



REPUBLIC OF KENYA

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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Misc Civil Appli 186 of 2005**

**IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF LAND DISPUTE TRIBUNAL CASE NO. 25 OF 2005**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**LAND DISPUTES TRIBUNAL**

**MERU CENTRAL DISTRICT..... RESPONDENT**

**RULING**

The *ex parte* applicant has moved this court by chamber summons dated 6th July 2009. By that application, the *ex parte* applicant seeks leave to amend the notice of motion dated 15th November 2005. The affidavit in support of the application stated that the amendment is necessary to correct the notice of motion which inadvertently left out the name of the *ex parte* applicant. This is a judicial review matter. The amendment sought by the *ex parte* applicant is to include his name which had been omitted in the original notice of motion as the *ex parte* applicant. The original notice of motion and indeed the *ex parte* chamber summons for leave to file judicial review had the title showing the Republic as the applicant, the Land Dispute Tribunal Meru Central District as the respondent and Marcella Gakii M'Murungi as the interested party. It is that anomaly that the *ex parte* applicant seeks to amend by including the name Andrew Kaburu M'Rinkuri *ex parte*. The application met stiff opposition from the State Counsel and counsel appearing for the interested parties. Their argument was that order LIII of the Civil Procedure Rules is a unique procedure which does not borrow from the other procedures in the Civil Procedure Rules. They argued that order LIII has no provision for amendment of notice of motion. That it only provides for the amendments of statements of facts. Further they argued that Order VIA Rule 5 of the Civil Procedure Rules relied upon by the applicant could not be of assistance because that rule cannot be imposed in the judicial review process. They also attacked the authorities that were relied upon by the applicant on the basis that they were only of persuasive nature. The applicant argued that the application was merited since no prejudice would be suffered by the interested parties and the respondents if the amendment was allowed. The *ex parte* applicant argued that the test to be applied by the court was whether the notice of motion had merit and what if any, would be the prejudice suffered by the other parties. In that respect, the applicant relied on the case of **Farmers Bus Service & Others Vs. Transport Licensing Appeal Tribunal** [1959] EA 779. In that case, the Court of Appeal after finding that the prerogative orders are issued in the name of the crown and on commenting that such application should correctly be intitled, proceeded to grant leave for the notice of appeal and other documents which included a notice of motion to be amended. The Court of Appeal in the case of **Deepak Shah and Another Vs. Resident Magistrate and Attorney General, Civil Application No. Nai 81/2000** stated as follows:-

***“On the authority of the decision of the Court of Appeal for Eastern African, in Mohamed***

**Ahmed Vs. R. [1959] E.A. 523, in which, that court, allowed an appeal to proceed to hearing despite the misjoinder of parties, and following on the decision of that court in the case of FARMERS BUS SERVICE AND OTHERS VS TRANSPORT LICENSING APPEAL TRIBUNAL [1957] E.A 779, we were of the view that the misjoinder of the Attorney General and the Resident Magistrate and non-joinder of the Chief Magistrate, were irregularities which were curable by an amendment to the title to the application for leave to apply for an order of prohibition.”**

I ask myself, is there merit in the opposition raised against the application before court? As correctly argued by the respondent to the application Order LIII Rule 4 (2) provides for amendment for statement of facts. That rule also provides the court with power to order for further affidavits to be filed. On the issue of whether a notice of motion in a judicial review matter can be amended in the absence of specific power under that rule, I respond by saying that it has now received several judicial decision to the effect that such an application can be granted by invoking the court’s inherent power. To mention but a few is the following authorities:-

1. **JOSEPH M. MAINA VS. THE CHIEF LAND REGISTRAR** HC Misc. 803 of 2004 (unreported), a decision by Hon. Wendoh. J.
2. **ADAM BROWN & COMPANY LTD VS. COMMISSIONER OF LANDS HCMC 1692/2002** (unreported) a decision by Hon. Emukule J.
3. **REPUBLIC VS. PERMANENT SECRETARY MINISTRY OF PLANNING AND NATIONAL DEVELOPMENT ex parte PROF. MWANGI KIMENYI** Misc. Civil Application No. 1769 of 2004 (unreported) a decision by Hon. Nyamu J.

In **Republic Vrs. Judicial Commission of Inquiry into the Goldenberg Affairs: Hon. Mr. Justice of Appeal S.E.O. Bosire, Mr. Nzamba Kitonga, and Peter le Pelley S.C.** Misc. Civil Application No. 416 of 2006 a bench of three judges faced with an application for amendment of a notice of motion in a judicial review matter stated thus:-

*“Turning to amendments to the notice of motion whether amendments to the notice of motion should be allowed so that the notice of motion tallies with the pleading in Judicial review). In our view, we find and hold that the to allow such amendments.”* *although the Order 53 Rules are silent on allowed, ..... amendments may be statement (which is the main court has inherent powers*

The said judges proceeded to allow the amendment for what they stated to be in order to preserve the subject matter for hearing on merit and in order not to occasion any prejudice to the applicant before the hearing of the notice of motion on merit. In a case decided in this court being HC Misc. Application Number 156 of 2003 [Meru] **David Kinyua Bedford Vrs. Festus Mbaya & others.** The court had this to say:-

*“In the event, I am persuaded and appropriately judicial review orders is wrongly intituled then the remedy often being done by the High Court but an order of amendment saw, I think that where the motion seeking is not an order of striking out as so of the document.”*

I too will state that I am of the same persuasion that this court can invoke its inherent power to allow an amendment to notice of motion in a judicial review. The courts are as always clothed with inherent power and can at any time invoke such power even in instances where there is an abuse of the court process to stop such abuse. In this case, that power can

be invoked to enable a party proceed to a hearing without occasioning prejudice. The amendment sought by the applicant is merely to correct an irregularity. I find the application merited and I hereby proceed to grant the following orders:-

- 1. That this court does hereby grant leave to the applicant to amend the notice of motion dated 15 November 2005 as per the annexure annexed to the chamber summons dated 6<sup>th</sup> July 2009.*
- 2. The costs of the chamber summons dated 6<sup>th</sup> July 2009 shall be in the cause.*

Dated and delivered at Meru this 6<sup>th</sup> November 2009.

**MARY KASANGO**

**JUDGE**