



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

PETITION NO. 16 OF 2017

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 27, 50, 56, 73, 75,

232, 258 AND 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

IN THE MATTER OF CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015

AND

IN THE MATTER OF DISCRIMINATION OF PERSONS LIVING WITH

DISABILITIES IN NOMINATION OF COUNTY CHIEF OFFICERS

QABALE DIBA BADAKE.....1ST PETITIONER

QALICHA DIBA BORU.....2ND PETITIONER

AMBARO ABDULLAH ALI.....3RD PETITIONER

VERSUS

THE PUBLIC SERVICE BOARD MARSABIT COUNTY.....1ST RESPONDENT

THE GOVERNOR MARSABIT COUNTY.....2ND RESPONDENT

THE COUNTY GOVERNMENT MARSABIT.....3RD RESPONDENT

THE COUNTY ASSEMBLY OF MARSABIT.....4TH RESPONDENT

NATIONAL GENDER & EQUALITY COMMISSION....INTERESTED PARTY

RULING

1. Before me is the 1st and 3rd Petitioners/Applicants' notice of motion application dated 27th May 2019 seeking leave to amend the Petition herein. The 1st and 3rd Petitioners have sought the amendment on grounds that there have been substantial developments affecting the

substratum of the Petition which necessitate the amendments sought and that as the Petition stands is hollow, naked and bereft of consequential and beneficial final orders and that the grant of the orders in the Petition as drawn are a miscarriage of justice. The 1st and 3rd Petitioners seek the amendment as the Petition was targeting the recruitment process which has now been concluded. The 1st and 3rd Petitioners assert that they were entitled on both merit and the disabilities they have to be appointed to the positions set aside for people with disabilities and were not. They thus urge the motion to amend so that they can articulate their case as the Petition. The 1st and 3rd Petitioners assert that the orders sought in the Petition are general and moot and pursuing them would be an exercise in futility as they would not help the Applicants/Petitioners in their cause for vindication of their rights even if they were granted by the court.

2. The proposed amendment is opposed by the Respondents who filed a replying affidavit sworn by Malicha Boru Wario the County Secretary. The gravamen of the affidavit is that the application by the Petitioners/Applicants is a vain attempt to seal the loopholes in the initial petition and the 1st and 3rd Petitioners/Applicants cannot be allowed to raise a different or fresh case disguised as an amendment to the petition. The deponent asserts that the in-depth analysis of the draft amended petition reveals that the amendments sought introduce a new petition and are prejudicial to the Respondents. The Respondents argue that to introduce the amendments would be to reopen a case that was already concluded and parties in the process of filing final submissions.

3. The parties filed submissions in support and opposition of the motion. The Petitioners/Applicants submitted that the petition was filed when the process of recruitment was at the vetting and approval stage and thus sought conservatory orders *inter alia* barring the 4th Respondent from vetting, approving and/or in any way allowing the nominees to chief officers' jobs from taking their respective positions in Marsabit County as nominated by the 2nd Respondent. However, the said notice of motion was overtaken by events as the nominees were vetted, approved and appointed before the conservatory orders sought in the motion could be issued. The Petitioners/Applicants submitted that what then was left was the original petition which targeted the recruitment process which process has since been completed. The Petitioners/Applicants submit that they were now alleging discrimination in the whole process being the nomination, vetting, approval and appointment of chief officers as they were discriminated against on grounds of their disabilities and other political considerations. They submit that under the provisions of Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (famously known as the Mutunga Rules) a party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the court. The Petitioners/Applicants submit that in line with Rules 2(3), 4, 8, and 18 of the Mutunga Rules provide the rubric for the realization of the Constitutional imperatives under Articles 50(1), 259, 10, 159(2) and the provisions of Order 8 of the Civil Procedure Rules. The Petitioners/Applicants rely on the case of **Institute for Social Accountability & Another v Parliament of Kenya & 3 Others [2014] eKLR** where the court held that 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.* The Petitioners/Applicants submit that without the amendments, the Court will be dealing with a petition that does not disclose the Petitioners/Applicants' real case. Further, it was asserted that the petition did not also capture the whole recruitment process of chief officers as it was filed when the process was at the vetting and approval stage and therefore did not deal with the ensuing appointment thereafter. In addition, the Petitioners/Applicants argue there are specific aspects of violation of rights to equality that have not been included which are necessary to enable the court make an informed determination. It was submitted that the amendments will therefore advance the ends of justice and principles espoused in Article 159 of the Constitution. The Petitioners/Applicants cited the case of **Central Kenya Limited v Trust Bank Ltd & 5 Others [2000] eKLR** where the court held *the overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.* The Petitioners/Applicants relying on the case of **Geysier International Assets Limited v Attorney General & 3 Others [2019] eKLR** submitted that *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....* The Petitioners/Applicants submit that it was manifestly clear that the changes in the substratum of the petition necessitated the amendment. The Petitioners/Applicants rely on the holding in **Mombasa Cement Limited v Speaker of the National Assembly & 2 Others [2016] eKLR** where Onguto J. held *Even though the time lost prior to the filing of a application for amendment is relevant, the guiding line ought really be the stage at which the proceedings stand at the time the application is filed and heard. This is so as to enable the court to consider whether the respondent may be unduly prejudiced. The mere fact of delay alone, unless the delay is inordinate, should not be the sole determinant. The nature of the intended amendment and whether it is necessary for purposes of determining all issues in controversy are some of the other factors to be taken into consideration.* The Petitioners/Respondents submit that the amendments sought are made in good faith and would not prejudice the Respondents in any way as they do not introduce a new cause of action.

