



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 27 OF 2020

DANIEL ODHIAMBO KAUDO.....PETITIONER/APPLICANT

VERSUS

THE SPEAKER HOMABAY COUNTY ASSEMBLY.....1ST RESPONDENT

THE HOMABAY COUNTY ASSEMBLY.....2ND RESPONDENT

AND

HON. MICHAEL NYANGI.....1ST INTERESTED PARTY

HON. JUMA OWUOR.....2ND INTERESTED PARTY

COMM. LILIAN OGONO.....3RD INTERESTED PARTY

COMM. JOSEPH OKOTO.....4TH INTERESTED PARTY

FAITH APOKO.....5TH INTERESTED PARTY

RULING

1. The Petitioner/Applicant's application before court is dated 16th February, 2022. He seeks several orders. First is that the Court expunges the **Firms of S.M Onyango & Co. Advocates** and **Njogu, Omwanza & Nyasimi Advocates** from the record for not being properly on record. It is Counsel's submission that Order 9 is exclusive on how a party can come on record, and that the Notice of Appointment of Advocates filed by the Firm of **Njogu, Omwanza & Nyasimi Advocates**, when there are other Advocates on record is not tenable.

2. It is further argued in this regard, that the Firm of **S.M. Onyango** filed a Notice of Change of Advocates to take over the matter from the Firm of **Onsongo & Co. Advocates**, yet the Firm of Nyamweya had come on record in place of **Onsongo & Co. Advocates**, which then means that the Firm of S. M. Onyango, has come on record to replace a Firm that is not on record, with the effect that the Firm that replaced **Onsongo & Co. Advocates**, is still on record. The Applicant submits that this is meant to bring confusion and derail the expeditious determination of the Petition.

3. It is further argued that one **Faith Apuko** has sworn three of the affidavits filed in reply to this application on behalf of the Respondents, yet she is herself an Interested Party in the petition.

4. The Applicant's second prayer is for leave to amend his petition. It is submitted that when the Petitioner filed the petition before court, he had been suspended from his then position of Clerk of the County Assembly of Homabay. It is further urged that Justice Radido rejected the Petitioner's petition premised on the manner in which he was appointed to the office of Clerk of the said Assembly.

5. The Petitioner appealed against the decision of Justice Radido dismissing his petition, and the Court of Appeal ordered that the petition be heard a fresh. It is the Applicant/Petitioner's position that following the dismissal of his petition by Justice Radido, he was dismissed from the service of the Respondents, and hence the need to amend his petition in order for it to encompass the new position.

6. The Applicant states that the amendment is necessary so as not to occasion a multiplicity of suits resulting from filing a fresh petition due to the new cause of action. It is submitted for the Applicant that the amendment sought herein, will bring all issues to be determined by court

within one suit. The Applicant cited the holding in the cases of *Henry Gitau Muhura & 5 Others v Bernard Muturi Karanja (2021) eKLR and Priscillah Warui Nyaga v Joseph Njoka Kaara & Another (2015) eKLR* for the holding that amendments should readily be allowed, save only to ascertaining that the amendment(s) does not prejudice the other parties.

7. Thirdly, the Applicant seeks to reinstate the orders issued on 2/10/2020. It is the Applicant's case that before he was appointed to the position of Clerk of the Assembly of Homabay, he served in the County Public Service. He seeks that he be reinstated back to the county public service, pending the determination of the petition.

8. The Applicant's Fourth and last prayer, is that the petition herein be expedited as the position he seeks to be reinstated to, is hinged to the life of the County Assembly.

9. The 1st Respondent did not oppose the application, and Ms. Onsongo holding brief for Mr. Otieno for the 1st Respondent, submitted that the 1st Respondent is agreeable to the court granting the Applicant all the prayers sought.

10. The 2nd Respondent opposed the application vide a replying affidavit sworn by one Faith Apuko on 7th March, 2022 as well as grounds of opposition filed on 22nd February, 2022.

11. Mr. Onyango submitting for the 2nd Respondent, urged that this suit is a public interest litigation and calls for its expeditious determination.

12. Mr. Onyango argued against the Applicant's prayer to expunge his Firm from the record, arguing that there is no evidence that the Firm of Nyamweya is on record and hence the reason they came on record in place of the Firm of Onsongo & Co. Advocates. He urged that the court should be guided by Article 159(2)(d) of the Constitution, which empowers the court not to be bound by technicalities.

