



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLICATION NO. JR/ELC 3 OF 2011

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW ORDERS OF CERTIORARI AND MANDAMUS**

**IN THE MATTER OF: THE PHYSICAL PLANNING ACT (CAP. 286 OF THE LAWS OF
KENYA)**

IN THE MATTER OF: THE CITY COUNCIL OF NAIROBI

**IN THE MATTER OF: AN APPLICATION FOR THE CHANGE OF USE OF LAND
REFERENCE NUMBERS**

13114/29, 30, 32, 46 AND 47 BY JAMES DAVID ROBINSON AND PETER HENDERSON

RICHARD BELL

**MARY ANNE FITZGERALD.....EX PARTE
APPLICANTS**

AND

**CITY COUNCIL OF NAIROBI.....1ST
RESPONDENT**

PETER HENDERSON.....2ND RESPONDENT

JAMES DAVID ROBINSON.....3RD RESPONDENT

RULING

The ex parte applicants' application dated 18th March, 2011 seeks the following orders:

- “1. That leave be granted to the ex parte applicants to amend the Notice of Motion dated 12th January, 2011, filed herein in the manner set out in the draft amended Notice of Motion.**

- 2. That leave be granted to the ex parte applicants to file a further affidavit.**

- 3. That costs of this application be provided for”.**

The application was supported by an affidavit sworn by **Samora O. Owino**, an Advocate practicing in the firm of Murgor & Murgor Advocates who have the conduct of this matter on behalf of the ex parte applicants. He stated that on 11th January, 2011 the ex parte applicants filed an application seeking, *inter alia*, leave to apply for orders of certiorari and mandamus against the respondents. Leave was granted as prayed and on 14th January, 2011 the ex parte applicants filed the substantive Motion. The motion was served upon the respondents on 27th January, 2011.

Thereafter, it became apparent that there was an inadvertent error on the face of the application in that “the Republic” was not indicated as the applicant as required in judicial review applications. It is for that reason that the ex parte applicants seek leave to amend the Notice of Motion and also file further affidavits. In their view, the respondents will not suffer any prejudice if this application is allowed.

The respondents filed grounds of opposition and stated as follows:

- “1. That the application is an abuse of court process.**

- 2. That the application has not been brought timeously the applicant having been made aware of the defect on 9th February, 2011 and the applicant waited until 21st March, 2011, a period of 40 days, to make the application to amend. No explanation has been offered for the delay.**

3. That in any event the amendment proposed is otiose as it is not possible to save the originating application herein as:

(a) the prerogative remedy of “certiorari”

requires the bringing before the court a decision to be quashed. No decision has been presented for quashing and in that regard certiorari cannot lie.

(b) the prerogative remedy of “certiorari” requires that a particular decision made on a particular day by a public body be identified as being offensive. The date of the decision sought to be challenged has not been stated and certiorari cannot, perforce, lie.

(c) the prerogative remedy of “certiorari” must

be instituted within six (6) months of the date of the decision. No date of the alleged offending administrative decision having been offered the originating application is fatally defective and is for quashing.

(d) the change of user “no objection” certification was granted by the 1st respondent more than six (6) months before the institution of the proceedings herein and the application for certiorari is therefore out of time.

(e) the 1st respondent does not issue change of user but merely grants a “no objection” certificate. The proceedings herein are a nullity in that it is the Commissioner of Lands who issues a change of user.

(f) an order of mandamus cannot lie if the original decision has not been quashed by way of certiorari and the said application for mandamus is a nullity and inapplicable.

(g) the balance of the claim is not justiciable as injunctive relief cannot be issued under Order 53.

(h) in any event the claimant has admitted that Hogmead Hotel was officially opened on the 14th February, 2011 and an injunctive relief would, in the circumstances be unavailable to stop that which has already happened”.

Mr. Owino for the ex parte applicants and Mr. Okoth for the 2nd and 3rd respondents made brief

submissions. Mr. Owino sought to rely on the provisions of **Article 159(2) (d)** of the **Constitution of Kenya**. He further stated that there was no undue delay in making the application and referred the court to a letter dated 11th February, 2011 addressed to this court's Deputy Registrar setting out the difficulties his firm had experienced in tracing the court file and getting a hearing date for this application.

Responding to the ground that the application for certiorari had been made outside the statutory six (6) months period, Mr. Owino stated that the application was delayed by the fact that the 1st respondent approved the change of user in a clandestine manner.

Mr. Okoth for the 2nd and 3rd respondents also submitted briefly on the aforesaid grounds of opposition. The grounds of opposition are quite elaborate and Mr. Okoth's submissions were basically a rehash of the same.

I have considered the rival arguments made by counsel herein. As regards the argument advanced by Mr. Okoth that there was undue delay in filing the application, upon perusal of the applicant's advocate's letter dated 11th February, 2011, it is evident that the court registry was unable to trace the file to enable the ex parte applicants' advocate to file the application. The said letter was copied to the respondents' advocates. The delay has been sufficiently explained.

The ex parte applicants' counsel stated that there was an inadvertent mistake in failing to cite "the Republic" as the applicant and wishes to effect appropriate amendment to the application. In my view, the aforesaid mistake does not go to the root of the matter. The court would be penalizing the ex parte applicants unnecessarily if it were to refuse the application due to the aforesaid mistake on the part of its advocates.

The provisions of **Article 159(2) (d)** of the **Constitution** require the court to administer justice without undue regard to procedural technicalities. In **KENYA ANTI-CORRUPTION COMMISSION vs AHMED MWIDANI & OTHERS, Civil Appeal No. 114 of 2008**, the Court of Appeal, while considering an application to strike out the appeal on some technicalities stated as hereunder:

"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 as stated by the Court of Appeal in the aforesaid matter when it comes to a consideration of procedural technicalities in administration of justice.

As regards the 2nd and 3rd respondents' objections raised in ground (3) as cited hereinabove, my view is that these are issues which ought to be raised in opposition to the substantive notice of motion as they relate to the merits of the ex parte applicants' application. Further, I do not think that any prejudice would be occasioned to the 2nd and 3rd respondents if the ex parte applicants' application is granted.

Taking all the relevant issues into consideration, I am inclined to exercise my discretion in favour of the ex parte applicants by allowing them to amend the Notice of Motion dated 12th January, 2011 and to file a further affidavit. The amended Notice of Motion and the further affidavit should be filed and served within the next fourteen (14) days from the date hereof. The ex parte applicants shall bear the costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JUNE, 2011.

D. MUSINGA

JUDGE

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In the presence of:

Nazi – Court Clerk

Mr. Owino for the Applicant

No appearance for the Respondent