



Republic v Chief Land Registrar & 2 others; Fadli Construction & Fadli Construction & Transport Company Limited (Exparte Applicant); Mbinda & another (Interested Parties) (Judicial Review Cause E116 of 2024) [2024] KEHC 14999 (KLR) (Judicial Review) (28 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14999 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW CAUSE E116 OF 2024
JM CHIGITI, J
NOVEMBER 28, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

THE CHIEF LAND REGISTRAR 1ST RESPONDENT

THE LAND REGISTRAR SC NJOROGE 2ND RESPONDENT

THE PS MINISTRY OF LANDS 3RD RESPONDENT

AND

**FADLI CONSTRUCTION & FADLI CONSTRUCTION & TRANSPORT
COMPANY LIMITED EXPARTE APPLICANT**

AND

ALIDAN MAITHYA MBINDA INTERESTED PARTY

JOHN MUTERU GATHUTHI KABIRU INTERESTED PARTY

RULING

Applicant’s case;

1. The Application that is before this court for determination is the Notice of Motion dated 24th July 2024. It is supported by an affidavit and supplementary sworn by Adan Gure Disowa on 24th July, 2024.
2. The applicant is seeking the following Orders:



- i. Leave be granted to the Ex-parte Applicant to amend the statement of facts dated 30th May 2024 and the substantive Notice of Motion dated 24th June 2024 and file further affidavits if need be.
 - ii. The annexed amended statement of facts and substantive notice of motion be deemed as duly filed.
 - iii. Any further order this Honourable Court deems fit to grant.
 - iv. Costs of this Application be provided.
3. It is the applicant's case that the amendments are meant to incorporate some grounds inadvertently left out but are not new as they are contained in its protest letter dated 30th April 2024 addressed to the Respondents.
 4. The Applicant argues that the Respondents will not suffer any prejudice if leave to amend is granted since they will have an opportunity to respond to any issues raised in the amended notice of motion.
 5. The Ex-parte filed a supplementary affidavit in response to the 1st and 2nd Interested party's grounds of opposition to its application sworn by Adan Gure Disowa on 28th August, 2024.
 6. It argues that the law has not defined the scope of the amendment and there is no specific ban to the introduction of new cause of action even at the hearing stage.
 7. It is its case that it is within 14 days granted by this court as time started running from the date leave to file the substantive motion was granted.
 8. The Ex parte applicant contends that it is not in dispute the amendments they seek leave for are not new issues.
 9. The Ex parte Applicant posits that it is the lawful and registered owner of all that piece of land known as LR. No. 11895/47 which was subdivided into Two (2) parcels being LR. 11895/3177 and LR 11895/3178.
 10. On 30th April 2024 they were summoned by the 2nd Respondent to appear before the Registrar and bring with them and produce its original title documents for no explained reasons.
 11. It is its case that the Summons did not contain a copy of the complaint letter initiated by the Interested parties to enable it adequately prepare for the hearing and respond to the allegations levelled against it and its indefeasible title and in defiance asked for more time.
 12. This resulted in the complaint by the Interested Parties herein being heard ex parte by the 2nd Respondent who rendered its ruling on 14 May 2024 recommending that the Interested parties are lawful and bona fide owners of the parcel LR.11895/47 IR 122720; the Register containing documents relating to Fadli Construction and Transport Limited, the ex-parte Applicant herein was irregular and will be expunged forthwith from the records under Section 79(2) of the [Land Registration Act](#); and that the registrar to recall original title documents LR 11895/3177 IR 248695 and 11895/3177 IR.248695 for cancellation.
 13. The Ex parte applicant further argues that on 14th May 2024, it was directed to appear before Land Registrar C. K. Muchiri for purposes of surrounding its original titles for cancellation on 10th June 2024.
 14. It is the Ex-Parte's case that having being dissatisfied with the ruling dated 14th May, 2024 he proceeded to seek leave to file judicial review proceedings against the Respondents before this Honorable court.



15. The Ex-Parte Applicant contends that this court has jurisdiction to allow the amendment and cites the case of Republic v Commissioner of Lands & another Interested Party Masai Villas Limited Ex-Parte Jimmy Mutinda [2013] eKLR, Justice W.K. Korir where the court held as follows:

“The starting point would be to determine whether this Court has jurisdiction to allow an amendment of the substantive notice of motion. In the case of Ex-Parte Murangi S Kimenyi, S.G. Nyamu, J (as he then was) observed that:

“It is also significant to note that the scope or ambit of the amendment have not been defined nor is there a specific ban to the introduction of new cause of action, even at the hearing stage.”

It is also significant to note that the wording of O. 53 Rule 4(2) clearly stipulates that an amendment to the statement may be sought on the hearing of the motion. The above takes care of the principal objection as raised above. As regards the amendment of the Notice of Motion I hold that the court has inherent powers to allow it so that the purpose of the proposed amendment in the statement is not defeated.”

Rawal, J (as she then was) expressed a similar opinion in the case of RESLEY which was cited by the Applicant's counsel.

Order 53 Rule 4(2) Civil Procedure Rules, 2010 provides that:“4.(2)The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.

A plain reading of the Section reveals that only a statement may be amended and leave may be granted to file further affidavits in response to new matters arising out of the affidavit of any other party to the application.

What does a statement contain” It contains the name and description of the applicant, the relief sought and the grounds on which it is sought? If the rule allows for the amendment of the statement, then it means that the relief sought can be amended. If the relief sought can be amended, then it goes without saying that the substantive notice of motion which contains the prayers can be amended. It would serve no purpose for a statement to be amended without granting leave for the amendment of the substantive notice of motion

It should be noted that the application for leave is accompanied by a statement and affidavits verifying the facts relied upon. The leave is granted on the basis of the contents of the statement and affidavits. When a Court allows a statement to be amended, it follows that it has granted leave for commencement of judicial review proceedings in the terms of the amended statement. As such, if a relief sought in the statutory statement is amended then the substantive notice of motion should be amended to take care of the amended relief in the statement. Once the Court grants an applicant leave to amend a statement and the substantive notice of motion, the court has, by that act, granted leave for an order of mandamus, prohibition or certiorari in the terms of the amended pleadings. I therefore agree with J.G. Nyamu, J and Rawal, J that this Court has jurisdiction to allow an application for amendment of the substantive notice of motion



16. It also makes reliance on the case of Republic v Betting Control and Licensing Board & 3 others; Ex parte: Standard Global East Africa Limited [2021] eKLR, Justice P. Nyamweya while allowing amendment of Substantive Notice of Motion stated as follows;

“ 3. I have considered the application dated 4th May 2021, and note that provisions of Order 53 Rule 4(2) Civil Procedure Rules state as follows as regards to amendments of pleadings in judicial review proceedings:”

(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.”

4 While a plain reading of the rule indicates that only a statement may be amended. if a relief sought in the statutory statement is amended, then the substantive notice of motion will also require to be amended as well. This Court therefore has power and discretion to allow an amendment of a substantive Notice of Motion in judicial review proceedings in light of the foregoing provisions of the law.

6. In addition, in light of the fact that no further steps have been taken by the ex parte Applicant in this matter, this Court will consider the prayer for amendment of the substantive Notice of Motion ex parte. This Court is in this regard guided by the overriding objectives in sections 1A and 1B of the Civil Procedure Act, including the just, expeditious and efficient disposal of disputes, and facilitated by the inherent powers in section 3A of the Act to make such orders as may be necessary for the ends of justice.

7. Lastly, no prejudice will be caused to the Respondents by the requested amendment, as they will be accorded opportunity to respond to the new pleadings filed by the ex parte Applicant.”

17. It is the Ex-parte Applicant’s case that it is in the interest of substantive justice and within the jurisdiction of this court that the application for amendment of statement and the substantive notice of motion is allowed.

18. It is also its case that failure to include the details in the protest letter was mistake of counsel who drafted the documents and the same should not be visited upon it and doing so would be against the interests of justice. It cites the case of Tree Shade Motor Ltd -v-D.T. Dobie Co. Ltd CA 38 of 1998 and Mania-v-Muriuki (1984) KLR 407 where the courts held that the discretion of the court should be exercised to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error. The general principle is that an applicant should not suffer due to a mistake of its Counsel. This was the position in Lee G. Muthoga-v-Habib Zurich Finance (K) Ltd & Another, Civil Application No. Nair 236 of 2009 where it was held that:

“it is widely accepted principle of law that a litigant should not suffer because of his Advocate’s oversight”



19. The Ex parte applicant contends that it is not in dispute that vide order dated 6th June 2024, the Ex Parte Applicant was granted 14 days leave to file Substantive Notice of Motion and the same was filed on 24th June 2024; six days past the time stipulated by the court.
20. It is also not in dispute that Order 53 Rule 3 provides that once leave is granted, the substantive Notice of Motion commencing judicial review proceedings must be filed within 21 days. The Substantive Notice of Motion was filed within 21 days from the date leave was granted.
21. It makes reliance on the case of Republic v Commissioner of Value Added Tax Ex-Parte Iron Art Limited [2012] eKLR; Justice C.W. Githua where the court held as follows;

“In this case, it is common ground that the Applicant was granted leave by the court on 20th January 2012 to file and serve the substantive Notice of Motion within 10days. Both the Applicant and the Respondent are in agreement that the Applicant filed the Notice of Motion late by one day.

Though it was within the court's power to limit the period of leave granted to ten (10) days, the law under Order 53 Rule 3 provides that once leave is granted the substantive Notice of Motion commencing judicial review proceedings must be filed within 21 days.

It therefore follows that though the Applicant failed to comply with the time limit fixed by the court, it filed its Notice of Motion within the time allowed by the law. In the circumstances, I think that if the application was filed without delay and good reasons were given for failure to file the substantive motion within the period of time limited by the court, the court would be entitled to exercise its discretion to enlarge the time given for filing of the substantive motion if the interests of justice require it to do so.

The application was made without inordinate delay and there is no evidence to suggest that any prejudice will be occasioned to the Respondent if the prayer for amendment of the Notice of Motion is allowed.

In the new constitutional dispensation, courts are obligated to administer substantive justice and not to tie its hands with procedural technicalities. This is what I have endeavoured to do in this case.”

22. Also, in the case of Republic v Commissioner of Lands & another Interested Party Masai Villas Limited Ex-Parte Jimmy Mutinda [2013] eKLR, Justice W.K. Korir held;

“The remaining question is whether the Applicant delayed in bringing this application. The Applicant filed this application on 14th November, 2012 which was about three months from the date of filling of the substantive notice of motion. This cannot be said to be undue delay. Justice should be done without undue regard to small procedural lapses.”

23. It is the Ex parte applicant's case that raising the issue of filing the substantive motion late is an afterthought by the Interested Parties as they responded to the said Motion vide their Replying Affidavit dated 16th July 2024 and is only being raised at this late stage to mislead the court.
24. The Applicant urges court should concentrate on substantive justice and allow the application as prayed.

The interested parties case;

They oppose the application



25. The 1st and 2nd Interested parties in rebuttal of the instant application filed grounds of opposition arguing the following grounds:
- i. That the substantive Notice of Motion application that the applicant wishes to amend was filed out of time. The orders issued by the court on the 4th June, 2024, required that the application be filed and served within 14 days. The Substantive Notice of motion was filed on 24th June, 2024, marking a delay of twenty days against the directions issued by the Honorable court on the 4th June, 2024.
 - ii. That the application by the Applicant is an abuse of the court process. This, because the amendments the Applicant is seeking to introduce in the substantive Notice of motion application and in the statement of facts, are not new facts arising but are facts that were clearly within the Applicant's knowledge prior to filing of the substantive application on the 24th June, 2024.
 - iii. That the amendments that the Applicant is seeking to introduce in their Statement of facts are additional facts, which facts can only be introduced by filing further affidavits as opposed to amending the statement of facts as per the requirements of Order 53 rule 4(2) of the Civil Procedure Rules.
 - iv. That Order 53 rule 4(2) of the Civil Procedure Rules 2010, that the Applicant relies on in their application seeking leave to amend only lays the foundation for amendment of the Statement of facts and filing of further affidavits as opposed to amending the substantive Notice of Motion application.
 1. It is their case that the orders of the court issued on 4th June, 2024 required the Ex parte Applicant to file their substantive motion within 14 days.
 2. The Ex parte Applicant filed their application on the 24th June, 2024. This is a clear delay of six (6) days against the orders of the court.
28. In the case of Republic v District Education Board Sub County Health Officer, Nyeri South District Ex Parte Bridge International Academies Limited (2016) the learned Judge Ngaah Jairus in declining an application filed outside the courts timelines rendered himself as follows;
- “While granting leave to the applicant, this court prescribed the time within which the substantive motion for judicial review orders should be filed. The motion was filed 14 days outside the period granted by the court. If the court had not prescribed the time within which to file the motion, the law itself provides that the motion must be filed within 21 days of the date of the order granting leave.
- ...Both the court order and the rules are couched in mandatory terms implying that this court does not even have the discretion to entertain the motion filed in breach of its order and the prescribed rules.”
29. It is their case that there is no competent notice of motion in this matter and proceed to dismiss this case. On another front, it is their case that should this Court hold that there is a competent notice of motion in place the law does not provide for or envisage an amendment of the substantive motion.



