



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 119 of 2009**

**NANCY M. MWONGERA.....APPELLANT/APPLICANT**

**VERSUS**

**THE BOARD OF GOVERNORS, SALVATION ARMY**

**THIKA HIGH SCHOOL FOR THE**

**VISUALLY CHALLENGED PERSONS.....RESPONDENT**

**R U L I N G**

1. By a Notice of Motion Dated 19<sup>th</sup> June 2009 brought under Order VIA Rule 5 and 6 of the Civil Procedure Rules, Nancy M. Mwongera hereinafter referred to as applicant, seeks leave of this Court to amend her Notice of Motion dated 3<sup>rd</sup> April, 2009. The amendments seek to clarify the subrule of Order XLI Rule 4 under which the Notice of Motion is intended to be brought, and also to include “stay” as one of the orders sought under prayer No.2 of the Motion. The applicant explains that the omissions were due to some inadvertence. Counsel for the applicant has urged the Court to exercise its wide powers under Order VIA of the Civil Procedure Rule to grant the order sought.
2. The application is opposed by the respondent who has filed grounds of opposition, maintaining that the application is an abuse of the Court process, that the amendment does not lie within the purview of Order VIA Rule 5 and 8 of the Civil Procedure Rules. It is further contended that the applicant has not come to this Court with clean hands as the application is only intended to enable her to continue enjoying *ex parte* orders which were obtained on 7<sup>th</sup> April, 2009 although the same were not pleaded in her pleadings.
3. In response to the application counsel for the respondent submitted that the application was an abuse of the Court process as the proposed amendments would not cure the defect. He contended that the application was defective because it was brought by way of Chamber Summons instead of a Notice of Motion. Further counsel contended that the prayers sought in the Notice of Motion which included “varied, discharge, or set aside” are not available under Order XLI Rule 4(1) of the Civil Procedure Rules under which the application is brought. Counsel for the respondent further submitted that Order VIA Rule 5(2) of the Civil Procedure Rules has no effect in relation to a judgment or order. He submitted that the amendments sought by the applicant were only intended to give credence to the orders which were obtained *ex parte*.
4. I have given due consideration to this application as well as submissions made by both counsel. With regard to the submissions that the applicant has wrongly come to this Court by way of a Chamber Summons, I find that the respondent’s counsel has confused the applicant’s Chamber Summons for amendment of the Notice of Motion, which was brought under Order VIA Rule 5 and 6 of the Civil Procedure Rules, and the applicant’s Notice of Motion dated 3<sup>rd</sup> April 2009 which was brought under Order XLI Rule 4, and Order XXXIX Rule 4 of the Civil Procedure Rules.
5. Under Order VIA rule 8 of the Civil Procedure Rules, the application for the amendment of the Notice of Motion was properly brought by way of Chamber Summons. As regard the Notice of Motion dated 3<sup>rd</sup> April, 2009, Order XLI Rule 32 of the Civil Procedure Rules only provides for applications under Order

XLI Rule 9 of the Civil Procedure Rules to be brought by way of Chamber Summons. No procedure having been provided for applications brought under Order XLI Rule 4 or Order XXXIX Rule 4 of the Civil Procedure Rules under which the applicant's application was brought, **Order L Rule 1 of the Civil Procedure Rules, provides for such applications to be brought by way of motions.**

**6. With regard to the objection that the orders sought in the Notice of Motion are not available under Order XLI Rule 4(1) that is not a reason for rejection of the application for amendment. While it is true that some of the orders may not be available, the Court will only have to determine the application on merit after hearing it fully. At this stage the Court is only dealing with an application for amendment.**

**7. Finally with regard to objection that Order VIA Rule 5(2) of the Civil Procedure Rules has no effect in relation to a judgment or order, the amendments sought do not relate to amendment of a judgment or order of the Court. The amendment seeks to amend a Notice of Motion which is pending for consideration before the Court. Under Order VIA Rule 5(1) of the Civil Procedure Rules, the Court has wide powers to amend any documents before it in order to enable it determine the real questions in controversy between the parties or correct any error or defect in any proceedings.**

**8. I find that no prejudice will be caused to the respondent by the proposed amendments. Accordingly, I do allow the Chamber Summons dated 18<sup>th</sup> June, 2009. The parties shall be at liberty to take a date for the hearing of the Notice of Motion dated 3<sup>rd</sup> April, 2009.**

**Dated and delivered this 17<sup>th</sup> day of July, 2009**

**H.M. OKWENGU**

**JUDGE**

**In the presence of:-**

**Ireri for the Respondent**

**Advocate for the appellant, absent**