



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC PETITION NO.13 OF 2019

(FORMERLY PETITION NO.10 OF 2019)

IN THE MATTER OF ENFORCEMENT & INTERPRETATION OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE INTERPRETATION OF ARTICLES 22,40 AND 47 OF THE CONSTITUTION OF KENYA

BETWEEN

KIBWARI PLC.....PETITIONER

VERSUS

THE PRINCIPAL LAND REGISTRATION OFFICER

MINISTRY OF LANDS AND PHYSICAL PLANNING.....1ST RESPONDENT

COUNTY LAND REGISTRAR

COUNTY OF GOVERNMENT OF NANDI.....2ND RESPONDENT

KETTCHEM COMPANY LTD.....3RD RESPONDENT

JOSEPH CHEPKWONY.....4TH RESPONDENT

PAUL CHEBARUS.....5TH RESPONDENT

SAMUEL KETER.....6TH RESPONDENT

COUNTY GOVERNMENT OF NANDI.....7TH RESPONDENT

RULING

This Ruling is in respect of an application dated 4th September, 2019 by the Petitioner/Applicant seeking for Orders;-

1. That this Honourable court do strike out the amended Response to Petition and the Amended Cross-petition dated 21st August, 2019.

Applicants Submissions

Counsel for the Applicant submitted that the initial cross-petition was filed on 22nd July 2019 and the parties herein were the County Government of Nandi and Kibwari Ltd. That the response to the cross-petition was filed on the 6th August, 2019 and the County Government filed an amended Cross-petition on 22nd September, 2019. Order 2 Rule 13 of the Civil Procedure Rule which states that pleadings shall be

closed 14 days after service of the reply of defence to counter claim.

It was Counsel's submission that pleadings in this matter closed on 20/8/19 and the amended cross-petition was filed 2 days after the pleadings were closed. Order 8 Rule 1 requires that a party without the leave of the court may amend pleadings but once pleadings are closed a party needs leave of the court. This provision is underscored by order 7 rule 17(2) see order 7 rule 17 (2).

Counsel submitted that this amendment has been in breach of rule 18 of Mutunga rules. A party that wishes to amend pleadings may do so with the leave of the court.

The amended cross-petition was filed without leave of the court and introduces new parties and prayers of certiorari and mandamus which is prejudicial to the petitioner as he has been deprived of the opportunity vide an application to respond.

Counsel relied on the case of **ZAKARIAH KINGORI vs MURITHI KALEB** in this case the pleadings were struck out contrary to order 8. It is true that Article 159 abhors technicality. See the case of **GEORGE KAMAU KIMARU VS COUNTY GOVERNMENT OF TRANS-NZOIA** see pg 3 of highlight

Rules of amendment cannot be wished away as the court will lose control of proceedings. Article 159 does not give a blanket cover for all manner of cases which go against the rules of amendments. Counsel therefore prayed that the amended cross petition be struck out with costs.

Respondents Submission

Counsel submitted that it is not disputed that the cross-petition was filed on 6th August, 2019 and if all the parties had complied then the pleadings would have closed on 21/8/19. That no response has been filed on behalf of the 1st and 2nd Respondent which is the A.G. who is bound by the provisions of the Government Proceedings Act. This means that the Petitioner would have sought leave to proceed against the Government. Therefore the pleadings have not yet closed.

Secondly the application would be determined under Order 8 Rule 2(2) which the court must make a determination whether an application for leave to amend would have a determination whether an application for leave to amend would have been refused or granted.

Counsel relied on the case of **AAT Holdings Ltd vs Diamond shield international Ltd**. The court should be asking itself whether those amendments will aid in the determination of the issues and the answer would be in the affirmative. The amendment is necessary for the determination of the issues and it does not introduce new cause of action.

Counsel submitted that the petition is for determination of ownership which are also captured in the cross-petition and it would be unnecessary to file another petition. The 1st, and 4th Respondents were already parties to the Petition and the only introduction is the NLC who is a custodian of Public Land and community land. These proceedings would not be proper without the enjoinder of the NLC. The court would not have declined the amendments had an application been made. The petitioners can be granted leave to file further additional documents if they so wish. The delay of 1 day is not unreasonable it can be remedied by an award of costs to the Petitioners.

Counsel submitted that the court has powers under Rules 5 of the Mutunga Rules to enjoin parties for purposes of determination of issues. The court can invoke its powers to do so. Striking out of the cross-petition to trigger an application for leave is not proper use of judicial time. Counsel there urged the court to dismiss the application with costs.

Analysis and Determination

This is an application to strike out a cross petition as it was filed out of time without the leave of the court. Striking out pleadings is a draconian measure which the court should apply when it is really glaring that it is an abuse of court process.

The current application does not fall under the purview of where the court is forced by law and procedure to exercise that discretion. This is a matter where pleadings have not yet closed as parties are still in the preliminary stages of compliance and filing responses. What hurry does the petitioner have in urging the court to strike out the cross petition? The 1st to 4th Respondents have also not complied with filing responses. Does the petitioner want a field day or walk over where parties have been locked out of the arena. If there is any anomaly on time then the same can be rectified by the wide discretion of the court to deem documents filed as proper before the court. This does not mean that the same should be abused. Likewise article 159 abhors technicalities and this is one such case.

I find that the application lacks merit and is therefore dismissed with no orders as to costs. The amended cross petition is deemed as properly filed and parties granted 30 days leave to file responses if need be.

DATED and DELIVERED at ELDORET this 11TH DAY OF DECEMBER, 2019.

M. A. ODENY

JUDGE

RULING read in open court in the presence of Miss.Tabut for the Petitioner and Mr.Tororei and Miss. Masai for Respondents.

Ms. Towett - Court Assistant