



**Young Traders Tigoni Limited v Gachomo & 5 others (Environment & Land
Petition 9B of 2021) [2024] KEELC 1559 (KLR) (12 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1559 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND PETITION 9B OF 2021**

**BM EBOSO, J
MARCH 12, 2024**

BETWEEN

YOUNG TRADERS TIGONI LIMITED PETITIONER

AND

MICHAEL GACHOMO 1ST RESPONDENT

DAVID KARAO 2ND RESPONDENT

LEWIS NGETHE 3RD RESPONDENT

MANAGEMENT AUTHORITY 4TH RESPONDENT

KIAMBU COUNTY GOVERNMENT 5TH RESPONDENT

AND

AQUARIUM GUEST HOMES LTD PROPOSED RESPONDENT

RULING

1. Young Traders Tigoni Limited initiated this petition at the Kiambu Chief Magistrate Court on 20/9/2019 as Kiambu CMC E&L Petition No 67 of 2019. The petition was subsequently transferred to Thika Environment & Land Court pursuant to an order issued on 30/6/2021 by Gacheru J in Thika ELC Miscellaneous Application Number E010 of 2021. Upon transfer, an amended petition dated 22/1/2021 [sic] was filed at Thika ELC on 6/10/2021.
2. Through the amended petition, the petitioner alleged that they were investors in real estate business and they were engaged in the development and leasing out of real property. They contended that they developed residential units on Land Reference Numbers 12825/57 to 60, situated along Kiambu Road, a neighbourhood that was zoned as residential area by the County Government of Kiambu.



3. The petitioner contended that the 1st, 2nd and 3rd respondents operated a night bar directly opposite their residential units and were playing loud music at night, causing vibrations in the petitioner's residential units. It was the petitioner's case that their plea to the three respondents to stop playing loud vibrating music had fallen on deaf ears, adding that the said respondents continued to play loud music even after the 5th respondent arrested the club supervisor and arraigned him in court.
4. The petitioner sought: (i) an order directing the 4th and 5th respondents to enforce the Environment Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations; (ii) an order compelling the 1st to 3rd respondents to discontinue the noise pollution emitted at their business premises known as Aquarium Cabanas Club/Aquarium Bar & Lounge/Aquarium Kiambu Road; (iii) an order prohibiting the 1st, 2nd and 3rd respondents against causing further noise pollution at their business premises known as Aquarium Cabanas Club/ Aquarium Bar & Lounge/ Aquarium Kiambu Road; (iv) an order directing the 1st, 2nd and 3rd respondents to pay the petitioners damages for loss of business occasioned by the noise pollution emanating from the business premises known as Aquarium Cabanas Club/Aquarium Bar & Lounge / Aquarium Kiambu Road; (v) special damages and (vi) costs of the petition;
5. Hearing of the petition through viva voce evidence commenced on 29/6/2023. Moses Kuria testified as PW1. He was partially cross-examined by counsel for the 1st, 2nd and 3rd respondents. The witness was stood down for further cross-examination on 15/11/2023. Subsequent to that, the petitioner brought an application dated 21/8/2023 seeking leave to further amend the petition and introduce a 6th respondent, file additional affidavits and file a supplementary trial bundle. The said application is the subject of this ruling. The application was premised on the grounds outlined in the motion and in the supporting affidavit sworn on 21/8/2023 by Monica W Kinuthia. It was canvassed through written submissions dated 22/8/2023, filed by M/s Morara Omoke Advocates.
6. The case of the applicant is that the petition discloses a reasonable cause of action against the 1st, 2nd, 3rd, and the proposed 6th respondents. The applicant contends that the 2nd respondent is misleading the Court by denying that the 1st, 2nd, and 3rd respondents are the owners of Aquarium Cabanas/ Aquarium Guest House Ltd yet he had earlier admitted that they were the owners through his replying affidavit dated 20/1/2020. He adds that the 2nd respondent's averments in the replying affidavit dated 20/1/2020 portrayed him as the owner of Aquarium Cabanas which was the same entity trading as Aquarium Cabanas/Aquarium Guest Homes Ltd. The applicant contends that the Single Business Permit issued by the County Government of Kiambu Revenue Office on 2/6/2017 shows that the proposed 6th respondent and Aquarium Cabanas were the same entity operating under one certificate of incorporation number CPR/2011/44349. The applicant adds that the allegation that Aquarium Cabanas stopped operating on 31/12/2021 is misleading. The applicant contends that the proposed 6th respondent is necessary to explain to the Court who the real owners of Aquarium Cabanas are.
7. The applicant further contends that the 2nd respondent's allegation that the petitioner did not adduce evidence to demonstrate that the noise complained of either emanated from Aquarium Cabanas or exceeded the permissible noise levels is contrary to his earlier statement made in the replying affidavit dated 20/1/2022 where he had stated that excessive noise from Aquarium Cabanas affected the petitioner's tenants causing him to install sound-proof material on the premises to contain the noise. The applicant adds that the proposed 6th respondent ought to be joined in the suit to clarify the issue of ownership of Aquarium Cabanas. The applicant contends that prejudice will be occasioned to them if the orders prayed for are not granted. Lastly, the applicant contends that it is in the interest of equity and justice that the application be granted.



