



REPUBLIC OF KENYA



**Bosire & 4 others v Nyaribo & 8 others (Petition 010 of 2022)  
[2023] KEELRC 1140 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1140 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION 010 OF 2022**

**S RADIDO, J**

**MAY 11, 2023**

**BETWEEN**

**DOUGLAS OSEKO BOSIRE ..... 1<sup>ST</sup> PETITIONER  
JOHN MOENGA OMANWA ..... 2<sup>ND</sup> PETITIONER  
BENARD OSUMO MANG'AA ..... 3<sup>RD</sup> PETITIONER  
PETER MUGA OMWANZA ..... 4<sup>TH</sup> PETITIONER  
ZABLON OERO ONCHIRI ..... 5<sup>TH</sup> PETITIONER**

**AND**

**H.E. AMOS KIMWOMI NYARIBO GOVERNOR, NYAMIRA  
COUNTY ..... 1<sup>ST</sup> RESPONDENT  
COUNTY GOVERNMENT OF NYAMIRA ..... 2<sup>ND</sup> RESPONDENT  
COUNTY ASSEMBLY OF NYAMIRA ..... 3<sup>RD</sup> RESPONDENT  
HON ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT  
GLADYS MOMANYI ..... 5<sup>TH</sup> RESPONDENT  
M.S. EMILY MORAA ONGAGA ..... 6<sup>TH</sup> RESPONDENT  
THOMAS NYARIKI ..... 7<sup>TH</sup> RESPONDENT  
JONES OMWENGA ..... 8<sup>TH</sup> RESPONDENT  
SAMUEL MAIKO ..... 9<sup>TH</sup> RESPONDENT**



## RULING

1. Douglas Oseko Bosire, John Moenga Omanwa, Benard Osumo Mangaa, Peter Muga Omwanza and Zablon Oero Onchiri (the Petitioners) sued the 9 Respondents on 14 January 2021 before the Court in Kericho, contending that their removal from office as County Executive Committee members upon the assumption of office as Governor by the 1<sup>st</sup> Respondent after the demise of the appointing Governor amounted to constructive dismissal and was illegal.
2. On 14 September 2021, the Petitioners filed an application dated 2 August 2021, seeking orders:
  - (1) ...
  - (2) That the Petitioners/applicants be and are hereby granted leave to amend their Petition as set out in the Draft Amended Petition herein annexed.
  - (3) That the Draft Amended Petition be deemed as duly filed and served.
  - (4) That this Honourable Court be pleased to certify that the Amended Petition herein raises substantial questions of law and forthwith refer the case to her ladyship the Chief Justice for appointment of a bench of an uneven number of judges being not less than three (3) pursuant to Article 165(4) of *the Constitution*.
  - (5) That the Honourable Court be pleased to arrest the Ruling slated for delivery on the 21<sup>st</sup> September 2021 in respect of the Respondents application dated 12<sup>th</sup> April 2021 and direct that the instant application is heard prior to and or together with the Respondents application dated 12<sup>th</sup> April 2021.
  - (6) That the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing if granted.
  - (7) That costs of the application be in the cause.
3. The primary grounds advanced in support of the application were that it was necessary to bring additional parties (the Council of Governors and the Senate); that there were weighty and novel issues of law which required to be brought forth; that it was necessary for the Court to interpret article 179(7) of *the Constitution*, and that it was intended to raise issues of national importance as all the 47 Counties stood to be affected by the outcome of the Petition.
4. The Court in Kericho transferred the Petition to this Court before hearing the Motion, and in the course of time, the Court dealt with an application by the Respondents seeking to have the Petition dismissed.
5. This Court gave directions on the application on 25 January 2023 and 21 February 2023 (the directions included the parties addressing the question of jurisdiction).
6. The Respondents had filed a replying affidavit in opposition to the application and submissions on 14 February 2023.
7. In the affidavit, the Respondents countered that the intended amendments would introduce new matters which constituted a complete departure from the issues already before the Court; that the Court had already rendered itself on the application and interpretation of Article 179(7) of *the Constitution* in the Ruling of 18 February 2021; that the issues in contention revolved around



employment rights; that the parties sought to be added were not privy to the Petitioners' contracts or the alleged constructive dismissal; that allowing the amendments would lead to the Court sitting on appeal over its previous decision; that the issues sought to be introduced were better left to a fresh action on the constitutionality of the said provisions and that there were no complex or substantial issues of law to empanel an uneven number of judges as the question of Article 179 had been litigated severally.

