



**Nyang'ongo & another v Cabinet Secretary, Ministry of Education & 6 others
(Petition E007 of 2022) [2023] KEELRC 2215 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2215 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E007 OF 2022
CN BAARI, J
SEPTEMBER 28, 2023**

BETWEEN

EVANS MORARA NYANG'ONGO 1ST PETITIONER

CHARLES MORARO MOGUNDE 2ND PETITIONER

AND

THE CABINET SECRETARY, MINISTRY OF EDUCATION .. 1ST RESPONDENT

**THE PRINCIPAL SECRETARY, MINISTRY OF EDUCATION, DEPARTMENT
OF VOCATIONAL & TECHNICAL TRAINING 2ND RESPONDENT**

THE ATTORNEY GENERAL 3RD RESPONDENT

**DIRECTOR, DIRECTORATE OF TECHNICAL EDUCATION, MINISTRY OF
EDUCATION 4TH RESPONDENT**

**ELICANAH M. MISIORI, DIRECTOR, HUMAN RESOURCES
MANAGEMENT 5TH RESPONDENT**

**THE CHAIRMAN, KISII NATIONAL POLYTECHNIC GOVERNING
COUNCIL 6TH RESPONDENT**

PRINCIPAL, KISII NATIONAL POLYTECHNIC 7TH RESPONDENT

RULING

1. Beforecourt is the Attorney General's Application acting on behalf of the 1st respondent/applicant dated March 7, 2023, and brought pursuant to article 159 of the [Constitution](#) of Kenya 2010, Rules 3 (12, 3 (8), 10 (2) (b) (c) & (g) and 18 & 19 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013 and Order 8 Rules 2(1) and 3 of the [Civil Procedure Rules](#), seeking orders That: -



- i. Spent.
 - ii. This court be pleased to disallow the amendments made in the 'Petition' / 'Amended Petition' filed herein and dated 12/02/2023.
 - iii. This court be pleased to strike out the 'Petition' / 'Amended Petition' filed herein and dated 12/02/2023, together with the Affidavit of Evans Morara Nyang'ongo in support of the same, deponed on 12/2/2023.
 - iv. Spent.
 - v. Costs be provided for.
2. The application is supported by grounds on the face thereof and the affidavit of Moimbo Momanyi, the Counsel on record for the Applicant herein.
 3. The applicant argues that the petitioners were granted leave to file an Amended Petition, which they filed and served upon the Respondents on 17/2/2023. It is the applicant's further argument that the amendments made by the petitioners do not comply with the mode of amendment contemplated by the Rules, and are an abuse of this court's process.
 4. The applicant further avers that the amendments made by the petitioners altered the substratum and character of the petitioners' claim as filed on 1/2/2022, which is an abuse of this court's processes.
 5. The petitioners opposed the motion vide grounds of opposition filed on March 15, 2023, wherein, the Petitioners argue that the motion does not disclose grounds upon which the Amended Petition should be struck out as required under Order 2 Rule 15 of the *Civil Procedure Rules*, 2010.
 6. It is the Petitioners' further assertion that prayer 1 of the motion is not tenable since the amendment was done with the leave of the court, and that the applicant cannot ask the court to review its decision except as required under Order 45 of the *Civil Procedure Rules*, and Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*.
 7. The Petitioners further argue that by the court granting leave for amendment, the aspect of admission of the amended petition was spent, and all that is left for determination is the merit of the amended petition.
 8. Parties canvassed the motion by way of written submissions and which have been duly considered.

Analysis and Determination

9. I have considered the respondent's motion application, the grounds in support and those in opposition and the submissions by both parties. The issue that falls for determination is whether the amended petition should be disallowed and be struck out.
10. The motion herein, is brought pursuant to Rules 3 (1), 3 (8), 10 (2) (b) (c) & (g) and 18 & 19 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 and Order 8 Rules 2(1) and 3 of the *Civil Procedure Rules*, which provide as follows: -

“3.

- (1) These rules shall apply to all proceedings made under article 22 of the *Constitution*.



- (8) Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

10.

- (2) The petition shall disclose the following—
- (a) the petitioner’s name and address;
 - (b) the facts relied upon;
 - (c) the constitutional provision violated;
 - (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
 - (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
 - (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
 - (g) the relief sought by the petitioner

18. A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court. Formal applications.

19. A formal application under these rules shall be by Notice of Motion set out in Form D in the schedule and may be supported by an affidavit.”

11. Order 8 Rules 2(1) and 3 of the [Civil Procedure Rules](#) states thus: -

“(1) Within fourteen days after the service on a party of a pleading amended under rule 1 (1), that party may apply to the court to disallow the amendment.

When the court hearing an application under this rule is satisfied that if an application to make the amendment in question had been made under rule 3 at the date when the amendment was made under rule 1 (1) leave to make the amendment or part of the amendment would have been refused, it shall order the amendment or that part of it to be struck out.

Any order made on an application under this rule may include such terms as to costs or otherwise as the court thinks just.

12. The question is whether the Petitioners in amending their petition, complied with the requirements of the law as outlined above. In [Joseph Ochieng & 2 others v First National Bank of Chicago](#), Civil Appeal No 149 of 1991 the Court held thus on amendment of pleadings: -

“i. the powers of the court to allow amendment is to determine the true, substantive merits of the case;



- ii. amendments should be timeously applied for;
- iii. power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;
- iv. that the proposed amendment must not be immaterial or useless or merely technical;
- v. that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action;
- vi. that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”

13. The Court is by law empowered to allow parties to amend their pleadings at any stage, including at an appellate stage, with the leave of the Court. It is not disputed that the Petitioners through Counsel, sought and obtained leave to amend their petition. It is also not in dispute that the amended petition was filed on 12th February, 2023 and served upon the Respondents.
14. The purpose for which such amendment is allowed, is to enable determination of the real issues in controversy between the parties and to allow correction of defects or errors in pleadings. (See *Mombasa Cement Limited v Speaker of the National Assembly & 2 others* (2016) eKLR)
15. Further, amendment of pleadings is a right enshrined under Rule 18 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practices Rules*, also known as the Mutunga Rules. All that is required under this Rule, is for a party to obtain leave of the court to amend their pleadings.
16. The Applicant’s argument is that the amendments of the petition was done outside the parameters of the law, on the premise that the amendments altered the substratum and character of the petition as initially field.
17. A glance at the original petition vis-à-vis the amended petition, does not in my view, depict a totally or substantially different matter that would of convenience be better of if filed as a fresh suit. It is clear from the record that the amended petition arises out of the same facts as those of the initial petition.
18. In the final analysis, I find the applicant’s motion devoid of merit and is dismissed with costs to the Petitioners.
19. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 28TH DAY OF SEPTEMBER, 2023.

CHRISTINE N. BAARI

JUDGE

