REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PETITION NO. 14 OF 2016

BETWEEN

HILLARY KIPCHIRCHIR……..……...……...…PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS…….…...……..1ST RESPONDENT

INSPECTOR GENERAL OF POLICE..…….……..2ND RESPONDENT

ATTORNEY GENERAL……..…….3RD RESPONDENT

D.C.I.O. ELDORET SOUTH……....4TH RESPONDENT

AND

PETER KIBIRIGE CHEGE……..……..…1ST INTERESTED PARTY

ALFAYO OTIENGA……..……...2ND INTERESTED PARTY

ERICK K. BARNGETUNY……..…1ST INTERESTED PARTY

RULING

1. The *original* petition was lodged on 27th July 2016. Contemporaneously with the petition, the petitioner presented a notice of motion praying for conservatory relief. He sought to restrain the respondents from arresting, detaining or charging him in *Eldoret Chief Magistrate's Criminal Case Number 202 of 2016.*

2. Before the motion could be heard *interparties*; and, without prior leave of the court, the petitioner filed and served an *amended petition;* and an *amended notice of motion* both dated 12th August 2016. An objection was taken by the respondents and the interested parties as to the *validity* of the amended pleadings. On 10th August 2016, I directed that the objection be determined as a preliminary issue.

3. On 18th August 2016, I heard counsel for all the parties. On the latter date, learned counsel for the petitioner sought for the leave *retroactively*; and, prayed that the amended pleadings be deemed to have been filed with leave of the court. The application was contested by the respondents and interested parties. I have carefully considered the objection, the impugned amendments, precedents and the rival submissions.

4. Learned counsel for the petitioner was apologetic; and, stated that failure to seek leave was a regrettable and inadvertent error. He cited the case of *Philip Chemwolo & another v Augustine Kubende*, Court of Appeal, Civil Appeal 103 of 1984 [1986] eKLR for the proposition that the petitioner should not be punished for the infraction of rules. He contended that procedural rules are handmaidens of justice; and, that in this case, the respondents or interested parties stand to suffer no prejudice. In any case, such prejudice could be remedied by costs. I was also implored to uphold the principles set out in Article 159 (2) (d) of the Constitution.

5. The retort is that Rule 18 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013,* which came into force by Legal Notice 117 of 2013 is express on the matter. It provides that a party can *only* amend a petition with *leave* of the court. I was urged to find that the amended petition and motion are a nullity.

6. The main petition in this matter is still pending. I will refrain from commenting on the merits of the petition or the prayers for a conservatory order. The only live issue for determination is whether leave to amend should be granted retrospectively. Paraphrased, whether the amended petition and notice of motion have legal validity.

7. I am alive to the notion that amendments to pleadings should be liberally allowed. An application for amendment may be made at any stage before judgment. The key rationale is to allow a 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 and the dictum of Madan JA (as he then was) in *D. T. Dobie & Company v Muchina* [1982] KLR 1.

8. In addition, the court is now enjoined by article 159 of the Constitution; and, sections 1A and 1B of the Civil Procedure Act to do *substantial justice* to the parties. That is the overriding objective. 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.

9. But that is not to say that rules or technical rules shall not apply: only that the court should not pay *undue regard* to them. If rules were to be thrown out of the window, chaos akin to a village *baraza,* will step in through the wide door. That was clearly not the intention of the legislature. *Steven Kariuki v George Mike Wanjohi & others*, Nairobi, High Court Election Petition 2 of 2013 [2013] eKLR.