8. Despite the order on 21 February 2023 that the Petitioners file their submissions on or before 17 March 2023, the submissions were not on record by the time of preparation of this Ruling. The Respondents filed further submissions on 13 March 2023.
9. In the further submissions, the Respondents asserted that there was no employer/employee relationship between the parties and the Court should, therefore, follow and apply the holding by the Court of Appeal in Civil Appeal No. 656 of 2022, the *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 Ors*, find it had no jurisdiction over fresh causes of action sought to be introduced through the intended amendments, and down its pen.
10. The Court has considered the Motion, affidavits and submissions.

### **Amendments**

11. The law on amendment of pleadings is well settled.
12. In *Humanity Action Knowledge Integrity in Africa Trust (Haki Africa) & 19 others v Attorney General & 3 Ors; Kenya National Commission on Human Rights (KNHCR) & 2 Ors (Interested Parties)* (2020) eKLR, the Court observed:

Rule 18 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereafter “the Mutunga Rules”) should be the starting point for purposes of the instant application.

The Rule allows parties to amend their pleadings, and in particular, the Petition, with leave of the Court at any stage of the proceedings. Amendment of petitions once filed can only be done with the permission of the court. Additionally, the permission and consequent amendment may be granted and made respectively at any time or stage of the proceedings. ...

It is trite law that an amendment ought to be allowed as long as the same is not frivolous or occasions prejudice to the opposing Party.

13. In *Mombasa Cement Limited v Speaker of the National Assembly & 2 ors* (2016) eKLR, the Court stated:

The general rule when it comes to amendments of pleadings is that amendments ought to be freely allowed so long as they do not occasion any prejudice to the party facing them. The test whether or not to allow amendments is now relatively clear.

14. In *Geyser International Assets Limited v Attorney General & 3 Ors* (2019) eKLR, the court stated:

... a party should always be allowed to make such amendments as are necessary for determining the real issues in controversy or avoiding a multiplicity of suits. The court then went on to state that the amendments or joinder would be allowed provided (i) there had been no undue delay, (ii) that no vested interest or accrued right was affected and (iii) no injustice or prejudice would be occasioned to the other side...



15. Rule 18 of *the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 gives the Court the discretion to grant leave to amend a pleading. Under Rule 5, the Court can order the joinder of a party even without leave.
16. The Petitioners quest for amendment and joinder of more parties revolves around the application and interpretation of Article 179(7) of *the Constitution* and Articles 27, 41, 47, 48 and 50 of *the Constitution*.
17. The parties herein addressed the Court on the proper application and interpretation of Article 179(7) of *the Constitution* at an interlocutory stage and in a Ruling delivered on 18 February 2021, the Court held:
  42. In determining whether there is a prima facie case to dispose of the Petitioners and Respondents applications, this Court notes that the main contention by the Petitioners is that they were legally appointed and that the 1<sup>st</sup> Respondent cannot purport to sack them. The Respondents on their part have submitted that the 1<sup>st</sup> Respondent didn't sack the Petitioners but that their term of office expired by operation of the law. The Respondents relied on the provisions of Article 179(7) of *the Constitution* which states as follows: -

If a vacancy arises in the office of the County Governor, the members of the county executive committee appointed under clause (2)(b) cease to hold office.
  43. My understanding of this Article is that the appointment and term of office of the CEC members is premised upon the life of the Governor. It is also stated in the facts which have been agreed upon by both parties that indeed the former Governor passed on and the 1<sup>st</sup> Respondent herein assumed office as the new Governor. That being the position, it implies that before the current Governor assumed office, there was a vacancy in that office. That therefore also means that the operation of Art 179(7) of *the Constitution* came into operation warranting the applicants to cease occupying the office of CECs.
18. In this Court's view, the Court made findings of fact and law at an interlocutory stage, whether legally sound or not, and it is not open to it to reopen the findings. It would be tantamount to this Court sitting on appeal of the findings made earlier if it were to allow the amendments and reopen the issues.
19. Further, the Respondents would be prejudiced were the Court to allow the amendments and seek to interpret and apply Article 179(7) of *the Constitution* afresh, the same provision having been interpreted and applied in these proceedings.
20. The correct course of action for the Petitioners should have been to appeal against the Ruling of 18 February 2021.

### **Conclusion and Orders**

21. In consideration of the foregoing, the Court declines to exercise its discretion in favour of the Petitioners and the application dated 2 August 2021 is dismissed with costs.
22. The Court will, hereinafter, issue directions on the hearing of the Petition on the merits.

**DELIVERED VIRTUALLY, DATED, AND SIGNED IN KISUMU ON THIS 11TH DAY OF MAY 2023.**

**RADIDO STEPHEN, MCI Arb**

**JUDGE**

**Appearances**



**For Petitioner Wamuyu Munga & Associates Advocate**  
**For Respondents Ligunya Sande & Associates**  
**Court Assistant Chrispo Aura**

