



**Omar & 161 others v National Land Commission & 4 others (Petition
19 of 2017) [2024] KEELC 4618 (KLR) (12 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4618 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
PETITION 19 OF 2017
SM KIBUNJA, J
JUNE 12, 2024**

BETWEEN

OMAR SAID OMAR & 161 OTHERS PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

**KENYA RAILWAYS CORPORATION & BOARD OF GOVERNORS 2ND
RESPONDENT**

COUNTY GOVERNMENT OF MOMBASA 3RD RESPONDENT

HON ATTORNEY GENERAL 4TH RESPONDENT

**MINISTRY OF AGRICULTURE, LIVESTOCK & FISHERIES 5TH
RESPONDENT**

RULING

[3rd Respondent's Preliminary Objection Dated 26th July 2023]

1. The 3rd respondent filed the preliminary objection dated 26th July 2023 to the Petitioners' Further Further Amended Petition dated 14th October 2022, raising one ground that depositions in affidavit are statements under oath, and they cannot therefore be subject to amendment. The preliminary objection was filed with brief submissions in which the counsel argued that the further further amended petition is supported by an affidavit which has been extensively amended. That it is settled law that depositions in an affidavit cannot be amended, and the amended affidavit must be struck out, with the further further amended petition with costs. The learned counsel cited the case of *Sammy Ndungu Waity & Another v Independent Electoral and Boundaries Commission & 3 Others* [2017] eKLR, where the court considered the decision in *Swaleb Gbeithan Saanu v Commissioner of Lands & 5 others* (2002) eKLR, which had dealt with amendments of the technical parts of an affidavit, and found that the primary



depositions in an affidavit cannot be subject to amendments. The court went further to cite with approval the finding in the case of *Republic v Resident Magistrate's Court MKS & Stephen Maundu Muia* (2004) eKLR, which had arrived at a similar decision.

2. After the court issued directions on the 11th December 2023 on filing and exchanging submissions, the counsel for the 3rd respondent filed theirs dated the 9th January 2024, more or less along the lines of the previous one.
3. The petitioners filed their submissions dated the 15th January 2024, arguing that amendment of the supporting affidavit was an inadvertent mistake, which should not unduly prejudice their clients. The learned counsel cited the cases of *Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co. Ltd & 2 Others* [2018] eKLR, *Phillip Chemwolo & Another v Augustine Kubebe* [1982-1988] KLR and *Menza Kasena v Ngala Katsole* [2021] eKLR, and submitted that though the court may deem it appropriate to strike out the further amended supporting affidavit, the amendments to the petition are valid, and for the sake of justice, the court should consider exercising its discretion and instead, grant the petitioners leave to file a supplementary affidavit to reflect the amendments and averments of the petitioners.
4. The learned counsel for the 2nd respondent submitted orally on the 22nd February 2024 that she supported the preliminary objection, and would rely on the 3rd respondent's submissions.
5. The issues for determination before the court are as follows:
 - a. Whether the ground raised in the preliminary objection raises a pure point of law that can be determined without calling evidence, and if upheld would determine the petition.
 - b. Whether the preliminary objection has merit or not, and what orders to issue.
 - c. Who bears the costs?
6. The court has carefully considered the ground on the preliminary objection, submissions by the learned counsel, superior courts' decision cited thereon and come to the following findings:
 - a. Preliminary objections were described in the celebrated case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 thus:

“... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which, is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.”

The ground on the preliminary objection has not been challenged not to be raising a pure point of law, that if upheld would determine the petition. I hasten to add that the court does



not need to take any evidence outside the said impugned affidavit to determine the preliminary objection. I therefore find and hold that the ground on the preliminary objection raises a pure point of law.

- b. Looking at the Further Further Amended petition dated and filed the on the 14th October 2022, it inter alia removed some parties, joined others, removed portions of the averments and prayers and introduced new ones. Filed together with the Further Further Amended Petition is the Further Amended Supporting Affidavit of Mohamed Said Omar, Kasichana Menza Mwavita, Juma Rashid Gassre, Bedan D. Mwakio and Saum Abdalla dated on the 14th October 2022. It is this Further Amended Supporting Affidavit that is the subject of the 3rd respondent's preliminary objection. In their submissions dated the 15th January 2024, the counsel for the petitioners is conceding that a mistake was made in amending the supporting affidavit, and proceeds to seek for the court's indulgence to grant the petitioners leave to file a supplementary affidavit, instead of striking the Further Amended Supporting Affidavit out, as sought through the preliminary objection.
 - c. I have perused the Further Amended Supporting Affidavit subject matter of the preliminary objection, and it contains deletions and additions on primary depositions that cannot in any way, be termed technical in nature. No wonder the learned counsel for the petitioners has not attempted to justify the amendments on the affidavit in their submissions, but instead put forward their application beseeching the court to grant the petitioners leave to file and serve a preliminary affidavit, to carry the amendments that they attempted to irregularly and unlawfully introduce through the Further Amended Supporting Affidavit. Applications should be made through the processes provided for under the rules like notices of motions, chamber summons and originating summons. Such applications are then served upon the other parties to accord them an opportunity to be heard in accordance with Article 50 of the Constitution, the law and Rules. Applications cannot be initiated through parties' written submissions, in the way the learned counsel for the petitioners has done.
 - d. It is the court's finding that the 3rd respondent's preliminary objection has merit, and is hereby upheld. The Further Amended Supporting Affidavit is struck out leaving the Further Amended Petition without supporting evidence. As the Further Further Amended Petition cannot stand on its own without an affidavit in support, it is also struck out.
 - e. The general rule is that costs follow the event unless where for good reasons the court direct otherwise. This petition is not brought on public interest, but for the personal benefits of the petitioners. They should therefore pay the costs to the respondents.
7. Flowing from the foregoing determinations, the court finds and orders as follows:
- a. The 3rd respondent preliminary objection dated the 26th July 2023 has merit and is hereby upheld.
 - b. The petitioners' Further Amended Supporting Affidavit sworn on the 14th October 2022 and Further Further Amended Petition of even date be and are hereby struck out with costs.
 - c. The file be closed.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 12TH DAY OF JUNE 2024.

S. M. KIBUNJA, J.



ELC MOMBASA.

In the presence of:-

Petitioners : M/s Wambani

Respondents : M/s Opondo For 2Nd Respondent.

M/s Njuguna For Kibaara For 3Rd Respondent.

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

