kenya, 2010**, economic and social rights under **Article 43** of the **Constitution** and the 1st Petitioner’s right to equal rights of marriage guaranteed under **Article**

45(3) of the Constitution.

3. On 18th December 2015, I delivered a ruling on two Applications dated 29th April 2014 and 21st May 2014, to strike out the Petition. I declined to strike out the entire Petition but made orders that the 1st Respondent's name be struck off the proceedings as there was no cause of action against him in his personal capacity. I also made other orders including an order that the Petitioners' claim under the **Law Reform Act, Cap. 26** of the **Laws of Kenya** be struck off. It is that Ruling which has apparently initiated this Application.

Petitioners' case

4. The Petitioners invoke **Rules 18** and **19** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules)** and seek the following orders:

i. That the Petitioners be granted leave to amend the Petition.

ii. That the cost of this application be in the cause.

5. It was the Petitioners' submission that based on this Court's Ruling dated 18th December 2015, in which the 1st Respondent's name and the prayer premised on the **Law Reform Act** were struck off the proceedings, it is necessary and in the interests of justice to make crucial amendments to the Petition. That it would also be necessary to amend the facts on the face of the Petition in order to reflect the changes occasioned by the said Ruling.

6. The Petitioners further urged the point that the facts with respect to the arrest of the late Hon. Jean Marie Seroney, would remain as they were in the Petition but in addition, they needed to clarify certain matters in order to properly ventilate their case. They referred this Court to the case of **Chandoo v Hussein Petition No. 374 of 2015** in support of that submission and have also urged this Court to rely on **Rule 3** of the **Mutunga Rules** and allow the amendments because the rule of law and the values of the Constitution will not be upheld if the orders sought are not granted.

2nd Respondent's case

7. The 2nd Respondent opposes the Application. He relies on the grounds of opposition and written submissions dated 13th July 2016. In his opinion, the Application is mischievous and lacks a basis as it has only been made after the 1st Petitioner realized she could not properly sue the 1st Respondent personally for actions undertaken in his official capacity.

8. The 2nd Respondent further submitted that according to **Article 22** of the **Constitution**, Court proceedings claiming that a right or fundamental freedom has been denied, violated, infringed or is threatened should be lodged against clearly identified persons but the intended amendments show that the alleged violations are attributed to third parties whom they refer to as the late Hon. John Marie Seroney's political rivals or political enemies and not the 2nd Respondent. Without the third parties being identified, the intended amendments are mischievous.

9. It was also the 2nd Respondent's case that the only amendment that was necessitated by the Ruling of this Court was the striking out of the 1st Respondent's name from the proceedings and the proposed amendments cannot therefore be attributed to the Ruling.

10. The 2nd Respondent also contended that there is no cause of action against him and as a result, the Application should be dismissed with no order as to costs.

Determination

11. Parties have a right to seek leave of the Court in order to amend pleadings. Time and again, courts have held that the issue of whether or not to grant leave to amend pleadings is subject to the Court's discretion hence **Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** which reads thus;

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

12. Further, in the case of *Rogers Mogaka Mogusu v George Onyango Oloo & 2 Others* [2014] eKLR, this Court observed 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 vs Castelino (1958) EA 461, Ochieng and Others vs First National Bank of Chicago Civil Appeal No. 149 of 1991 and Kenya Commercial Bank vs Kenyatta National Hospital & Another (2003) 2 EA.)”

13. I reiterate that opinion and I also note that in the case of the **Institute for Social Accountability and Another v Parliament of Kenya and 2 Others Petition No. 71 of 2013**, the Court observed as follows;

“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.”

14. I agree and in the present case, the Petitioners submitted that they seek leave to amend the Petition to bring it to line with a Ruling, which I delivered on 18th December 2015. In that Ruling, I stated thus *inter alia*:

i. As there is no cause of action against the 1st Respondent in his personal capacity, his name is struck off the proceedings. The 2nd Respondent shall remain the sole Respondent therefore.

ii. As the Petitioners' claim under the Law Reform Act, Cap. 28 is time barred, prayer (b) of the Petition is struck off.

15. It was the Petitioners' case in that context that the proposed amendment only seeks to remove the 1st Respondent from the Petition as well as to amend the facts to reflect that fact. They also contended that the facts with respect to the arrest and detention of the late Hon. Jean Marie Seroney would remain the same. On the other hand, the 2nd Respondent states that the Application is mischievous as the Petitioners now want to apportion blame to the 2nd Respondent for the late Seroney's ordeal and yet there is neither a cause of action nor any human rights violations attributed to the 2nd Respondent in the Petition.

16. Having reflected on those rival positions, I am convinced that the Petitioners only intend to amend the Petition to bring it to be in conformity with my Ruling aforesaid. Indeed as stated in *Rogers Mogoku (supra)*, Courts will grant leave for parties to amend pleadings if it is in the interest of justice to do so. Likewise, I am alive to the dicta in *Chandoo v Hussein (supra)* where it was stated that Courts should not be in a hurry to declare a Petition fatally defective and should attempt to ensure that the ends of justice are met. In this particular instance, I find no harm or prejudice to be occasioned to the 2nd Respondent if the Petition is amended. In any event, the Petitioners have submitted that the facts and the cause of action that were in the initial Petition would remain the same. The amendments also seek to direct the claims only against the 2nd Respondent as the sole Respondent since the 1st Respondent has been struck out of the proceedings and to also remove any prayer based on the **Law Reform Act**.

17. In stating so, I am aware that in the *Institute for Social Accountability (supra)* case it was stated that the object of amendments is to alter the pleadings so as to allow litigation between the parties who seek to rely on a true set of facts and to ensure that the court functions effectively in determining the substantive merits of the case. It was also held that:

“The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.”

18. A reading of the proposed amended Petition indicates, as the 2nd Respondent submitted, that there were allegations of violations of rights committed against the Petitioners by the late Hon. Seroney’s political rivals and enemies. However, I do not agree with the 2nd Respondent’s contention that this amounts to a no cause of action against him. The initial Petition and the proposed amendment both show, at paragraph 14, that the alleged violations are as a result of actions of agents of the Government including members of the provincial administration, the National Intelligence Service and regular and Administrative Police. I made this same observation in the Ruling dated 18th December 2015 at paragraph 37 and I therefore find that there is no new or inconsistent cause of action that has been introduced in the proposed amendment to change the character of the entire Petition.

19. I am therefore satisfied that the proposed amendments are a result of the alteration of the Petitioners’ case due to the Ruling dated 18th December 2015 and the 2nd Respondent will have an opportunity to respond to or to amend his response if he so desires.

Disposition

20. For the above reasons, I find that the Application dated 3rd May 2016 is merited and the following orders shall consequently issue:

a) The Petitioners are granted leave to file and serve the amended Petition upon the 2nd Respondent within seven (7) days from the date hereof.

b) The 2nd Respondent shall thereafter be at liberty to file a response or amend his response and serve it to the Petitioners within 7 days after the service of the amended Petition.

c) Costs in this application shall be in the cause.

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 8TH DAY OF FEBRUARY, 2017

E. CHACHA MWITA

JUDGE