4. The Respondents submit that the Petitioners/Applicants seek to amend the petition by introducing new contraventions alleged to have been committed and new reliefs thus attempting to reopen the case under the guise of amendment. The Respondents submit that the amendment sought should not be after an inordinate delay or one that would prejudice the other party. The Respondents submitted that relying on the case of **AAT Holdings Limited v Diamond Shield International Ltd [2014] eKLR**, the amendments sought should be denied as they were bound to occasion injustice to the Respondents. The cases of **Lawrence Owino Omondi v Kenneth Inea Muyaera [2017] eKLR** and **John Mulwa Kangaatu v Pan African Insurance Co. Ltd [2015] eKLR** were cited for the proposition that the Petitioners should not be allowed to reframe their case as the draft amended petition departs from the original pleadings and introduces totally new facts and reliefs not originally pleaded. It was submitted that the amendments are aimed at aiding a negligent pleader to defeat an accrued defence by the Respondents. The Respondents submitted that to allow an amendment at this late stage would occasion grave prejudice to them. The case of **Harrison C. Kariuki v Blue Shield Insurance Co. Ltd. [2006] eKLR** was cited for this argument. The Respondents submitted that there had been great delay as the actions the Petitioners seek to bar occurred over 17 months ago and the Petitioners did not challenge them when they took place. The Respondents thus urge the dismissal of the application for amendment.

5. In my view, an amendment should be liberally granted provided the same does not occur so late in the day as to cause prejudice to the opposite number. Attention is drawn to the salutary provisions of the Mutunga Rules which accord with this view. In the Petition filed, relief was sought to bar the vetting, approving and/or in any way allowing the nominees to chief officers' jobs from taking their respective positions in Marsabit County as nominated by the 2nd Respondent. This attempt was unsuccessful from all accounts and the

Petitioners/Applicants assert that there have been substantial developments affecting the substratum of the Petition which necessitate the amendments sought. They assert that as the Petition now stands, it is hollow, naked and bereft of consequential and beneficial final orders. The admission by the Petitioners/Applicants is that the Petition as drawn is of little benefit to them. I am compelled to agree with the Respondents that the amendments sought are an effort to litigate a new case and that the proposed amendments would whittle away the Respondents defence already on record and introduce a fresh cause of action. The Petitioners allege that their counsel previously on record was negligent or lacked diligence in seeking the reliefs they now propose. In answer the court holds that it is clear as a pike staff that courts can no longer afford to show the same indulgence towards negligent conduct of litigation as was perhaps possible in a more leisured age. In this case justice will be better served by allowing the consequences of the alleged negligence of the previous counsel fall on their own heads rather than by allowing the proposed amendment at this very late stage in the proceedings. From the foregoing, the application by the Petitioners/Applicants is entirely devoid of merit and is dismissed. Granted the history of the matter and the pains at which the Petitioners have had to go to seek redress, I will make no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 30th day of July 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar