



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR CASE NO. 67 OF 2007**

REPUBLIC .....APPLICANT

VERSUS

THE CHIEF LAND REGISTRAR .....1<sup>ST</sup>  
 RESPONDENT

THE COMMISSIONER OF LANDS .....2<sup>ND</sup>  
 RESPONDENT

AND

DOMINIC NGARE.....1<sup>ST</sup> INTERESTED  
 PARTY

MARGARET WAMBUI KENYATTA .....2<sup>ND</sup> INTERESTED  
 PARTY

NANCY MUGECHI NGARE .....3<sup>RD</sup> INTERESTED  
 PARTY

JAMES MACHARIA GICHUKI.....4<sup>TH</sup> INTERESTED  
 PARTY

CECILIA WANJIRU WAWERU.....5<sup>TH</sup> INTERESTED  
 PARTY

PETER MUCHIRI NGATIA.....6<sup>TH</sup> INTERESTED  
 PARTY

THERESIA WAIRIMU NGATIA .....7<sup>TH</sup> INTERESTED  
 PARTY

KAGIRI NDIRANGU.....8<sup>TH</sup> INTERESTED  
 PARTY

EX-PARTE

**RULING**

1. In these proceedings, James Njoroge Njuguna is the ex-parte Applicant. The 1<sup>st</sup> Respondent is the Chief Lands Registrar and the Commissioner of Lands is the 2<sup>nd</sup> Respondent. Dominic Ngare, Margaret Wambui Kenyatta, Nancy Mugechi Ngare, James Macharia Gichuki, Cecilia Wanjiru Waweru, Peter Muchiri Ngatia, Theresia Wairimu Ngatia and Kagiri Ndirangu are the 1<sup>st</sup> to 8<sup>th</sup> interested parties respectively.

2. This is an old matter. Leave to commence these judicial review proceedings was granted in March, 2007 by Anyara Emukule, J. The matter was later heard by Msagha Mbogholi, J who delivered judgement on 26<sup>th</sup> October, 2010 in favour of the ex-parte Applicant.

3. The judgment was shortly thereafter followed by two applications by the 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties. In a ruling delivered on 28<sup>th</sup> September, 2012 D.S. Majanja, J concluded that the 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties had not been served with the substantive notice of motion filed on 12<sup>th</sup> April, 2007. He therefore set aside the judgment dated 26<sup>th</sup> October, 2010 thus paving way for the hearing of the substantive notice of motion dated 12<sup>th</sup> April, 2007 afresh.

4. Thereafter the matter went into mention mode up to 9<sup>th</sup> June, 2014 when the ex-parte Applicant filed the notice of motion, the subject of this ruling. Through the said application, the ex-parte Applicant prays for orders that:

**“1. Leave be granted to the Ex-parte Applicant herein to amend the Notice of Motion Application dated 12<sup>th</sup> April, 2007 and filed herein on 12<sup>th</sup> April, 2007 in terms of the draft amended Notice of Motion annexed hereto.**

**2. The draft amended Notice of motion be deemed as duly filed and served.**

**3. The costs of this Application be provided for.”**

5. The application is premised on the grounds on its face as follows:

**“(a) There is need to amend the Notice of Motion application herein in order to clarify and bring all issues herein before court.**

**(b) The amendment will help in determining the real question in controversy between the parties herein.**

**(c) The amendment will enable the Honourable Court to completely and effectually determine all the issues arising herein.**

**(d) The respondents and interested parties will not be prejudiced by the amendment sought.”**

6. The application is supported by an affidavit sworn by the ex-parte Applicant on 9<sup>th</sup> June, 2014. The affidavit reiterates the grounds in support of the application. The ex-parte Applicant however goes ahead to aver that all the relevant parties to the application have been served and they are the only ones to be affected by the proposed amendment. Further, that the amendment will eliminate the requirement of serving third parties who are not parties in this matter.