30. They invoke Order 53 rule 4(2) Civil Procedure Rules 2010 which provides as follows;

“The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matters arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavit”

31. Reliance is placed in the Court of Appeal case *Republic Vs Commission on Administrative Justice and Fazul Mohamed Civil Appeal No. 309 of 2017* the learned Judges of the Court of Appeal with approval of the holding of the Superior Court Judge Odunga J (as he was then) held that a substantive motion in Judicial review cannot be amended, they stated as follows;

“Secondly, we are in agreement with the learned judge that the Civil Procedure Rules do not provide for amendment of the motion in Judicial Review which motion is preceded by an application for leave.

The judge's comments on the provisions of order 53 rule 4(2) of the CPR were as follows:

“It is clear that the said provision expressly allows the amendment of the statement and the filing of further affidavits but only where they deal with new matters arising out of affidavits of any other part to the application. It is important to note that the provision deals with proceedings "on the hearing of the motion" which is a clear indication that the drafters of the rules were clear in their mind that at that time, the motion is already part of the record. Yet they did not deem it fit to expressly provide for the amendment of the motion as well. In my view, if it was intended that the motion could be amended at that state, nothing would have been easier than for the rules to provide for the same. To my mind, the omission to expressly provide for the amendment of the motion was intentional and was intended to avoid the introduction of other reliefs at the stage of the hearing of the motion for which leave was neither sought nor granted.”

“We agree. The procedure for Judicial Review being a two-pronged approach, it is unfathomable that the motion can be amended to reflect what was not contained in the application seeking leave and the supporting statement at the time leave was sought. If this were to be allowed, the application seeking leave to file Judicial Review proceedings, and the amended Judicial Review motion would be incongruous as the latter will not be based on the leave granted. The upshot of the above is that we find that the appeal has no merit. It is hereby dismissed with costs”

32. On the question whether additional facts can be introduced in Judicial review proceedings through amending the Statement it is the Interested Parties' position that Order 53 Rule 4 (2) only allows for amendment of the statement on the matters set out to be included therein which are name and address of the Ex parte Applicant, the relief being sought, and the grounds relied upon.

33. The law also allows for the filing of additional affidavits to deal with new matters arising from the replies filed by the Respondents or interested parties.



34. Reliance is placed in the case of *Jacqueline Resly vs City Council of Nairobi Misc Civil application 1654 of 2004* where it was held that;

“In the proposed amendments in the draft amended statement, the Applicant wants to introduce further facts in part B of the statement. The said part B already contained matters or statements of facts. The Applicant wants to present additional facts through the amendment. A careful reading (sic) of Order 53 Rule 1 (2) will show that a statement of facts is not contemplated to be contained in a statement.

The rule describes what a statement ought to contain and these are: -Name and description of the Applicant, the relief sought and the grounds on which the reliefs are sought (Emphasis ours). The said rule provides for affidavits verifying the facts relied on. This is the ratio decidendi of the Owaki case which is binding on this court. We therefore do hereby hold that the facts in a judicial review application must and can only be contained in the verifying affidavits or other affidavits allowed by the court. There is no provision permitting the facts to be contained in the statement. As a result, the proposed amendments in respect of part B of the statement are hereby rejected and disallowed for the said reason.”

35. It is, therefore, clear that the law does not provide for, explicitly or implicitly, for the amendment of the statement to introduce additional facts as the statement is not expected to contain facts in the first place. The law only provides for amendment of the statement on the matters contained therein but reserves additional facts in response to matters raised by the Respondents to additional affidavits. The application, therefore, is not merited and ought to be dismissed with costs to the interested parties.

Analysis and Determination:

Issues for determination;

1. On the issue of the late filing of the Notice of Motion.
 2. On the issue of the amendment of the statement and the Notice of Motion;
 3. On the issue of the late filing of the Notice of Motion.
36. In determining this issue, this court is guided by the case of *Republic v Commissioner of Value Added Tax Ex-Parte Iron Art Limited* [2012] eKLR; where Justice C.W. Githua held as follows;

“In this case, it is common ground that the Applicant was granted leave by the court on 20th January 2012 to file and serve the substantive Notice of Motion within 10 days. Both the Applicant and the Respondent are in agreement that the Applicant filed the Notice of Motion late by one day.