8. The application is opposed by the 1st, 2nd and 3rd respondents through a replying affidavit sworn on 23/10/2023 by Major (Rtd) David Karau and written submissions dated 30/11/2023, filed by M/s Hiram Christopher Advocates LLP. Their case is that the present application was prompted by the unfavorable testimony given by the petitioner's own witness during the preceding trial. They add that the application is an affront to fair trial guaranteed under Article 50 (1) of *the Constitution* of Kenya. The 1st, 2nd and 3rd respondents contend that the answers given by the petitioner's witness during cross-examination exposed holes in the petitioner's case which it seeks to seal by introducing a new party and additional documents it deliberately left out of the bundle it filed before the Court. They add that the applicant has not demonstrated the need for the inclusion of a new party mid-trial, adding that the applicant has not demonstrated that the additional evidence sought to be adduced could not reasonably be procured at the time of pre-trial conference. The 1st, 2nd and 3rd respondents contend that the application is brought in bad faith and that they would be prejudiced if it were to be allowed. They further contend that the affidavit in support of the application has been sworn without the petitioner's authority hence the application is grossly incompetent. They urge the Court to dismiss the application and direct that the petitioner's witness avail himself for further cross-examination on a date to be determined by the Court. The 4th respondent stated that it did not oppose the application while the 5th respondent did not respond to the application.
9. I have considered the application; the response to the application and the parties' respective submissions. I have also considered the legal framework and jurisprudence relevant to the key questions that fall for determination in the application. The three key questions to be answered in this ruling are; (i) Whether the applicant has satisfied the criteria for grant of leave to amend a petition; (ii) Whether the applicant has satisfied the criteria for leave to add or join a party to a petition; and (iii) Whether the applicant has satisfied the criteria for leave to file additional evidence in a petition or cross petition. I will dispose the first and second questions contemporaneously because they are intertwined.
10. Jurisdiction to grant leave to a party to amend a petition or cross-petition brought under the Bill of Rights is a discretionary one and is anchored under rule 18 of *the Constitution of Kenya [Protection of Rights and Fundamental Freedoms Rules (2013) (the Rules)]*. It 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.”
11. Jurisdiction to grant leave to add or join a party to a petition is exercised within the framework contained in rule 5 of the Rules which provides as follows:
- “ 5. The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—
- (a) Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties.
- (b) A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.
- (c) Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been



instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.

- (d) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just— (i) order that the name of any party improperly joined, be struck out; and (ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.
- (e) Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents.

12. Thirdly, jurisdiction to grant leave to a party to file additional evidence in a petition or cross-petition is exercised within the framework of rule 21(2) of the rules which provides as follows:

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- (2) A party who wishes to file further information at any stage of the proceedings may do so with the leave of the Court. “

13. The general principle on the criteria for grant of leave to amend pleadings or grant of an order of joinder was outlined by the Court of Appeal in *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] eKLR as follows:-

“.....the general principle in applications for leave to amend is that all amendments should be freely allowed at any stage of the proceedings provided that the amendments or joinder, as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

14. The object of amendment of pleadings was outlined in the case of *Institute of Social Accountability and Another V Parliament of Kenya And 2 Others*; Petition No 71 Of 2013 as follows:-

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigations between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”

15. In the application under consideration, the petitioner seeks leave to amend the petition principally to join a sixth respondent. The court has perused the draft further amended petition. The cause of action is by and large the same. Secondly, the application was brought when the petitioner’s first witness was



still giving evidence. The petitioner has not closed its case. At this point, were the leave to be granted to the petitioner, the existing respondents will be entitled to corresponding leave to amend their pleadings at a point when they have not yet started presenting their evidence.

16. Secondly, a reading of rule 5 of the relevant Rules indicates that where a petitioner is not sure of the person from whom redress should be sought, he is at liberty to join two or more respondents to the petition.
17. Taking into account the above legal framework and circumstances, the court takes the view that jurisdiction to grant the petitioner leave to: (i) amend the petition; (ii) join a sixth respondent to the petition; and (iii) file a supplementary trial bundle can be exercised at this point without occasioning prejudice to the existing respondents. For being taken through this motion, the 1st to 3rd respondents will be indemnified through an award of costs assessed at Kshs 30,000 payable within 30 days from today.
18. In the end, the application dated 21/8/2023 is allowed in terms of prayers 2, 3 and 4. All the items in respect of which leave has been granted shall be filed and served within 14 days. The respondents shall have corresponding leave. The petitioner shall pay the 1st to 3rd respondent costs of Kshs 30,000 within 30 days.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 12TH DAY OF MARCH 2024

B M EBOSO

JUDGE

In the presence of: -

Ms Masaba for the Petitioner

Mr Kariuki for 1st, 2nd and 3rd Respondents

Court Assistant: Hinga