7. Annexed to the application is the proposed amended notice of motion in which the ex-parte Applicant intends to seek orders as follows:

**“1. THAT orders of mandamus be issued compelling the respondents herein to cancel all entries and dealings made in the register pertaining to L.R. No. 11916/2 after the death of JOSEPH NJUGUNA NJOROGE the ex-parte Applicant’s deceased father that is to say entry No. 13 which gave rise to L.R. No. 11916/3 and all the subsequent entries therein.”**

**2. THAT further or in the alternative the Honourable Court be pleased to issue orders of certiorari to remove to this Honourable Court for the purposes of quashing all entries and fraudulent dealings made in the register pertaining to L.R. No. 11916/2 after the death of JOSEPH NJUGUNA NJOROGE the ex-parte Applicant’s deceased father that is to say entry No. 13 which gave rise to L.R. No. 11916/3 and all the subsequent entries therein.”**

**3. THAT the respondents do bear the costs of the suit.”**

8. The ex-parte Applicant also swore a further affidavit on 8<sup>th</sup> September, 2014 in support of the application. The respondents and the interested parties opposed the application.

9. The 1<sup>st</sup> and 3<sup>rd</sup> interested parties opposed the application through grounds of opposition dated 14<sup>th</sup> August, 2014 and a replying affidavit sworn by the 1<sup>st</sup> Interested Party on 3<sup>rd</sup> September, 2014.

10. On behalf of the 2<sup>nd</sup> Interested Party, the application was opposed through a replying affidavit sworn on 25<sup>th</sup> July, 2014 by Ngomo Kamau, the manager of the estate of the 2<sup>nd</sup> Interested Party.

11. The 4<sup>th</sup> and 8<sup>th</sup> interested parties opposed the application through an affidavit sworn by the 8<sup>th</sup> Interested Party on 8<sup>th</sup> August, 2014.

12. On their part, the 6<sup>th</sup> and 7<sup>th</sup> interested parties opposed the application through grounds of objection dated 24<sup>th</sup> July, 2014 and filed on 25<sup>th</sup> July, 2014.

13. The basis of the opposition to the application can be summarized thus:

- a. That the application has been brought after inordinate and inexplicable delay of more than seven years since the original motion was filed in court on 12<sup>th</sup> April, 2007;
- b. That the ex-parte Applicant is not the administrator of the estate of his father and therefore had no legal capacity to commence these proceedings;
- c. That the Applicant’s original notice of motion was filed pursuant to the specific leave granted to him on 22<sup>nd</sup> March, 2007 and the notice of motion cannot be amended unless the leave order is amended or re-issued afresh which is not possible as over seven years have lapsed since the leave was granted.
- d. That the law does not provide for amendment of the substantive notice of motion in judicial review proceedings;
- e. That the application is made in bad faith as it is aimed at circumventing an order issued by this Court (D. S. Majanja, J) on 26<sup>th</sup> November, 2012 directing the ex-parte Applicant to serve the notice of motion on all the parties who would be affected by the orders he is seeking;
- f. That the amendment is aimed at defeating the interested parties’ defence to the effect that the Applicant is seeking orders in respect of the wrong property and against the wrong persons;
- g. That the ex-parte Applicant is trying to defeat one of the conditions of grant of leave which required his original advocate to be held personally liable in costs in the event the substantive motion does not succeed;
- h. That the verifying affidavit in support of the application for leave cannot be amended;

- i. That the application for leave to apply for an order of mandamus was not granted but the ex-parte Applicant had introduced a prayer for an order of mandamus in the substantive notice of motion which he now seeks to amend; and
- j. That the necessary parties have not be served with the application.

14. Some of the grounds raised in opposition to the application are grounds in opposition to the substantive notice of motion. As such, it is not appropriate to consider those grounds in determining this application.

15. In my view the questions that need to be answered in this ruling are:

- a. Whether the substantive notice of motion in judicial review proceedings can be amended? and
- b. If a notice of motion can be amended, whether the ex-parte Applicant has met the conditions for grant of leave to amend.

16. I have considered the submissions by the advocates on record on the issues before this court. The starting point would be to appreciate the fact that Order 53 Rule 4(2) of the Civil Procedure Rules, 2010 allows the amendment of the statutory statement and filing of further affidavits.

