



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.93 OF 2018

HUMPHREY NYAGA THOMAS & 25 OTHERS..... PETITIONERS

VERSUS

KENYATTA UNIVERSITY RESPONDENT

RULING

The respondent, Kenyatta University filed application and Notice of Motion dated 12th November, 2020 and seeking for orders that the amended petition dated 11th August, 2020 be struck out and the same be expunged from the record.

The application is supported by the affidavit of Grishon Ng'ang'a Thuo and on the grounds that the petition is scheduled for hearing on 16th November, 2020 and there is a danger of the respondent being condemned unheard as the petitioners have drastically amended the petition without leave of court and without giving the respondent a chance to comment on whether leave should be granted. The amended petition was filed on 11th August, 2020 but served on 5th November, 2020 just 11 days too close before hearing date which had been taken ex parte without inviting the respondent.

In his affidavit Mr Thuo avers that he is advocate for the respondent and in the conduct of this matter. The amendment of the petition without leave and the taking of the hearing date ex parte amounts to ambush and unless the application is allowed and the Amended Petition Is struck out and expunged from the record the respondent shall suffer prejudice and defeat the course of justice.

The respondent filed a list of authorities in support of the application.

In reply, the petitioners filed the Replying affidavit of Humphrey Nyaga Thomas and who avers that he is the 1st petitioner and a party to a suit can amend it any time before hearing and the petitioners are within such right to amend the petition herein.

The amended petition ventilates the real issues to be tried by the court between the parties.

The respondent shall not be prejudiced by the amendments since the hearing scheduled for 16th November, 2020 was adjourned following the instant application. There is an opportunity to respond to the amended petition within a reasonable time for the court to be able to hear the parties on the merits.

The parties made oral submissions.

The respondent as the applicant submitted that under Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2016 (Mutunga Rules) a party must amend pleadings upon being granted leave and therefore the petitioners could not amend and file the petition without leave of the court. there are radical amendments introducing fresh claims of ksh.178 million shillings which is substantial and such has been done without obtaining leave.

The respondent also submitted that the respondent is entitle dot be heard in an application to amend pleadings and the court is obliged to hear both parties. The instant petition is amended with delay after being filed 2 years ago the petitioners waited until August, 2020 to amend the petition without leave and only served the respondent on 5th November, 2020 a period of 11 days before the scheduled hearing on 16th November, 2020.

The respondent relied on the case of **Base Titanium Limited versus County government of Mombasa & another [2016] eKLR** where the court declined and rejected amendment of pleadings.

The petitioners submitted that Rule 18 of Mutunga rules provides that a party *may* seek leave to amend pleadings meaning it is not mandatory and the right to amend in good time and the leave to be granted is discretionary.

The petitioners have sought to elaborate their claims and sum of Ksh.178 million shillings which relates to what they seek the court to grant. The respondent has time to reply to the amended petition as they were served 11 days before the hearing but have opted to scuttle the hearing by filing the instant application instead of replying to the Amended Petition.

The right to amend pleading should be granted and the court to give an early hearing date. The cited case of **Base Titanium Limited** related to filing of incomplete documents but the petitioners have amended the petition and the circumstances of both cases is different.

Determination

The petitioners filed the petition herein on 7th September, 2018 and also filed Amended petition on 11th August, 2020.

The respondent has challenged the filing of the Amended Petition on the grounds that such was done without the petitioners obtaining leave of court and hence denied them the right to be heard with regard to such application. That to allow such amendments is contrary to Rule 18 of the Mutunga Rules which requires a party to obtain leave of court to amend a petition. That the Amended petition should be struck out.

The general rule with regard to amendment of pleadings is outline din the old case of in **Eastern Bakery versus Castelino, (1958) E.A.** that;

It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.

However, with the Mutunga Rules, 2013 all constitution petitions filed with the court must adhere to the same. Rule 18 of the Mutunga Rules requires that;

Amendment of pleadings.

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

The court has discretion to allow or reject the amendment of pleadings with regard to a petition. This is to ensure substantive justice is secured and that by allowing the amendments made, the ends of justice are achieved.

The court in the case of **St. Patrick's Hill School Limited v Bank of Africa Kenya Limited [2018] eKLR** allowed amendment to the petition and outlined the guiding principles as follows;

... the court approved amendment to a plaint which raised new causes of action because they were not of a different character from or foreign to or inconsistent with the original cause of action but stemmed from the same transaction.

*... in the case of **Ochieng and Others v First National Bank of Chicago Civil Appeal Number 147 of 1991** the court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings. The same is as follows:*

a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;

b) the amendments should be timeously applied for;

c) power to amend can be exercised by the court at any stage of the proceedings;

d) 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;

e) 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 limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.

The above are reasonable measures to follow in addressing an application such as the one before court and seeking to strike out the Amended Petition.

Petitions filed before this court are to be addressed pursuant to Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and this Rule should read together with Rule 14(6) which provides as follows;

(6) *A party may amend pleadings before service or before the close 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.

Parties have a general right to amend pleadings filed with the court before service or before close of pleadings and after such period has closed, amendments to pleadings can only be made with the leave of the court.

Such a rule and provision is important to follow to allow each party a fair and reasonable chance to reply to the filed amendments made before or close of pleadings and where such period has closed upon application for leave to amend, the other party has a chance and opportunity to reply thereof.

In this case, pleadings closed and parties were allocated a hearing date for the main petition on 16th November, 2020. The respondent was served with the Hearing Notice together with the Amended Petition.

The Amended Petition is filed contrary to Rule 18 of the Mutunga Rules, Rule 7 and 14 of the Employment and Labour Relations Court (Procedure) Rules, 2016. Pleadings have since closed and no leave was obtained before filing the Amended Petition.

The omission is however not fatal. The Amended Petition was filed and served before the hearing date. The respondent had a fair chance to see the Amendments made and opted to file the instant application. The scheduled hearing date has since been overtaken by events and application dated 12th November, 2020.

In the interests of justice and to allow the court address the substantive issues and matters between the parties, the Amended Petition is herein admitted into the record and the respondent shall have fourteen (14) days right of reply and file an Amended Response to the Amended Petition. Such will not be prejudicial to any party as each shall have a fair chance to urge its case and enjoy the right to be heard.

Accordingly, the application dated 12th November, 2020 is allowed to the extent that the Amended Petition is admitted on the record; the respondent is given 14 days to file Amended Response to the Amended Petition; the respondent is awarded costs of the application.

DELIVERED AT NAIROBI THIS 10TH DAY OF DECEMBER, 2020.

M. MBARU

JUDGE