



Republic v Principal Secretary Ministry of Transport, Infrastructure, Housing & Urban Development & another; Matheka & 2 others (Exparte); Soweto East A Housing Cooperative Society Limited (Interested Party) (Judicial Review Miscellaneous Application E025 of 2021) [2023] KEHC 262 (KLR) (Judicial Review) (26 January 2023) (Ruling)

Neutral citation: [2023] KEHC 262 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E025 OF 2021
AK NDUNG’U, J
JANUARY 26, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**PRINCIPAL SECRETARY MINISTRY OF TRANSPORT, INFRASTRUCTURE,
HOUSING & URBAN DEVELOPMENT 1ST RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

AND

SAMMY MATHEKA EXPARTE

BENSON IRUNGU EXPARTE

THERESIAH WAMBUI EXPARTE

AND

**SOWETO EAST A HOUSING COOPERATIVE SOCIETY
LIMITED INTERESTED PARTY**

RULING

1. The applicants have moved this court vide an application dated June 30, 2022 for orders that:
 1. That the ex parte applicants be granted leave to amend their Notice of Motion dated March 7, 2022 as set out in the Draft Amended Notice of Motion herein annexed.



2. That the Amended Notice of Motion be deemed as duly filed and served.
 3. That the costs of this application be provided for.
2. The application is supported by the grounds on its face and a supporting affidavit sworn by Sammy Matheka one of the ex parte applicants on June 30, 2022.
 3. The applicants' case is that vide a Chamber Summons application dated February 10, 2021 the applicants sought leave to obtain orders of *Mandamus*, *Certiorari* and Prohibition and that in its Ruling the court allowed the application in terms of prayer 2,3, and 5.
 4. Prayer 2 allowed leave to seek an order of mandamus to compel the 1st and 2nd respondents to produce the list of successful applicants and minutes relating to the allocation of market stalls; prayer 3 allowed leave to apply for an order of certiorari to quash the 1st respondent's list of successful applicants while prayer 5 allowed leave for an order of Mandamus to compel the 1st and 2nd respondents to include the applicants in the list of successful applicants.
 5. The substantive notice of motion application dated March 7, 2022 is said to have inadvertently left out prayers 2 and 5. It is the Applicants' case that the proposed amendments do not seek what was not granted at the leave stage.
 6. In response the Interested Party filed Grounds of Opposition dated August 22, 2022 raising four grounds of opposition as follows;
 1. The application for leave to amend the motion dated March 7, 2022 is incompetent for failing to exhibit the proposed Amended Notice of Motion showing the proposed amendments.
 2. The document attached to the supporting affidavit of Sammy Matheka sworn on June 30, 2022 as Annexure "SM2" is actually the Chamber Summons for leave dated February 10, 2021 which is already spent.
 3. There is nothing before the court to show the proposed amendments and the application cannot be granted in vacuum.
 4. In so far as the proposed amendment seeks to introduce new prayers, the same is out of time and cannot be granted."
 7. The application was canvassed by way of written submissions and only the Ex parte applicant and Interested Party filed submissions to the motion dated June 30, 2022.
 8. Having considered the pleadings as well as the submissions and the arguments advanced by the parties herein, it is my view that the issue for determination is whether the order for amendment sought is merited.
 9. In their submissions the applicants rely on Order 8 of the [Civil Procedure Rules, 2010](#) which allows for the amendment of pleadings without leave of the court once at any time before the pleadings are closed, with leave of the court and finally, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.
 10. The case of [St. Patrick's Hill School Limited v Bank of Africa Kenya Limited](#) [2018] eKLR is cited where the court held that the courts will not permit an amendment that is inconsistent with the original pleading and entirely alters the nature of the Defence or Plaint. The case of [Peter Bogonko Onchonga v](#)



National Bank of Kenya Limited & another [2021] eKLR is also cited on the principles under which courts may grant leave to amend pleadings.

11. The applicants reiterate that the amendments are intended to determine the true substantive merits of the case and also to enable the court determine the real question or issues raised in the proceedings. Further that the amendments sought will not cause any injustice to the respondents. The application is also said to have been timeously filed within the 21-day period.
12. The interested party on the other hand submits that the applicants in the supporting affidavit sworn by Sammy Matheka attach annexure “SM2” which is stated to be “a copy of the Amended Notice of Motion dated May 26, 2022”, yet what is annexed to the supporting affidavit is actually the Chamber Summons for leave dated February 10, 2021, which is spent.
13. Further that the court cannot grant leave to amend without the proposed amendments being shown to court and the parties to the suit. It is submitted that there must be a basis upon which this court can be asked to grant leave to amend and that no such basis has been laid out. Further that, the applicants’ failure to include any prayers for Mandamus in the motion dated March 7, 2022 meant that the applicants had abandoned those prayers.
14. The applicants are accused of not seeking an enlargement or extension of time within which to lodge the prayer for the above remedies but are instead praying for leave to amend.
15. The court has had due regard to the applicants’ motion seeking for leave to amend the substantive motion and the supporting affidavit together with the annexures therein and it notes that, although the applicants have erroneously attached the Chamber Summons application to the affidavit, the same has not been marked as “SM 2”. According to the record before this court there are two annexures marked “SM 1” and “SM 2” where “SM1” is this court’s Ruling dated February 17, 2022 while “SM 2” is the Amended Notice of Motion.
16. The Court of Appeal has on several occasions had the opportunity to address what principles a Court ought to consider before granting leave to a party to amend any pleading. The court in the case of *WAB Hotels Ltd (In Receivership) & another v Industrial Development Bank Ltd* [2020] eKLR held as follows;
 20. This appeal turns on the issue whether the learned Judge exercised his discretion judiciously when he dismissed the appellants’ application to further amend their amended plead.

Halsbury’s Laws of England, 4th Edition (re-issue) Vol. 36 (1) at Paragraph 76 lays down the purpose of amendments as follows:

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion.”

- 21. Order 8 rule 1 (1) of the *Civil Procedure Rules* stipulates that:

“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 5 provides that:

“An amendment shall be allowed under sub rule (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.”

22. Further, in *Abdul Karim Khan v Mohamed Rosban* (1965) EA.289 (C.A), the court laid down the principle that the courts will not permit an amendment that is inconsistent with the original pleading and entirely alters the nature of the defence or plaint.”
17. The court at paragraph 23 states thus;
23. A wider footage on the same issue was given in *Ochieng & others v First National Bank of Chicago*, Civil Appeal Number 147 of 1991 where this court clearly set out the principles under which courts may grant leave to amend the pleadings 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.”
18. The applicants before this court seek to amend the substantive motion dated March 7, 2022 to include prayers 2 and 5 which according to them were inadvertently left out. The Notice of motion seeking amendment was filed timeously and based on the orders granting leave, such an amendment will enable the determination of the true substantive merits of the case. There is no introduction of a new cause of action and neither is there prejudice to be suffered by the respondents since the applicant will only be exercising leave already granted by the court.
19. I am satisfied that the applicants have made out a case for the grant of the Orders sought and I therefore make the following orders;
- i. The ex parte applicants are granted leave to amend their Notice of Motion application dated March 7, 2022 as set out in the Draft Amended Notice of Motion.
 - ii. The Amended Notice of Motion application be deemed as duly filed and served.
 - iii. The costs of the application will be in the main suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY 2023

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A. K. NDUNG’U
JUDGE