17. I addressed the question of amendment of the substantive notice of motion in a ruling I delivered on 7<sup>th</sup> August, 2013 in **Nairobi H.C. JR ELC No.9 of 2012, Republic v Commissioner of lands and 2 others ex-parte Jimmy Mutinda**. In that case I reached the conclusion that a notice of motion could be amended. My decision was supported by the decisions of Nyamu, J (as he then was) in **Republic v Permanent Secretary, Ministry of Planning & National Development ex-parte Mwangi S. Kimenyi [2006] eKLR** and that of Rawal, J (as she then was) in **Resley v Nairobi City Council [2002] 1 EA 241**.

18. That position has since received support from the recent Ugandan case of **National Outdoor Advertisement Contractors Association & 7 others v Uganda National Roads; Kampala H.C. Misc. Application No. 3 of 2015; [2015] UGHCCD 93(3 September 2015)** in which Stephen Musota, J observed:

**“My reading of the rules as a whole seems to suggest that the general principle is that as long as the application for Judicial Review has been filed in the prescribed time, it can under Rule 7 be amended any time or at the time of hearing and this may be by adding grounds and/or reliefs being sought contrary to the view advanced by learned counsel for the respondent that allowing the amendment would deprive them of the defence of limitation. The respondent can only take advantage of the Statute of Limitation at the time of filing of the claim, if that filing has been done outside the time of limitation. But as regards amendment, there is nothing in the rules which says that the Notice of Motion must at the time of filing be perfect and free from defects. Once the Notice of Motion is amended then it speaks from the date on which it was originally filed and not from the date of amendment. The defect is thereby cured and the actions brought in time. It will not be barred by statute.”**

19. A similar position was taken by the Supreme Court of Belize (Conteh, CJ) in **Queen v Department of the Environment and another ex parte Belize Alliance of Conservation Non-Governmental Organizations (BACANGO)** where it was stated that:

22. **It is worth noting that even with the promulgation of the new *Civil Procedure Rules 1998 (CPR)*, which came into effect in England on 26th April, 1999, the provisions of *Order 53* remain substantially the same, and now form part of *Schedule 1 of the Civil Procedure Rules*.**
23. **Thus ordinarily, although an applicant for judicial review is precluded at the substantive hearing from relying upon any grounds or seek any relief other than the relief or grounds set out in his Statement in Support of his application at the leave stage - *paragraph (1) of Rule 6 of Order 53*, this prohibition is however, often attenuated, and there is provision in *Rule 6(2)*, as I have pointed out earlier, to overcome this by seeking leave to amend, whether by**

specifying *different* or *additional grounds* or *relief* or otherwise - see also *Lewis op. cit.* at p. 253.

25. It is, I think, instructive in this connection to quote from the judgment of Watkins L.J. vis-à-vis the reliance on grounds at the substantive hearing other than those which had formed the basis for the leave application:

*"The practice as to reliance on grounds other than those which have formed the basis for leave to move given by . . . the . . . judge to an applicant for judicial review needs to be explained . . . It is this. Where an applicant has made an application for leave to apply on a number of grounds and is given leave to move expressly on one of them for example, it is unnecessary for him to renew his application . . . for the purpose of relying on the other grounds on which he has not specifically been given leave to move provided, and this of the utmost importance, that he gives notice to the respondent whoever he may be, and if there is more than one then each of them, that he intends at the substantive hearing to rely on one or more of the other grounds on which he has not expressly been given by the . . . judge leave to move. That is so that the respondent shall have ample opportunity to consider his position in respect of the other grounds on which the applicant seeks to rely".*

28. I will therefore, accordingly, allow the amendments sought as they do not, in any event, occasion any prejudice to the respondents who have yet to file any affidavits in answer to the applicant.
29. The applicant is also by the same notice of 11th April 2002 seeking leave of the Court to use further affidavits, viz, one by Brian Holland, the other, a second affidavit by Ambrose Tillet. Both were sworn to on the 11th April 2002 and have been served on both respondents.
30. Both respondents are resisting the grant of leave to use these affidavits. The basis of their objection, I believe, is that these affidavits will introduce new elements or fresh evidence and in any event they relate to issues that arose after the decisions the applicant is seeking to impugn were taken.
31. Again, I believe the short answer to the respondents on this score is contained in the combined operation of *paragraphs (2) and (3) of Rule 6 of Order 53*. These provide:

