



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ELC CONSTITUTIONAL PETITION NO. 2 OF 2017

HALIMA ALI SAGARA.....PLAINTIFF/APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

WAJIR COUNTY GOVERNMENT.....2ND RESPONDENT

RULING

The application before me is the Notice of Motion dated 27/01/2018 brought under Article 48 of the Constitution of Kenya, 2010 and Rule 18 of the Protection of Rights and Fundamental Freedoms Practice and Procedure Rules, 2013.

The petitioner is seeking leave to amend the petition herein. The application is supported by the petitioner's affidavit sworn the same date. On 12/3/2018, the 2nd respondent filed grounds of opposition. When the said application came up for interparties hearing on 18/06/2018, the respondents were absent despite having been duly served with a hearing notice. The application proceeded ex parte with the petitioner's advocate arguing that an application for amendment is a procedural law which seeks to clarify issues in the petition and that the court has unfettered discretion to grant the orders. Learned Counsel further submitted that such an application for amendment of pleadings has the potential of driving away potential litigants from the seat of judgment if the same is disallowed. He stated that the respondent will not suffer any prejudice if the application for amendment is allowed. He cited the following case in support;

1. Mavuno Industires Ltd & 2 others –Vs- Keroche Industiries [1999] EALR 234.

The 2nd respondent also cited the following two (2) cases in opposition to the application herein:

1. Francis Mwangi Mugo –Vs- David Kamau Gachago (2017) eKLR

2. Jonh Mulwa Kangaatu –vs- Pan African Insurance Co. Ltd 92015) eKLR

3. Macfoy –Vs- United Africa Co. Ltd (1963) 3 AII ER

DECISION

The 2nd defendant's contention in the petitioner's application is that the affidavit in support of the petition herein was sworn by a stranger who has no capacity to do as the purported power of Attorney attached to the petitioner's/applicant's supplementary affidavit is not registered.

The 2nd respondent also submitted that the petition herein was filed on 28/9/2017 and a supporting affidavit purportedly sworn by one Mohamed Abdullahi Unshur under a power of Attorney which was not annexed thereto. The 2nd respondent argued that since this petition is supported by an affidavit sworn by a person not authorized in law to swear such an affidavit, this petition is null and void and that the same should be struck out.

I have carefully considered the submissions by counsel for the petitioner/applicant and the rival submissions by counsel for the 2nd respondent in opposition thereto.

Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2012) provides for amendment of pleadings at any stage of the pleadings with the leave of the court.

The 2nd respondent has already filed an application dated 29/11/2017 which they are seeking to expunge from the record the supporting affidavit in question sworn by Mohammed Abdullahi Unshur. That application is yet to be heard and determined. It would be proper or so I believe to leave the said affidavit in support of the petition herein pending hearing and determination of that application.

Regarding the present application dated 27/1/2018, the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 under Section 18 provides as follows:

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

The petitioner in her supporting affidavit has explained why she seeks the proposed amendments as reflected in the draft amended petition. The 2nd respondent has not shown how the proposed amendments will prejudice her. Those averments contained in a supporting affidavit have not even been challenged or controverted as no replying affidavit has been filed in opposition thereto. This court has severally rendered itself on the principles for amendment of pleadings that they are freely given unless they are likely to prejudice the opposite party. I find the application for amendment in terms of the proposed amendments contained in the draft amended petition merited and the same is allowed on the following terms;

- 1. The applicant petitioner to file and serve the proposed amendment of the petition within 14 days from today.**
- 2. The respondent to be at liberty to amend, file and serve their replying affidavit within 14 days from the date of service thereof.**
- 3. The cost of this application to abide the event.**

Read, Delivered and Signed in the open court this 30th day of July, 2018.

Hon. Justice E. C. Cherono

ELC JUDGE

In the presence of

1. Ojiambo for petitioner
2. Fardowsa – Court Clerk