13. It is further submitted for the 2nd Respondent that the Applicant does not have capacity to hold the position for which he seeks to be reinstated to, as he does not meet the mandatory requirements for the position in issue.

14. Mr. Onderi also responding for the 2nd Respondent, argued that Sections 20 and 22 of the Employment and Labour Relations Court Act, entitles a party to representation. He further argued that Rules 2 and 10 of the Mutunga Rules, permits the court to proceed on the basis of informal documentation.

15. It is Mr. Onderi's further argument that none of the Counsels previously on record have contested their representation, and that no prejudice will be occasioned to the Petitioner by the representation of the 2nd Respondent by two Law Firms.

16. On the Applicant's prayer for reinstatement of the status quo orders, Mr. Onderi questioned the subsisting status quo. It is his argument that the status quo orders were spent on the date judgment was delivered in the matter.

17. On the prayer for amendment of the petition herein, Mr. Onderi submitted that by virtue of the reversal of Justice Radido's Judgment, the only petition that can be heard by this court is that originally filed and not any other.

18. Mr. Obiero submitting for the 5th Interested Party, argued that the 5th Interested Party swore the affidavits in her different capacities; one being as the Clerk of the 2nd Respondent and secondly as an Interested party herein. He further submitted that no issue of law has been raised on why the affidavits should be struck out.

19. On the Applicant's prayer for amendment, it is submitted for the 5th Interested Party, that the Court of Appeal referred the matter for retrial and the court can only handle a similar matter.

20. On the prayer for reinstatement of the orders of status quo, the 5th Interested party submitted that in between the dismissal of the Applicant and this application, the 2nd Respondent has had two substantive Clerks, hence the court need to ask what the status quo currently is. He sought to rely on the holding in *Equity Bank Limited v West Link, Civil Application No. 78 of 2011* where the court held that an application to preserve cannot be given as an application to repossess or stay that which does not exist.

Determination

21. I have considered the application, the grounds and affidavit in support, the opposition filed by the 2nd Respondents and 5th Interested Party, and the oral submissions by the parties herein. The issue for determination is whether the Applicant/Petitioner has justified the grant of the orders sought.

A. Representation

22. The Applicant has challenged the representation of the 2nd Respondent by the **Firms of S. M. Onyango and Co. Advocates and Njogu Omwanza & Nyasimi Advocates**. The issue is the Notice of Appointment of Advocates filed by the Firm of **Njogu, Omwanza & Nyasimi Advocates**, when there are other Advocates on record and that the Firm of **S.M. Onyango** filed a Notice of Change of Advocates to take over the matter from the Firm of **Onsongo & Co. Advocates**, yet the Firm of Nyamweya had come on record in place of **Onsongo & Co. Advocates**.

23. Order 9 Rule 5 provides as follows in respect of change of Advocates:

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

24. Further, Order 9 Rule 7 states:

“Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.”

25. The Learned Counsel was of the view that the error on his part is curable under Article 159(2) (d) of the Constitution which requires the Court not to pay undue regard to technicalities.

26. On 22nd February, 2022 the **Firm of S.M.Onyango & Co. Advocates** filed a Notice of Change of Advocates on behalf of the 2nd respondent to take over the matter from the Firm of **Onsongo & Co. Advocates**. On similar date (22nd February, 2022) the Firm of **N.E. Mogusu & Associate Advocates** filed a Notice of Change of Advocates, to take over the matter on behalf of the 2nd Respondent from the Firm of **Onsongo & co. Advocates**, while yet again, on 8th March, 2022, **Njogu, Omwanza & Nyasimi Advocates** filed notice of Appointment for 2nd Respondent.

27. This court is concerned that the 2nd Respondent; a public entity, has three Law Firms on record as shown by the court record. This is nothing close to prudent and efficient utilization of public resources, not to mention the apparent intention to create confusion and derail the expeditious determination of this case.

28. The Firm of **Njogu, Omwanza & Nyasimi Advocates**, notice of appointment indicates that they have taken over the suit. It is not clear whether this means that they have taken over from the firms of S.M.Onyango and Mogusu & Associates Advocates or whether they act alongside the other Firms on record.

