



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**JUDICIAL REVIEW NO. 16 OF 2012 “A”**

**REPUBLIC.....APPLICANT**

**VERSUS**

**MANAGING DIRECTOR K.P.A.....RESPONDENT**

**EX PARTE: MICHAEL WAWIRE**

**RULING**

**The Application**

1. By the Notice of Motion application dated 19<sup>th</sup> October, 2016 the Applicant/Respondent seeks the leave of the court to amend its Notice of Motion application dated 20<sup>th</sup> July, 2016 in the terms of the Amended Notice of Motion dated the 3<sup>rd</sup> October, 2016 and filed herein on 4<sup>th</sup> October, 2016, and that the Respondent’s aforesaid Notice of Motion dated 3<sup>rd</sup> October, 2016 and filed herein on 4<sup>th</sup> October, 2016 be deemed to have been filed with leave of the court.

2. The application is premised on the grounds that it is necessary in the interest of justice, to amend the Notice of Motion dated 20<sup>th</sup> July, 2016 in order to have the matter properly and effectively determined by this court, and that no prejudice will be caused to the ex-parte Applicant should the amendment be allowed. The application is supported by affidavit of Stephen Kyandih sworn on 19<sup>th</sup> October, 2016. Mr. Kyandih depones that he is an employee of the Respondent herein and a Senior Legal Officer in the Litigation and Disputes Department and that he is duly authorized by the Respondent’s Board of Directors, and that he is well aware of these proceedings.

3. In support of the application Mr. Kyandih depones that it is necessary to set the record straight and that there is a clear error apparent on the face of the record in that the decree herein was given for an amount of Kshs. 1,374,734.30 and not for Kshs. 4,952,082.40 for which the ex-parte Applicant seeks to execute. Mr. Kyandih depones that in exercising its jurisdiction under the prerogative orders or regime by way of judicial review, the court can only intend to compel by way of an order for mandamus the compliance and discharge of obligations pursuant to the decree and nothing more. To hold otherwise would be to condone an illegality and the attempt by the ex-parte Applicant to unfairly and unjustly enrich himself.

**The Response**

4. The motion is opposed by the ex-parte Applicant vide Grounds of Opposition dated and filed herein on 13<sup>th</sup> March, 2017. The Respondent’s case is that the application is an abuse of the process of the court

and is intended to frustrate and delay the execution of the decree of the court issued on 26<sup>th</sup> July, 2016; and that the court has no jurisdiction to grant the prayers sought.

### **Submissions**

5. Parties made oral submissions in court. **Mr. Khagram** for the Applicant submitted that amendment of pleadings can be done at any stage in the interest of justice, and that the court should adopt a liberal approach to amendment of pleadings.

6. On his part, **Mr. Asige** for the ex-parte Applicant opposed the application stating that the application is an abuse of the court process, and that there are now three notices of motion filed by the Respondent in this matter. Counsel submitted that if the leave to amend is granted, the same would amount to this court sitting on appeal on its own Judgment. Mr. Asige submitted that the Applicant is coming to court under Article 159(3) of the Constitution which does not give the court the jurisdiction to amend pleadings. Mr. Asige submitted that an amendment that seeks to subvert the law is impermissible and cannot be granted. Counsel submitted that the application must be looked at together with the intended objective.

### **Determination**

7. I have carefully considered the application and opposition to it. I have also considered the submissions of parties. I have also looked at pleadings in the matter cursorily. What I can say at this stage is that there appears to be some rather serious disparities in terms of the Judgment on the suit delivered by **Hon. Azangalala J on 25<sup>th</sup> August, 2010** on the one hand, and that delivered by **Hon. Kasango J on the Judicial Review suit on 26<sup>th</sup> July, 2012** on the other hand. There is a possibility of some mistake in between those two Judgments, which the present Applicant seeks to cure or to correct through the proposed amendments. The purpose of amendments is generally to bring before the court all relevant issues in the life of a suit, so that a court is able to make Judgment with all the facts on board. Through the process of amendment a court can also correct a manifestly absurd aspect of a suit. At the end of the day, a court is the seat of justice. An amendment would be allowed if the same delivers an aspect of justice to the pleadings.

8. This court has no way of explaining the apparently contradictory figures in the aforesaid two Judgments of this court. If the Applicant's intended amendments may shade light to clarify that issue, that would be welcome. In any event, granting the leave to amend is not equal to admitting the facts as amended. For whatever it is worth, it is the finding of this court that the application for leave to amend the said notice of motion is merited.

9. In the upshot, the motion before the court is allowed as prayed.

**Dated, Signed and Delivered in Mombasa this 18<sup>th</sup> day of May, 2017.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Khagram for Applicant

Mr. Asige for Respondent

Mr. Kaunda Court Assistant