*"(2) The Court may on hearing of the motion or summons allow the applicant to amend his Statement whether by specifying different or additional grounds of relief or otherwise, on such terms if any, as it thinks fit and may allow further affidavits to be used by him".*

*"(3) Where the applicant intends to ask to be allowed to amend his Statement or to use further affidavits he shall give notice of his intention and of any proposed amendments to every other party". (emphasis added)*

32. Clearly, I think the rules permit the applicant to apply to the Court to be allowed to use *further* affidavits provided it gives notice of its intention to every other party. In the instant application, as I have mentioned, the applicant has given notice of its intention and served copies of the further affidavits on the respondents.
33. Although *Lewis op. cit.* at p. 252 to 253 expresses the view that the provision in *Order 53 Rule 6(2)* is directed primarily at the applicant who may wish to respond to matters raised in a respondent's affidavit in reply, I do not think however, that this is an impediment in the way of the Court exercising its discretion to allow an applicant to use further affidavits even if, as here, there is, as yet, no affidavits from the respondents on the substantive hearing of the applicant's motion."

20. In *ex-parte Jimmy Mutinda (supra)* I summarized my views on the question of the amendment of the substantive notice of motion as follows:

"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.**

**Ms Maina and Mr. Njuguna argued that no new prayer can be introduced in a substantive notice of motion since no leave has been granted to seek relief in terms of the new reliefs to be introduced by a proposed amendment. 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. In doing so, the Court will consider whether the intended amendment would substantially change the case before it. It would therefore be ideal that whenever an applicant seeks to amend his pleadings, he should annex the proposed amendments so that the Court can decide whether or not to allow the amendment.”**

21. An amendment that is aimed at aiding the court in reaching a just decision should not be rejected. What the court only needs to ensure is that the amendment does not prejudice the other parties.
22. The only disturbing thing about the application before this court is that the ex-parte Applicant brought the application close to two years after the judgement of Msagha Mbogholi, J was set aside by D. S. Majanja, J. No explanation has been given for this delay.
23. The ex-parte Applicant did not also respond to the assertion that his application is meant to circumvent the orders of D. S. Majanja, J directing him to serve all the parties that were likely to be affected by the orders he seeks.
24. Be that as it may, the ex-parte Applicant’s new counsel immediately filed the application upon coming on record. The ex-parte Applicant has given plausible reasons why he wants to amend his notice of motion.
25. In the further affidavit he avers at paragraph 5 as follows:

**“THAT it is within my knowledge that entry number 13 in L.R. No. 11916/2 which entry was irregularly made after my father had passed away and it is the one that gave rise to L.R. No. 11916/3 and the entry together with all subsequent entries are the ones sought to be quashed by the substantive motion. (see exhibit “N-2”).”**
26. The ex-parte Applicant has thus zeroed in on what he seeks from this court and it is only fair that he be granted an opportunity to present his case as he thinks best. The respondents and interested parties will not suffer any prejudice since they will have an opportunity to respond to the ex-parte Applicant’s amended notice of motion.
27. Whether or not the ex-parte Applicant was granted leave to apply for an order of mandamus is a question to be addressed at the hearing of the substantive notice of motion.
28. Although the leave originally granted to the ex-parte Applicant was subject to the payment of costs by counsel on record at the time, if the motion failed, the terrain has changed so much since that time. The

advocate who represented the ex-parte Applicant when leave was originally granted in 2007 has since been substituted by another counsel. The ex-parte Applicant has exercised his right to be represented by an advocate of his choice. The said condition upon which leave was granted has in the circumstances of this case become redundant and it would be unjust to deny the Applicant an opportunity to amend his claim on reliance on that condition.

29. In the circumstances of this case, I allow the ex-parte Applicant to file and serve an amended notice of motion together with further affidavits, if any, within 14 days from the date of this ruling. Upon service, the respondents, the interested parties and any other person who may be served as a necessary party will have 14 days to respond to the amended notice of motion. At the end of the 14 days given to the respondents and interested parties, the ex-parte Applicant will have 7 days to file further affidavits, if need be. As this matter is old, a date for highlighting of submissions on the amended notice of motion should be fixed on priority basis.

30. The costs of this application will be in the cause.

**Dated, signed and delivered at Nairobi this 24<sup>th</sup> day of Feb., 2016**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**