



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC PET NO. 2 OF 2014**

**(Formerly PETITION NO. 7 OF 2014)**

**IN THE MATTER OF ARTICLES 19, 20, 21, 23, 40, 42, 70 AND 159 OF THE CONSTITUTION OF KENYA (2010)**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 AND 42 OF THE**

**CONSTITUTION OF KENYA (2010)**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013**

**BETWEEN**

**SUSAN GILLIAN THOMASIN MAGOR ..... PETITIONER**

**-VERSUS-**

**KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED ....1ST  
RESPONDENT/APPLICANT**

**NATIONAL LAND COMMISSION..... 2ND RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....3RD  
RESPONDENT**

**HON. ATTORNEY GENERAL ..... 4TH  
RESPONDENT**

**RULING**

1. Kenya Electricity Transmission Company Limited, hereinafter referred to as the applicant brought the notice motion dated **28th July, 2016** seeking leave of this court to file and serve their amended notice of motion dated **8th July, 2016**. In alternative the applicant prays for leave to file and/or validate its notice

of motion dated 8th July, 2016.

2. The application is premised on grounds that the notice of motion filed by the applicant dated 27th May, 2016 does not reflect the true case/instructions of the applicant; that there is need to amend the said notice of motion to accord with the applicant's intended case/instructions. It is pointed out that the applicant has already filed the intended amended notice of motion and included the amendments in its written submissions and contended that the amendments sought will not occasion any prejudice on the respondents because the amendments sought to be introduced are in consonance with the objections raised by the respondents.

3. The application is opposed by the petitioner/respondent on the grounds that it is improperly before court, misconceived, incurably incompetent and fatally defective. The petitioner contends that a notice of motion cannot be amended unless under **Order 8 Rule 5** of the Civil Procedure Rules or under **Section 100** of the Civil Procedure Rules, which sections of law do not apply to petitions.

4. The petitioner faults the applicant for having filed and served the amended application without leave of the court.

5. When the matter came up for hearing, counsel for the applicant, **Mr. Kihara**, informed the court that the applicant seeks to add more grounds. He explained that the application is informed by realisation that the notice of motion filed previously does not reflect the instructions given to him by the applicant.

6. Arguing that allowing the application will not occasion any prejudice on the parties but save the court's time, Mr. Kihara submitted that under **Rule 18** of the Mutunga Rules, 2013 the court has discretion to allow amendments of pleadings.

7. Concerning the grounds of opposition filed by the petitioner he contended that they are meant to delay the matter considering that the applicant has already filed its submissions incorporating the amendments sought to be regularised.

8. Counsel for the 3rd respondent, **Ms Judy Githinji**, supported the application and urged the court to allow it as prayed.

9. The issues for determination are:

- 1) Whether a notice of motion is amendable under the Mutunga Rules?
- 2) Subject to outcome of (1) above, whether the application herein is defective?
- 3) Subject to outcome of (2) above, whether the defect renders the application incurably incompetent or fatally defective?
- 4) Subject to outcome of (3) above, whether the applicant has made up a case for being granted the orders sought?
- 5) What orders should the court make?

#### **10. Whether a notice of motion is amendable under the Mutunga Rules?**

With regard to this issue, I adopt the decision of **Onguto J.**, in the case of **Mombasa Cement Limited v. Speaker of National Assembly and 2 others 2016 Eklr** where he stated:

**“Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 ( hereafter “the Mutunga Rules”) states as follows:**

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

7. It is clear from the rule that the application may be made at any time or stage in the proceedings so long as the trial is not yet concluded: see *Wareham t/a AF Wareham & 2 Others vs Post Office Savings Bank* CACA No. 5 of 2002. The discretion is with the court and is to be exercised judiciously.

8. The general rule is that amendments ought to be freely allowed if the same has been sought without undue delay. It will however be denied in isolated situations. Where therefore the intended amendments would cause undue prejudice and injustice to another party the court ought not allow the amendments: See *Weldon vs Neal* [1887] 19 QBD 394. The court is also to bear in mind that the purpose of amendments is truly to ensure that, if allowed, all matters in controversy are brought to the fore for settlement by the court. The aim is to help set out clearly the issues in controversy.

9. These principles were partly expressed in the case of *The Institute for Social Accountability & Another vs. Parliament of Kenya & Two Others* HCCP No 71 of 2013 [2014]eKLR where the court stated as follows :

*“[17] The issue of amendment of pleadings is not novel and has been the subject of numerous court decisions, the common denominator being that as a general principle, courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. See generally *Eastern Bakery v Castelino* (1958) EA 461 ; *Ochieng and Others v First National Bank Of Chicago CA Civil Appeal Number 149 of 1991*, *Kenyatta National Hospital v Kenya Commercial Bank Ltd & Another* [2003] 2 EA.”*

**10. I am still duly guided....”**

11. It is clear from **Rule 18** of the Mutunga Rules and the above exposition of the law, which I totally associate myself with that this court has discretion to allow amendment of pleadings, with leave of the court at any stage of the proceedings. The only rider to the exercise of the discretion is that the court must be satisfied that the amendment can be done without occasioning injustice or prejudice to the other party.

12. An amendment will also be allowed if the prejudice if any that may be occasioned on the other party may be can be compensated by an award of costs.

13. In the circumstances of this case, the applicant effected amendment to his ‘pleadings’ without first obtaining the leave of court as contemplated by **Rule 18** of the Mutunga Rules. He therefore seeks leave of this court to regularise the said amendments.

14. I have considered the case urged by the applicant in support of the application and the objection thereto. Whereas the respondent may suffer some prejudice in terms of delay and costs that he may incur in addressing the issues raised in the amended notice of motion, being of the view that the prejudice if any that will be occasioned on the respondent can be compensated by award of costs, I allow the application in terms of the alternative prayer.

15. I award the costs of defending the application to the petitioner/respondent.

### **Directions**

16. The respondents shall within seven (7) days of service of the amended notice of motion serve their responses and/or submissions thereto.

17. The matter shall be mentioned on 22nd November, 2016 to confirm compliance and for issuance of further directions.

**Dated, signed and delivered at Nyeri this 4th day of November, 2016.**

**L N WAITHAKA**

**JUDGE.**

In the presence of:

Mr. Gitau for the petitioner

Mr. Wachira for 1st respondent and h/b for Ms Githinji for 3rd respondent

N/A for National Land Commission

Court assistant - Lydia