Though it was within the court's power to limit the period of leave granted to ten (10) days, the law under Order 53 Rule 3 provides that once leave is granted the substantive Notice of Motion commencing judicial review proceedings must be filed within 21 days.

It therefore follows that though the Applicant failed to comply with the time limit fixed by the court, it filed its Notice of Motion within the time allowed by the law. In the circumstances, I think that if the application was filed without delay and good reasons were given for failure to file the substantive motion within the period of time limited by the court, the court would be entitled to exercise its discretion to enlarge the time given for filing of the substantive motion if the interests of justice require it to do so.



The application was made without inordinate delay and there is no evidence to suggest that any prejudice will be occasioned to the Respondent if the prayer for amendment of the Notice of Motion is allowed.

In the new constitutional dispensation, courts are obligated to administer substantive justice and not to tie its hands with procedural technicalities. This is what I have endeavoured to do in this case.”

37. It is this court’s finding that the late filing is not inordinate and the respondent and the interested parties will not suffer any prejudice if the application is admitted late and I so hold.

On the issue of the amendment of the statement and the Notice of Motion;

38. In the case of *Jacqueline Resly Vs City Council of Nairobi Misc Civil application 1654 of 2004* the Learned Judges A. Visram and M.K Ibrahim rendered themselves as follows in regard to additional facts being introduced via amendment in a Statement;

“In the proposed amendments in the draft amended statement, the Applicant wants to introduce further facts in part B of the statement. The said part B already contained matters or statements of facts. The Applicant wants to present additional facts through the amendment. A careful reading (sic) of Order 53 Rule 1 (2) will show that a statement of facts is not contemplated to be contained in a statement.

The rule describes what a statement ought to contain and these are: -Name and description of the Applicant, the relief sought and the grounds on which the reliefs are sought (Emphasis ours). The said rule provides for affidavits verifying the facts relied on. This is the ratio decidendi of the Owaki case which is binding on this court. We therefore do hereby hold that the facts in a judicial review application must and can only be contained in the verifying affidavits or other affidavits allowed by the court. There is no provision permitting the facts to be contained in the statement. As a result, the proposed amendments in respect of part B of the statement are hereby rejected and disallowed for the said reason.”

39. This court is bound by the court of appeals’ finding to the effect that the statement of facts cannot be amended as sought.
40. The Court is satisfied with the reason that the applicant has advanced in arguing its application.
41. The interested parties and the respondent have not demonstrated that they suffer prejudice if the application is allowed to the extent as will reflect in the orders of this court.
42. The application was made without inordinate delay and there is no evidence to show that any prejudice will be occasioned to the Respondent if the prayer for amendment of the Notice of Motion is allowed.
43. The applicant is however, at liberty to file a further affidavit if need be so as to bring out the facts that it intended to introduce through amendment of the statement of facts.
44. From Bullen and Leake & Jacob’s Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others *vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991* as follows: -

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that 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 Limitation Acts.”

45. The legal parameters governing the amendment of pleadings from the above cited decisions can be summed up as follows; that the amendment should not introduce new or inconsistent cause of actions or issues; the amendment should be made timeously; it should not affect any vested interest or accrued legal right and it should not prejudice or cause injustice to the other party.
46. The amendment of the Notice of Motion is in the view of the court going to enable the applicant have an anchor upon which the reliefs it is seeking rest.
47. The court is always under a duty to ensure that the fair hearing is promoted and that cases are heard and determined on merit. Allowing the amendment to the Notice of Motion will accord with access to justice as a result of which the same is allowed.
48. In any event, the respondent and the interested parties have an opportunity to file responses to the amended notice of motion if they so wish.
49. This court has power under its inherent jurisdiction to do justice to the parties before it to make orders that are fair and just depending on the circumstances of the case provided that no prejudice is caused to the opposing party.

Order;

1. The Application is allowed in the following terms:
2. Leave is hereby granted to the Exparte Applicant to file and serve an amended Notice of Motion and a supplementary Affidavit within 14 days.
3. The respondent and the interested parties shall file and serve their respective supplementary affidavits within 14 days if need be.
4. The ex parte applicant shall file its submissions within 14 days thereafter.
5. The Respondents and the interested parties shall file and serve their respective submissions within 14 days thereafter.
6. The application to amend the statement of facts is disallowed.
7. The matter shall be mentioned on to report compliance and for directions on 13.2.25.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF NOVEMBER, 2024.

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J. CHIGITI (SC)

JUDGE