10. I also had this to say in *Edward Steven Mwiti v Peter Irungu & 2 others (No. 2)* Nairobi High Court ELC 105 of 2011[2012] eKLR:

> *"Procedural rules have been aptly described as the handmaidens of justice. True, Article 159 of the constitution as read with sections 1A, 1B, and 3A of the Civil Procedure Act as well as Order 8 rule 5 of the Civil Procedure Rules 2010 frown upon technical objections. But this is not a simple matter of want of form. The plaintiff is represented by learned counsel. If procedural rules were to be waived in all cases, there would be disorder in court processes. I do not see why the legislature in section 81 of the Civil Procedure Act created the Rules Committee if the Civil Procedure Rules were to be waved away casually".*

11. The Supreme Court has succinctly interpreted the boundaries of Article 159 (2) (d) in *Raila Odinga and others v Independent Electoral and Boundaries Commission and 2 others* Nairobi Petition No. 5 of 2013 [2013] eKLR. In a motion brought to strike out a further affidavit, the learned judges delivered themselves as follows:

> *"The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone, and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of*

justice is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course".

12. I thus disagree with the learned counsel for the petitioner that Rule 18 of *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013* is just a doormat; or, impotent when confronted by Article 159 (2) (d) of the Constitution. I found that submission by learned counsel to be prosaic. That said, there is *no* doubt that this court has *residual* power to ensure that the ends of justice are not defeated. See *Githere v Kimungu* [1976-1980] E. A 101, *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.

13. There are five main reasons that persuade me to *validate* the amendments. First, the petition alleges violation of *fundamental rights* enshrined in the Constitution. If the amendments are *disallowed*, there is a real question whether the *original petition* would be a *valid* pleading; or, whether the petitioner can fall back on it. The reason is that the *latest* and *only* pleadings by the petitioner are the *amended petition;* and, the *amended notice of motion* both dated 12th August 2016. They have *replaced*, for all intents and purposes, the *original* pleadings in this matter. If the amendments are annulled, it is obvious that the petitioner will be left hanging high and dry.

14. Secondly, the impugned amendment is a simple *one liner* to introduce the *Eldoret Chief Magistrates Court* as the 5th respondent. From the nature of the petition, that court is a *necessary party*. I am unable to discern any serious *prejudice* to the other parties that cannot be cured by costs. And I am prepared to grant the respondents and interested parties *thrown away* costs.

15. Thirdly, the petitioner has conceded freely that he committed a serious procedural error. His learned counsel says it was an inadvertent mistake. The petitioner is thus pleading with the court to rectify the damage. A mistake, as Madan JA (as he then was) observed, is a mistake. *Belinda Murai & others v Amos Wainaina* [1978] LLR 2782. What is critical is whether it can be remedied to salvage the petition. The petitioner has moved to correct his misstep without delay; and, before the hearing of the motion or petition. This then is a case that calls for justice to be tempered with a little mercy.

16. Fourthly, I do not have any evidence that the petitioner, by filing the amended pleadings without leave, *intended* to abuse the process of court; or, to cause further delay of the petition. See *Eastern Bakery v Castelino* [1958] E.A. 461, *Unga Limited v Magina Limited* [2014] eKLR.

17. Fifthly, the court has *discretionary power* to right the ship. I am unaware of any rule that bars the court from granting leave to amend *retroactively*; or, from *extending* time to do so; or, any fetter on its discretion to order that the impugned pleadings be deemed to have been filed and served with such leave.

18. The upshot is that I grant *leave* to the petitioner to amend the petition and notice of motion dated 27th July 2016 to the *intent* that the *amended petition;* and, the *amended notice of motion* dated 12th August 2016 be and are hereby *deemed* to have *been* filed and served with leave of the court. I grant *thrown away costs* to the respondents and interested parties. The costs shall be agreed between the parties within the next *fifteen* days; and, paid within a *further twenty one* days. In default, the costs will be assessed by the Taxing Master of this Court.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 8th day of September 2016.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Ms. Kiget for Mr. Arusei for the petitioner.

Ms. B. Oduor for Mr. J. Mulati for the 1st, 2nd & 4th respondents.

Mr. Wabwire for the 3rd respondent.

Mr. Lang'at for the 1st & 2nd interested parties.

Mr. Kibii for the 3rd interested party.

Mr. J. Kemboi, Court Clerk.