



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

MISCELLANEOUS CIVIL APPLICATION 472 OF 2002

**AN APPLICATION BY ALEXANDER MUTUA HOSEA FOR ORDERS OF CERTIORARI
PROHIBITION AND MANDAMUS**

AND

**IN THE MATTER OF: THE CHIEF MAGISTRATE'S COURT CIVIL COURT CASE NO.
1728 OF 1998**

AND

- 1. JULIUS MBAABU M'MWETI.....1ST INTERESTED PARTY**
- 2. JOSEPH GACHAU MUTURI.....2ND INTERESTED PARTY**
- 3. MICHAEL GITAU NGAE.....3RD INTEREST PARTY**

AND

- 1. THE CHIEF MAGISTRATE MOMBASA.....1ST RESPONDENT**
- 2. THE LAND REGISTRAR MOMBASA.....2ND RESPONDENT**

RULING

This is an application expressed to be brought under the provisions of Order VI A Rule 3 of the Civil Procedure Rules. The application is by Alexander Mutua Hosea, (hereinafter "the ex parte applicant") who seeks leave to amend the heading of his application for prerogative orders. The main reason for the application, is that the ex parte applicant has come to realize that orders on his application ought to be issued in the name of the Republic hence this application for leave to amend the application to indicate the Republic as the applicant. The ex parte applicant contends that no prejudice shall be occasioned to the interested parties or the respondent by the proposed amendment.

The application is supported by the ex-parte applicant's affidavit sworn on 10th February 2009 which affidavit restates the reasons given on the face of the application. The application is opposed on the basis of Grounds of Opposition filed by counsel for the 3rd Interested Party. The respondents and the other

Interested Parties have not opposed the application. In his Grounds of Opposition, the 3rd Interested Party contends that he will be gravely prejudiced as the Notice of Motion intended to be amended is fatally incompetent and erroneously instituted and cannot be amended. The ex-parte applicant further contends that the Civil Procedure Rules do not apply to Judicial Review and there is therefore no jurisdiction to grant the leave sought.

In their oral submissions before me, counsel repeated their client's stand points taken in their above documents (supporting affidavit and Grounds of Opposition).

I have considered the application, the affidavit in support, the Grounds of Opposition and the submissions of counsel. Having done so, I take the following view of this matter. I accept the proposition that in exercising the power to issue orders of certiorari, mandamus and prohibition, the court exercises a special jurisdiction. However, in exercising the special jurisdiction, the court may apply the Civil Procedure Rules where Order LIII is silent. There is no specific rule regarding amendment of the application originating Judicial Review proceedings. The absence of rules would not imply that once lodged, the application cannot be amended. Even if the Civil Procedure Rules were inapplicable, the court must still retain the power to amend the application where such amendment will serve the ends of justice and will not occasion injury or injustice to the other side which cannot be compensated by an award of costs. Having come to that conclusion, the ex-parte applicant's application should therefore be considered on merit. All the ex-parte applicant wishes to introduce to his Notice of Motion is a heading which will indicate that the application has been lodged in the name of the Republic. I see no prejudice which will be occasioned to the 3rd Interested Party or any other party which cannot be compensated for by costs. The application in its present form is indeed defective, but the defect in form is, in my view, not fatal and does not go to jurisdiction. The proposed amendment will not alter the parties' respective claims.

In the result, I allow the ex-parte applicant's application dated 19th February 2009 in terms of prayer (1) thereof. The amended Notice of Motion be filed and served within seven (7) days from the date hereof. Costs shall be in the cause.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 25TH DAY OF MAY 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Kenzi for the Applicant and Mr. Odongo for the Interested Party.

F. AZANGALALA

JUDGE

25TH MAY 2009