



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO 44 OF 2017

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 2(4), (5) & (6), 27(1) & (2), 28, 41(1) & (2) AND 48 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

PHILIP MARK BUSURU.....1ST PETITIONER

WELDON KIBET KIRUI.....2ND PETITIONER

VS

THE INTERNATIONAL UNION FOR CONSERVATION OF NATURE

(IUCN) REPRESENTED BY ITS EASTERN

AFRICAN REGIONAL OFFICE.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. There are two applications pending determination by the Court. The first is the Notice of Motion by the 1st Respondent dated 29th April 2021, seeking dismissal of the Petition for want of prosecution.
2. The 1st Respondent bases its application on the following grounds:
 - a) That more than 14 months have lapsed without the Petitioners and/or their Advocates attending court and/or setting down the Petition for hearing;
 - b) That the Petitioners have depicted indolence, disinterest and a lack of willingness to prosecute the Petition herein;
 - c) That the continued presence of the Petition in court without its prosecution is highly prejudicial to the 1st Respondent;
 - d) That litigation must come to an end;
 - e) That no prejudice shall be occasioned on the Petitioners if the Petition is dismissed with costs;
 - f) That it is in the interest of justice that the application be allowed.
3. The application is supported by an affidavit sworn by the 1st Respondent’s Regional Human Resources Manager, Nancy Njoki Ntinu.

4. The second application is brought by the Petitioners by Notice of Motion dated 17th May 2021, by which they seek leave of the Court to amend the Petition dated 12th March 2021, in terms of the amended Petition filed in court on 17th May 2021.

5. This application is supported by an affidavit sworn by the 1st Petitioner, Philip Mark Busuru and is based on the grounds that:

a) Upon the Petitioners' instructions, it is necessary to amend the Petition for clarity of the dispute and to bring all matters before the Court for trial and resolution;

b) The application has been made well before the case has been set down for hearing and the Respondent suffers no prejudice.

6. In his affidavit in support of the application, the first Petitioner, Philip Mark Busuru depones that owing to new developments after the filing of the Petition, it has become imperative to amend the Petition to capture and bring to the fore all matters in dispute.

7. Busuru points out the emergent issues addressed in the amendment as follows:

a) The question of immunity as pleaded by the Respondent and its waiver;

b) The reality that arising out of their dismissal and the continued engagement of the 1st Respondent in their affairs, the Petitioners have become unemployable and have actually lost out on any opportunities of employment;

c) That there is need to re-work the mathematics of the Petition as earlier presented.

8. The 1st Respondent opposes the Petitioners' application by a replying affidavit sworn, by its Regional Human Resources Manager, Nancy Njoki Ntinu.

9. Ntinu terms the Petitioners' application as incompetent, given that the Petitioners are irregularly purporting to seek orders in retrospect, because the amended Petition was actually filed on 17th March 2021, after close of pleadings and without leave of the Court. She points out that the application is an attempt to cure an immense procedural lapse, which the Court should not countenance.

10. Ntinu accuses the Petitioners of laches and indolence as the orders being sought were never raised at the preliminary stage of the case and in particular, during the pre-trial conferences.

11. Ntinu depones that the main suit was certified ready for hearing on 31st July 2019 and adds that since July 2019, the Petitioners have never invited the Respondents to fix a hearing date for the Petition.

12. According to Ntinu, there is inexcusable and inordinate delay in filing the instant application, being 4 years after filing of the suit in 2017. She adds that no reason has been proffered by the Petitioners for the delay.

13. The Petitioners' response to the 1st Respondent's application is contained in a replying affidavit sworn by the Petitioners' Counsel, Namada Simoni on 17th May 2021.

14. Counsel states that the Petitioners filed the Petition in 2017, accompanied by a verifying affidavit, witness statement and list of documents, through the firm of Koceyo & Co Advocates, before instructing the current firm of Advocates in 2019.

15. Counsel accuses the 1st Respondent of attempting to scuttle the hearing of the Petition on merit.

16. He points out that the 1st Respondent is aware that in the year 2020, court operations were paralyzed due to the COVID-19 Pandemic, making it hard to prosecute the matter. He adds that the Employment and Labour Relations Court was still handling matters filed in 2016 and before.

17. In pursuing its application, the 1st Respondent accuses the Petitioners of failing to take action towards prosecution of the Petition.

18. I have looked at the court record and note that the last time the matter was in court on 31st July 2019, the 2nd Respondent sought and was granted leave to file a Response. There is no evidence that the 2nd Respondent ever complied with the directions given by the Court. There is also no indication that the matter was certified ready for hearing.

19. Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides the following:

(6) A party may amend pleadings before service or before closure of pleadings:

Provided that after the close of pleadings, the party may only amend pleadings with the leave of the Court on oral or formal application, and the other party shall have a corresponding right to amend its pleadings.

20. In *Institute for Social Accountability & another v Parliament of Kenya & 3 others [2014] eKLR Lenaola J* (as he then was), **Mumbi Ngugi J** (as she then was) and **Majanja J** stated the following:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation 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.”

21. In this case, there is no evidence of the pleadings having been closed. That being the case, the Petitioners were at liberty to file and serve an amended Petition as they did.

22. In the circumstances, the only order I will make is to admit the Petitioners’ amended Petition as duly filed, subject to payment of appropriate court fees. The Respondents are at liberty to respond to the amended Petition within the next fourteen (14) days from the date of this ruling.

23. The costs of both applications will be in the Petition.

24. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF MARCH 2022

LINNET NDOLO

JUDGE

Appearance:

Mr. Namada for the Petitioners

Mr. Kimani for the 1st Respondent

No appearance for the 2nd Respondent