29. The issue of representation is critical to a party's right to be heard. It is however paramount that parties adhere to procedures on representation so as to ensure orderly conduct of litigation. In the case of **Lalji Bhimji Shangani Builders & Contractors –vs- City Council of Nairobi [2012] eKLR** the Court held as follows in regard to representation:

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

30. This said, I will not at this stage expunge the representation of the 2nd Respondent by the many law Firms now on record, instead, I order that the 2nd Respondent files within 7 days of this ruling, a proper notice of appointment of advocates, failure to which all the Firms on record shall stand expunged from the record of this court, and the 2nd Respondent deemed as acting in person and/or unrepresented.

Amendment of Petition

31. The Applicant/Petitioner has sought leave to amend his petition, premised on the fact that when he filed the petition, he had been suspended from his then position of Clerk of the County Assembly of Homabay. It is further argued that Justice Radido dismissed the Petitioner's petition based on the manner in which he was appointed to the office of Clerk of the said Assembly, which dismissal resulted in his dismissal from the service of the 2nd Respondent. It is his position that the dismissal from service, has necessitated the amendment of his petition in order for it to encompass the new perspective.

32. Order 8 Rule 3 of the Civil Procedure Rule gives the court unfettered discretion to allow amendment in the following words:

“(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”

Order 8 Rule 3(5) further states:

“(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

33. The foregoing provisions are clear on the court's power to allow parties leave to amend pleadings, even where the amendment is to change the cause of action. The general rule on the amendment of pleadings, is that amendments sought before the hearing should be freely allowed if they can be made without injustice to the other side, or where the injustice can be compensated by way of damages. (**See Eastern Bakery v Castelino (1958) EA 461**).

34. This position was affirmed by Bramwell, LJ in *Tildesley v Harper (1878)*, 10 Ch.D. at p.296, in the following words:

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise.”

35. In a further case of *James Ochieng’Oduol T/A Ochieng Oduol & Co. Advocates v Richard Kuloba (2008) eKLR* Justice Bosire held that it is quite clear from decided cases that a trial court has power to allow amendments of a plaint.

36. The Applicant correctly submitted that due to the effects of the dismissal of his petition and his subsequent dismissal from service, the nature of his case and the prayers therein, have since changed and the new perspective can only be brought through amendment of the petition. The 2nd Respondent and 5th Interested Party’s argument that the Court of Appeal’s directive was for the suit to be heard as is, does not hold. It will be an academic exercise for the court to go on to hear and determine a suit that has been overtaken by events for no fault of the Petitioner. In *Budding v. Murdoch (1875) 1 Ch.D at p.42*, it was held that the court will not refuse to allow an amendment simply because it introduces a new issue or case.

37. In the circumstance, the interest of justice demands that the Applicant is allowed leave to amend his petition, to enable the court to determine the true substantive merits of the petition.

Reinstatement of Status quo orders.

38. The Orders that the Applicant seeks to reinstate, were status quo orders. The order as submitted by the 2nd Respondent were spent upon delivery of the judgment in the petition. The subsisting status quo is completely different from the status quo in the orders sought to be reinstated.

39. The Applicant did not obtain stay against the judgment of Justice Radido, and for that singular reason, the status quo orders were spent and there is nothing for the court to reinstate.

Expeditious determination of the Petition

40. The Applicant/Petitioner’s final prayer, is that this court orders that the petition herein be heard expeditiously for reason that the position the Applicant seeks to regain, is hinged on the life of the Assembly. Both parties indicated their desire for the expeditious conclusion of his matter.

41. To aid the expeditious determination of the petition, the court hereby orders, that upon amendment of the petition herein within 14 days of this ruling by the Petitioner, and 14 days to file amended replies by the Respondents and the Interested Parties, the petition shall be set down for hearing on priority basis. I further order that no further application(s) shall be filed in this suit in the interest of a faster conclusion of the petition.

42. In conclusion, the court makes orders as follows:

- i. The prayer to expunge the representatives of the 2nd Respondent from the record is declined.
- ii. The Applicant is allowed leave to amend his petition within 14 days of this ruling and the Respondents and the Interested parties will have corresponding leave to file their amended replies to the petition within 14 days of service of the amended petition.
- iii. The prayer to reinstate the orders of 2/10/2020 is declined.
- iv. The costs of the application shall abide the petition.

43. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 4TH DAY OF APRIL, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Makokha Present for the Petitioner/Applicant

Ms.Oduor h/b for Mr. Otieno for the 1st Respondent

Mr. Onderi Present for the 2nd Respondent

Mr. Mwamu Present for the 1st-4th Interested Parties

Mr. Obiero present for the 5th Interested Party

Ms. Christine Omollo-C/A