REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR ELC CASE NO. 9 OF 2012

REPUBLIC .....APPLICANT

VERSUS

COMMISSIONER OF LANDS .....1ST RESPONDENT

CHIEF LAND REGISTRAR .....2ND RESPONDENT

MASAI VILLAS LIMITED .....INTERESTED PARTY

EX-PARTE

JIMMY MUTINDA

RULING

The application for consideration is the notice of motion dated 13th November, 2012 brought under Order 53 Rule 4 of the Civil Procedure Rules, 2010. Through the said application, Jimmy Mutinda who is the ex-parte Applicant in these judicial review proceedings prays for leave to amend the statement of facts and notice of motion. He also asks for costs.

The Commissioner of Lands and the Chief Land Registrar, the 1st and 2nd respondents in the substantive proceedings, and Masai Villas Limited, the Interested Party opposed the application. For the purposes of this application, I will henceforth refer to all of them as the respondents.

In support of the application, counsel for the Applicant submitted that if the application is allowed, two additional prayers will be introduced in the notice of motion namely:

i. **An order of mandamus to compel the 2nd respondent to deregister and/or cancel the registration of all that property known as Land Reference No. 209/12168 (Grant No. I R 63626) issued to the Interested party herein Masai Villas.**
ii. **That the Respondent bears the costs of the proceedings.**

Mr. Marete for the Applicant argued that the omission to include the two prayers in the substantive notice of motion was not deliberate but due to an oversight. He argued that the aim of the amendment is to ensure that the remedies sought, if granted, will not only be effective but efficient. He submitted that the scope and ambit of the amendment as provided for under Order 53 Rule 4(2) of the Civil Procedure Rules (CPR), 2010 is not specified but left to the discretion of the court. He argued that the application for

amendment can be brought any time prior to the hearing of the substantive notice of motion. He asserted 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. He cited the decisions in the cases of **REPUBLIC v PERMANENT SECRETARY MINISTRY OF PLANNING AND NATIONAL DEVELOPMENT EX-PARTE MWANGI S KIMENYI [2006] eKLR** and **RESLEY v NAIROBI CITY COUNCIL [2002] 1 EA 241** in support of the application.

The respondents opposed the application on the ground that there is no provision which allows the amendment of the substantive notice of motion once filed. They argued that what is allowed by the Rule cited by the Applicant is an amendment of a statement of facts and the filing of further affidavits. Ms. Maina for the 1st and 2nd respondents contended that an amendment can only be allowed to the extent that it assists the court to deal with the substantive motion and cure defects in the application. Such leave is not meant to allow an applicant to introduce new prayers. She argued that the effect of the new prayer for an order of mandamus would amount to asking this Court to delve into matters of fact and yet it is not equipped to deal with issues of fact in these proceedings.

In support of her argument, Ms. Maina cited the case of **KENYA AFRICAN NATIONAL UNION v MWAI KIBAKI & 6 OTHERS [2005] eKLR** where their lordships opined that:

> **"Secondly the proposed Amended Statement of Facts brings into focus new and disputed facts which, in our respectful view, are only justifiable by way of either a plaint, or a constitutional reference under the Bill of Rights or Chapter V of the Constitution, rather than by way of judicial review.**
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> **Evidence of facts as was decided in the OWAKI CASE is to be given in an affidavit. Our rules on judicial review do not yet, unlike the post 1977 Supreme Court Rules in England, provide for either cross-examination, interrogatories and discovery of documents and therefore for the trial of issues of fact, so this Court cannot make orders for those procedures. If the question here solely depended upon a disputed point of law, it would be convenient for us to determine it. But where as it is here, the dispute turns on questions of fact and about which there are sharp differences, the issues do not lend themselves to resolution by judicial review."**

She also cited the case of **SANGHANI INVESTMENT LIMITED V OFFICER IN CHARGE NAIROBI REMAND & ALLOCATION PRISON [2007] eKLR** in which Justice R.V.P Wendoh expressed the same sentiments. She argued that there are no grounds in the statement of facts to support the prayer of mandamus which the Applicant seeks to introduce.

Mr. Njuguna for the Interested Party submitted that the Applicant cannot be allowed to introduce new prayers in the substantive notice of motion since leave was not granted for the new prayers and neither has leave been sought to introduce these prayers. He asserted that amendment of a statement can only be done if a respondent or interested party has introduced new matters in response to an applicant's substantive notice of motion. Counsel for the Interested Party further submitted that even if it were to be assumed that the Court can allow an amendment of the substantive notice of motion, the Court can only exercise its discretion to allow such an amendment judiciously. He submitted that in the application before this Court, the Applicant has not come to court with speed. He submitted that the Applicant filed his application one year from the date he was granted leave to commence these proceedings and failure to file the application expeditiously should work against him.

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.

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. The Applicant before me has not done so. He has, however, specifically indicated the two prayers he intends to introduce. In my view the new prayers are related to the other prayers and it will help the Court make a just determination in this matter.

There was an argument by Ms Maina that the proposed prayers are not supported by the statement of facts. It must be noted that an applicant can only amend the substantive notice of motion after amending the statement. In the case before me the Applicant has sought permission to amend both the statement and the substantive notice of motion. If permission is granted, he will have the opportunity of aligning the amended statement with the new notice of motion.

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 filing 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.

In my view, this application should be allowed. I therefore allow the application and direct the Applicant to file and serve an amended statement, further affidavits, an amended notice of motion and further submissions upon the respondents within ten days from the date of this ruling. The respondents will file their responses and further submissions within 14 days from the date of service. Costs will be in the cause.

Dated, signed and delivered at Nairobi this 7th day of August , 2013

W. K. KORIR,

JUDGE