



**Vivo Energy Kenya Limited v Kisumu County Government & 4 others
(Petition 7 of 2019) [2024] KEELC 426 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 426 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

PETITION 7 OF 2019

SO OKONG'O, J

JANUARY 30, 2024

**N THE MATTER PROTECTION OF THE RIGHT TO PROPERTY
AND ECONOMIC RIGHT OF THE USER THEREOF**

AND

**IN THE MATTER OF LICENSING AND REGULATION OF THE
USER OF IMMOVABLE PROPERTY REGISTERED IN THE
NAME OF A PRIVATE CITIZEN.**

AND

**IN THE MATTER OF THE NATIONAL ENVIRONMENTAL
MANAGEMENT AND CO-ORDINATION ACT 8 OF 1999**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLE 10, 21, 22, 23, 25, 40,
35, 47, 50 AND 60 (1) (B) OF THE CONSTITUTION OF KENYA, 2010.**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NUMBER 4 OF 2015

BETWEEN

VIVO ENERGY KENYA LIMITED PETITIONER

AND

THE KISUMU COUNTY GOVERNMENT 1ST RESPONDENT

KENYA PORTS AUTHORITY 2ND RESPONDENT

KENYA RAILWAYS CORPORATION 3RD RESPONDENT

INSPECTOR GENERAL 4TH RESPONDENT



RULING

1. This matter is part heard. The court has so far taken the evidence of three (3) witnesses for the Petitioner. Before the Petitioner's first witness gave evidence on 19th June 2023, the Petitioner informed the court that there were some new developments in the matter that made the amendment of the petition necessary. The Petitioner's advocate applied orally for leave to further amend the petition. There was no objection to the Petitioner's application and the court granted the leave sought and directed that the amended petition be filed within 10 days from the date of the order. The Respondents were similarly granted leave to file further affidavits in response to the amended petition if necessary within 14 days from the date of service of the amended petition.
2. Pursuant to that leave, the Petitioner filed a further amended petition dated 22nd June 2023. Upon being served with the further amended petition, the 3rd Respondent filed an amended answer to the further amended petition and a cross-petition against the Petitioner, the 1st Respondent and a new party, the National Land Commission dated 12th July 2023 and an affidavit in support of the same sworn by Geoffrey Wekesa on 12th July 2023.
3. In response to the 3rd Respondent's amended answer to the further amended petition and cross-petition, the Petitioner filed a Notice of Preliminary Objection dated 18th July 2023. The Petitioner contended that the cross-petition was filed without leave of the court during the active hearing of the petition. The Petitioner contended further that there was no leave sought and granted for the joinder of a new party to the proceedings.
4. After the filing of the said amended pleadings, the hearing of the petition proceeded on the 3rd and 4th of October 2023. The attention of the court was not drawn to the cross-petition by the 3rd Respondent and the joinder of the National Land Commission to the proceedings. The Petitioner did not also draw the attention of the court to its preliminary objection to the cross-petition.
5. The court fixed the petition for further hearing on 29th and 30th January 2024 without knowing that there was a dispute over the 3rd Respondent's cross-petition and joinder of a new party to the proceedings. It was not until 25th January 2024 that the 3rd Respondent's advocates wrote to the Deputy Registrar drawing the attention of the court to the cross-petition and the joinder of the National Land Commission to the proceedings and seeking the court's direction on these new developments.
6. When the matter came up for hearing on 29th January 2024, the parties addressed the court on the validity of the 3rd Respondent's cross-petition and joinder of the National Land Commission (NLC) to the proceedings. The 3rd Respondent's advocate Mr. Mutei submitted that the 3rd Respondent had assumed that following the amendment of the petition by the Petitioner, the 3rd Respondent was at liberty to amend its answer to the petition and to file cross-petition. On his part, Mr. Luseno for the Petitioner submitted that since the 3rd Respondent's cross-petition was filed without leave of the court, the same should be struck out. The advocate for the 2nd Respondent, Ms. Swaka told the court that the 2nd Respondent was not aware of the cross-petition since the same was not served upon the 2nd Respondent. She told the court that the 2nd Respondent would abide by any directions given by the court in the matter.
7. Ms. Masaka for the 4th Respondent told the court that the 3rd Respondent had not served the 4th Respondent with the cross-petition. She argued however that since the cross-petition was on record,



