**Muite v Attorney-General**

**Division:** High Court of Kenya at Nairobi

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**Date of judgment:** 25 February 2005

**Case Number:** 188/02

**Before:** Nyamu J

**Sourced by:** LawAfrica

*[1] Constitutional law – Enforcement of fundamental rights and freedoms – Amendment of pleadings –*

*Whether envisaged under the Constitution.*

**JUDGMENT**

**Nyamu J**: The application by way of chamber summons dated 19 November 2004 seeks to amend an originating motion in terms of the originating summons attached to the applicants affidavit. It is supported by the applicants’ affidavit sworn on 19 November 2004. The application, by way of an originating motion, was filed 6 months after the publication of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2000 Legal notice 133 of 2001. The applicant seeks to amend, in order to comply with the law. The amendment seeks to incorporate more orders but the grounds relied on are the same as in the originating motion which is being amended. Under rule 11 of the Rules made under section 84(6) of the Constitution application, under rule 5 and 9, must be by way of an originating summons. Rule 11 also provides that, in respect of such an application, Order XXXVI of the Civil Procedure Rules shall apply as far as is practicable. The application is opposed on the following grounds: 1. T he applicant has not properly invoked the jurisdiction of the court because originating motions are not contemplated by Order XXXVI, and the application to amend is based on Order XXXVI, rule 9 of the Civil Procedure Rules 2. T he applicant has failed to comply with rule 9 of the Rules made under section 84 rule 6 of the Constitution and a new prayer to the effect that the applicant will not get a fair trial and that the magistrate should be stopped from conducting the matter. Section 70 is being invoked and they have chosen to specify section 71 as well and these had not been included in the originating motion. And that the proposed amendments fatally affect the whole application and in a Constitutional application one has to be precise on the prayers and the provisions relied on. In the case of *Francis Karani Elijah v Chairman of Kanu*, High Court miscellaneous case number 235 of 2002, the court struck out an application brought contrary to the Rules and that this Court should adopt the case. The learned Counsel for the applicant Mr *Orengo*, in reply, pointed out to the court that in *Karani*’s case (*ibid*) the applicants had not applied to amend as in this case and waited until the faulty application came up for hearing when it was struck out. In this case, this Court’s jurisdiction to amend under Order XXXVI, rule 9 has been invoked well before the hearing and that a party can amend pleadings any time before judgment under Order VI, rule 3 and 4 of the Civil Procedure Rules and under Order VI, rule 3 which applies to civil proceedings generally, amendments apply equally to originating summons, a petition and an originating notice of motion as it has effect in relation to a plaint. In my ruling I have taken into consideration the arguments set out above. Under Order XXXVI, rule 9 the court has a wide discretion to make any amendments necessary to make the summons accord with existing facts and to raise the matters in issue between the parties. I think the court has been given an unfettered discretion to allow amendments which will assist it, or the parties, to ascertain the real issues between the parties. I have also taken into account the fact that the applicant has retained the same grounds as in the originating motion and also took the trouble of instituting a separate application to amend before taking directions. Under Order VI, rule 4 an originating motion can be amended as if it was a plaint. I see no big deal in substituting the word “summons” for “motion” and I find that no prejudice will be suffered, or is likely to be suffered, by the respondent since they have not filed any affidavit in reply to that, although they had filed general grounds of objection which they did not pursue before this application. In the case of *Labson Limited v Manula Haulers Ltd t/a Tausi Travellers* Civil case number 204 of 2003, this Court held that the right of access to the court under section 84 is a fundamental right. In the decision, I also held that the only bar to the right is failure to comply with the rules or contravention of the fundamental principles of law. Our Constitution does assume the existence of fundamental principles of law and I would like to repeat and reinforce the same principles here. In the special circumstances of this case where amendments are allowed by virtue of the incorporation of the Civil Procedure Rules by rule 11 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001, I cannot fairly prevent a party from amending in order to comply, the applicant having come in advance of the hearing of the application. In an even more recent decision of this Court, in *Booth Irrigation v Mombasa Water Products Ltd,* High Court miscellaneous case number 1052 of 2004, I held, *inter alia,* that our Constitution does assume the existence of fundamental principles of law and I went on to enumerate some of them and dismissed a preliminary point which ignored a possible breach of a fundamental principle of law. The principle behind the Rules, made under section 84(6) of the Constitution, is to achieve the ends of justice because justice is one of the objectives of our Constitution. Allowing an amendment which ordinarily would be allowed under the Civil Procedure Act and Rules in order to have the matter fully articulated and argued on merit, does in the opinion of this Court serve the ends of justice and therefore one of the objectives of the Constitution. I now wish to venture further and hold that our Constitution does, indeed, assume the existence of the law of evidence and the rules of Civil Procedure insofar as it is practicable in the circumstances of the cases which come before the court and in so far that the law and the rules are in conformity and do not violate any specific provisions of the Constitution. For the above reasons, the application to amend is allowed as prayed. Thrown away costs to be reserved this being a Constitutional matter. This Court shall endeavour to ensure that the court’s power to award costs does not make it difficult or restrain the right of access to the court by those who could have genuine Constitutional grievances to articulate. For the appellant:

*Mr Orengo*

For the respondent:

*Information not available*