



Philip & 22 others v National Housing Corporation & another (Environment and Land Petition E006 of 2023) [2025] KEELC 8614 (KLR) (10 December 2025) (Ruling)

Neutral citation: [2025] KEELC 8614 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND PETITION E006 OF 2023
SM KIBUNJA, J
DECEMBER 10, 2025**

BETWEEN

JOYCE WANZIA PHILIP & 22 OTHERS & 22 OTHERS PETITIONER

AND

NATIONAL HOUSING CORPORATION 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

RULING

[Notice of Motion Dated 21st March 2025]

1. The petitioners moved the court through the notice of motion dated 21st March 2025 seeking for inter alia leave to amend the petition and to file a supplementary affidavit in support. The application is premised on the five grounds marked (i) to (v) on its face and is supported by the affidavit of Joyce Wanzia Philip, 1st petitioner, deposing inter alia that there has been several changes since the petition was filed including houses being demolished and evictions being carried out and its necessary to amend the petition to bring all the issues before the court for a conclusive determination.
2. The application is opposed by the 1st respondent through their grounds of opposition dated 8th April 2025 stating among others that the amendments sought amount to substituting the cause of action to one that cannot be prosecuted through a constitutional petition, but an ordinary suit; that the compensation the petitioners are seeking of Kshs,39,998,788 can be claimed through a civil suit commenced through a plaint, and the application is bad in law, an abuse of court process and should be dismissed with costs.
3. The learned counsel for the 1st respondent filed their submissions dated the 11th April 2025. Pursuant to the directions of 23rd July 2025, the learned counsel for the petitioners filed their submissions dated 23rd July 2025. The court has considered the two submissions.



4. The issues arising from the application for the court's determinations are as follows:
 - a. Whether the petitioners have made out a reasonable case for leave to amend their pleadings to be granted.
 - b. Who pays the costs?
5. The court has carefully considered the grounds on the notice of motion, grounds of opposition, affidavit evidence, submissions by the learned counsel, superior court decisions cited thereon, and come to the following determinations:
 - a. The learned counsel for the 1st respondent and petitioners have cited superior court decisions that more or less state that amendments should be liberally allowed where for instance, it will be not be prejudicial, or not cause an injustice on the other party. See the Court of Appeal decisions in the cases of Kenya Hotels Limited versus Oriental Commercial Bank Limited (2018) eKLR, and Peter Opande versus Nganga Enterprises Limited (2019) eKLR.
 - b. The 1st respondent has opposed the application on the ground that the amendment sought will change the cause of action to one that should be pursued through a civil suit commence through a plaint. They have relied on the case of George Gikubu Mbuthia versus Consolidated Bank of Kenya Limited & Another (2016) eKLR, where the Court of Appeal listed situations when the court will refuse to exercise discretion to allow amendments as follows:

“Such cases include where a new cause of action is introduced. Where vested interest or accrued legal rights will be adversely affected; where prejudice or injustice which cannot be properly compensated in costs is occasioned to the other.”

The petitioners have submitted that the fact that the losses they suffered has been given a value does not amount to a change of the cause of action, as the loss was based on violations of their rights. The counsel referred to the Supreme Court of Kenya decision in the case of Attorney General versus Zinc Limited (Petition No. 1 of 2020) (2021) KESC (23 KLR) (CIV) (3 DEC 2012) (Judgement), that was about damages on violations of the respondent's right to property and submitted that a claim for damages for constitutional violations does not stop the pleadings from being a constitutional issue to be advanced through a petition.

- c. Being aware that the court should not at the interlocutory stage made final determinations on any issues of facts law as that has to wait until after the parties have presented their evidence and legal submissions, I have nevertheless perused the draft amended petition attached to the supporting affidavit and noted the main proposed amendments are as follows;
 - i. Deletion of paragraphs 8 to 11 of the petition.
 - ii. Additions of paragraphs 21 to 24 of the petition.
 - iii. Particulars of lost goods and assets under paragraph 45 of the petition.
 - iv. Substitution of prayer (a) of injunction, and introduction of a declaratory order.
 - v. Addition of prayer (f) for damaged/lost goods and assets for Kshs.39,998,788.

From the above, and in view of the explanation given by the petitioners that the proposed amendments have been caused by the changes that have occurred on the suit property after the filing of the petition, which the 1st respondent has not rebutted as no replying affidavit was filed, I find the application is meritorious. Indeed, if the amendments are not allowed in



this appeal, the result may be another suit being file for the damages in case the petitioners emerge victorious in the petition. The proposed amendments will help the court to deal with all the issues touching on the dispute effectively, justly and without resulting to a multiplicity of litigations.

- d. Though the petitioners are victorious in their application, and ordinarily may have been entitled to costs, I am of the view justice will be better served by an order that costs in the application shall abide the outcome of the petition.
6. Having come to the above conclusions in respect of the petitioners' notice of motion dated the 21st March 2025, the court finds and orders as follows:
- a. That the application is allowed in terms of prayers (a) & (b).
 - b. The costs to abide the outcome of the petition.
 - c. The amended petition to be filed and served in twenty-one (21) days from today.
 - d. The respondents be at liberty to file and serve replies to the amended petition in twenty-one (21) days after service.

It is so ordered.

DATED, SUGNED AND VIRTUALLY DELIVERED ON THIS 10TH DAY OF DECEMBER 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Petitioners : Mr Jengo

Respondents : M/s Osewe for Wafula for 1st Respondent

M/s Ambetsa for 2nd Respondent

Kalekye-court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