- the court should overlook the technicality regarding the validity of its filing and should proceed to admit the same to save on the court's time that would be spent on hearing the application for leave.
8. Mr. Ouma for the 1st Respondent agreed with Mr. Mutei for the 3rd Respondent that once leave was granted to the petitioner to amend the petition, the pleadings were opened and any party wishing to amend its pleading was at liberty to do so. Mr. Bii for the 5th Respondent had no objection to the cross-petition. He requested for time to respond to the same.
 9. In his rejoinder, Mr. Luseno submitted that the Petitioner had no objection to the amendment of the 3rd Respondent's answer to the petition. He submitted that the Petitioner's objection was to the joinder of a new party to the proceedings that would require the Petitioner to re-open its case and re-call witnesses who had testified. On his part, Mr. Mutei urged the court not to strike out the cross-petition but to give the 3rd Respondent time to apply for leave for the cross-petition to be admitted on record as having been filed with leave. Mr. Mutei argued that the issue of the inconvenience and expenses that would be occasioned by the recalling of witnesses could be addressed by the court through an order for costs.
 10. I have considered the Petitioner's objection to the 3rd Respondent's cross-petition and the joinder of the National Land Commission (NLC) to the cross-petition as 3rd Respondent. I have also considered the submissions by the advocates for the parties. Rule 5 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter referred to only as "the Rules") gives the court power to add, join, substitute or strike out a party to the petition. Rule 15 of the Rules provides for the reply to the petition and cross petition while Rule 18 provides for the amendment of pleadings.
 11. I am of the view that a respondent to a petition has a right to file a cross-petition together with his answer or reply to the petition without leave of the court within the time provided under Rule 15 of the Rules. I am also of the view that filing of a cross-petition outside the time prescribed under Rule 15 (1) and (2) of the Rules would require leave of the court as it would involve amendment of pleadings under Rule 18 of the Rules and filing of further "information" under Rule 21 (2) of the Rules that require leave of the court.
 12. Unlike the Civil Procedure Rules on amendment of pleadings, the Rules do not grant a respondent a right to amend its answer/response to the petition upon being served with an amended petition. This means that a respondent to a petition must ask the court for corresponding leave to amend his answer/response to the petition when a petitioner seeks leave to amend the petition. If no such corresponding leave is sought and an amended petition raises issues that require amendment of the answer/response to the petition, the respondent must seek leave to amend the answer/response to the petition. Any amendment to the answer or response to the petition without such leave would be irregular.
 13. In this case, when the Petitioner sought leave to amend the petition, I was of the view that a need could arise for the Respondents to respond to the amended petition. That explains why I gave the Respondents the liberty to file further affidavits in response to the amended petition even though the Respondents did not ask for such leave. I granted the leave on the assumption that the Respondents had filed replying affidavits in response to the petition rather than answers to the petition.
 14. Now that I had granted such leave, I am of the view that the 3rd Respondent which had filed an answer to the petition was within its right to amend such answer in response to the amended petition. The 3rd Respondent's amended answer to the petition was therefore filed within the ambit of the orders granted by the court on 19th June 2023. The filing of a cross-petition and joining of a new party to



the proceedings was however outside the scope of the said orders and required leave of the court under Rules 5 (d) and (e), 18 and 21 (2) of the Rules.

15. For the foregoing reasons, it is my finding that the 3rd Respondent's cross-petition having been filed without leave of the court is irregular.
16. Pursuant to Rule 3 (2), (4) and (5), and Rule 8 of the Rules, I grant leave to the 3rd Respondent to file an application and submissions in support thereof to regularise its impugned cross-petition within 14 days from the date of this ruling for the court's consideration. If the 3rd Respondent fails to file the application, the said cross-petition shall stand struck out with costs. If the application is filed as directed by the court, the Petitioner and the Respondents wishing to oppose the same shall file their responses and submissions to the application within 14 days of service of the same.
17. The submissions by all the parties shall not exceed 5 pages double spaced on font 12. The matter shall be mentioned on a date to be given by the court for further directions.

DELIVERED AND DATED AT KISUMU ON THIS 30TH DAY OF JANUARY, 2024.

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Luseno and Mr. Ogejo for the Petitioner

Ms. Swaka for the 2nd Respondent

Mr. Mutei for the 3rd Respondent

N/A for the 1st and 4th Respondents

Mr. Bii for the 5th Respondent

Ms. J. Omondi-Court Assistant

