



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MISCELLANEOUS APPLICATION NO. 417 OF 2007

REPUBLIC APPLICANT

VERSUS

THE PERMANENT SECRETARY
MINISTRY OF STATE FOR DEFENCE RESPONDENT
EX-PARTE R.M. KINYANJUI

RULING

This is an application dated 28th April, 2009 for leave to amend the statement dated 24th April, 2007. The ex parte applicant wishes to amend the statement regarding the relief sought by adding prayer numbers 3A, 3B and 3C to read:

“3A An order for costs of the proceedings herein be awarded to the ex parte applicant.

3B An order for interest to be awarded on the costs and all sums found to be due to the ex parte applicant.

3C Such further orders, any other relief and/or directions as this honourable court may deem fit to grant.”

The application is supported by an affidavit sworn by **Rajinder Billing**, the ex parte applicant’s advocate as well as by a supplementary affidavit sworn by Joyce Wakonyo Mwangi Kinyanjui.

The affidavits state that the amendments sought will not prejudice the rights of the respondent and that the amendments are necessary for determining the real questions in controversy between the parties. In addition, the said application is made before the hearing of the substantive Notice of Motion application.

The application is opposed through a replying affidavit sworn by **Emmanuel Bitta, Senior Litigation Counsel** appearing for the respondent. Although he concedes that the court has discretion in allowing amendments, he states that the amendment sought is intended to circumvent the respondent’s submissions.

He states that in May 2007 the ex parte applicant filed these judicial review proceedings seeking one prayer, to be paid Kshs.22,779,946/=. The amount was paid to the ex parte applicant’s counsel by August 2007. However, when the application came up for hearing before Wendo J. on 8th April, 2008 in respect

of the issues of costs and interest, the ex parte applicant's advocate sought leave to amend the statement filed on 24th April, 2007. The court directed that a formal application be filed. The respondent had contended that costs cannot be awarded to the ex parte applicant as they had not been pleaded in relief prayed for in the statement.

Mr. Bitta states that the respondent will be prejudiced by the ex parte applicant's application, having already paid the principal sum. Mr. Bitta further stated that Joyce Wakonyo Mwangi Kinyanjui had sworn an affidavit on 24th April, 2007 stating that the ex parte applicant is incapable of signing documents owing to his mental condition and therefore his counsel needs leave of the court to depone on his behalf.

Counsel for the parties filed their written submissions which I have considered. I will first deal with the issue of the ex parte applicant's mental condition. From the date of filing of the substantive motion on 24th April, 2007, the ex parte applicant's wife stated that her husband was suffering from Alzheimer's disease and was therefore incapable of signing documents. She had therefore been given a power of Attorney to represent him. She has since then done so. She is the one who signed the verifying affidavit that accompanied the application seeking orders of mandamus. The issue of the ex parte applicant's health was not brought up earlier and in my view it is not relevant given that his wife, being the ex parte applicant's duly appointed attorney, is lawfully representing him.

Turning to the merits of the application, it is clear that **Order 53 rule 4(2) of the Civil Procedure Rules** provides that the court may on the hearing of the motion order the statement to be amended, provided notice of intention to do so has been given. Such notice was duly given by the ex parte applicant's counsel. Thereafter the court directed that a formal application be filed.

In my view, the amendment sought is necessary so that the issue of costs and interest is dealt with substantively. In any event, costs normally follow the event. The ex parte applicant's counsel stated that the mistake sought to be rectified is a genuine one on his part and I do not think the ex parte applicant ought to be punished for that.

I also believe that the respondent will not suffer any prejudice if the proposed amendment is ordered. This is because he will be at liberty to file further submissions or affidavit with regard to the amendments and the court will make a determination accordingly.

Lastly, **Article 159(2) (d) of the Constitution of Kenya, 2010**, requires the court to administer justice without regard to procedural technicalities. In a recent decision of the Court of Appeal, **KENYA ANTI-CORRUPTION COMMISSION vs AHMED MWIDANI & OTHERS, Civil Appeal No. 114 of 2008**, the Court of Appeal stated:

“On the other hand, the cited article 159 (2) (d) of the Constitution, in our view, operates on a higher plain against reliance on technicalities of procedure in all cases where judicial power is to be exercised. Granted that in determining this application we are exercising judicial power, the technical points raised must in the same way give way to the hearing of the appeal on merit.”

I am of the same persuasion regarding this application. Consequently, I allow the ex parte applicant's application for amendment of the statement dated and filed on 24th April, 2007 as prayed. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MAY, 2011.

**D. MUSINGA
JUDGE**

In the presence of:

Nazi – Court Clerk

Mr. Billing for the Ex Parte Applicant

Miss Chesoni for the Respondent