



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

Misc. Civ. Appli. 416 of 2006

REPUBLIC..... APPLICANT

VERSUS

**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. RESPONDENTS

EX-PARTE ERIC CHERUIYOT KOTUT

RULING

The application before the Court seeks to amend the Statement filed on 26th July 2006 and the Notice of Motion filed on 3rd August 2006. Both draft Amended Statement and the Notice of Motion have been exhibited. The application invokes the inherent jurisdiction of this Court.

The Applicant states that he seek reliefs in the Statement which will be reflected in the Notice of Motion as well. The applicant has submitted that no prejudice will be occasioned to the Respondents if the amendments were to be allowed. The applicant contended that if the application for amendment is not allowed the subject matter will be rendered nugatory. The reasons for the application are contained in an affidavit filed on 19/9/2006 and are inter alia:-

- (1)** An application for leave to apply for judicial review orders was filed by the applicant on 27.7.2006 under a certificate of urgency.
- (2)** On the same day, Hon. Mr. Justice Emukule gave leave and also ordered that leave operates as stay. In the application the applicant sought leave to apply for an order of certiorari to remove to this court and quash the remarks decisions and findings contained in the report of the Goldenberg Affairs Report presented to the President on 3rd February 2006 in so far as they adversely relate to the role of the Applicant.

(3) Leave was also sought to apply for an order of prohibition directed to the Attorney General and/or any other person prohibiting the filing and prosecution of criminal charges against the applicant in respect of the Goldenberg Affair pursuant to the Judicial Commission of Inquiry presented to the President on 3rd February 2006.

(4) The reliefs sought in the Statement tally with the prayers in the Chamber Summons (pg. 8). However in the portion for grounds upon which reliefs are sought (at page 13) under the topic of “*fair trial*” the applicant gave the following as a ground.

“10. Without further investigations the said same Attorney General Mr. Amos Wako has now after 13 years preferred conspiracy and abuse of office charges in CMC Case Cr. No. 518/2006 and 519/2006 respectively against the applicant on the basis of the Bosire Commission of Inquiry Report which is seriously flawed and manifestly defective as it relates to the applicant.”

(5) The verifying affidavit in support of the Statement which was sworn by the applicant states:-

“That without further investigations the said same Attorney General Mr. Amos Wako has now after 15 years preferred conspiracy and abuse of office charges in CMC Cases Cr. No. 518/2006 and 519/2006 respectively against me on the basis of the Bosire Commission of Inquiry Report which is seriously flawed and manifestly defective as it relates to the me.”

(6) The Notice of Motion sought to be amended was filed on 3.8.2006 and it seeks prayers similar to those sought in the Chamber Summons for leave.

(7) By an affidavit filed in November 2006 in reply, Emily Kamau, a Senior Principal State counsel in office of the Attorney General depones at para 15 as under:-

“That in response to paras 13 and 14 of the applicants verifying affidavit, I wish to state that, it is now apparent that the evidence adduced before the Goldenberg Commission of Inquiry rendered much more than was proven at the 1994 Criminal charges were preferred against the various suspects. I am aware that, subsequent to the Commissions report the Attorney General ordered for further investigations as a consequence of which the applicant herein was charged in criminal cases no. 518/2006 and 519/2006”

(8) From (7) above, it is quite evident that the applicants prosecutions in CM Cr. 518 and 519/2006 were instituted and commenced after the Commission of Inquiry Report and with the Report in view.

(9) It is also quite evident that the applicants attack is principally directed at the Inquiry Report findings in so far as they touch the two criminal cases and any future prosecutions.

(10) It is also quite evident that our learned brother, Hon. Justice Emukule’s order for leave and stay given on 28.7.2008 was silent on the two pending criminal cases namely CM Cr. 518 and 519 of 2006 although both the Statement and the Verifying Affidavit placed before him under a certificate of urgency made clear and specific reference to the two pending criminal cases. The subsequent extracted order of leave and stay served on the Chief Magistrate was silent on the two criminal cases and therefore the Chief Magistrate refused to stay the hearing of the two cases hence the applicants application to be allowed to amend and specifically include the two pending cases.

The Attorney General has opposed the application on four principal grounds:-

(i). That the proposed amendments have not been occasioned by **“any new matter arising out of the affidavits of any other party to the application as contemplated by Order 53 Rule 4 (2) of the Civil Procedure Rules.”**

(ii). There is no prayer to amend the Notice of motion and that the prayers in the Notice to the Registrar did not include what is now being sought.

(iii). The applicant has not sought an order of certiorari to quash the Attorney General's decision to charge and prosecute in the two cases.

(iv). The amendments sought are so substantial as to occasion prejudice the Respondent.

ANALYSIS OF THE ISSUES RAISED AND THE LAW

On ground (i) the applicant has submitted that he only seeks to amend the Statement and the Notice of Motion and they do not intend to file any affidavit or rely on any other further affidavit or seek leave to file a further affidavit on the basis of any new matters introduced by any other party to the proceedings and therefore the Respondents interpretation of Order 53 Rule 4 (2) are misconceived. Rule 4 (2) deals with two situations:-

(a) Amendment of a Statement.

(b) Filing of further affidavits and they are only interested in (a)

The applicant contends that although the wording of Judge Emukule's order made reference to all prosecutions he now seeks to amend to specifically include the two pending cases so that any doubts are erased. He has further submitted that failure to stay the proceedings in the two cases, would render his application nugatory, as the intention and purpose of coming to court, was to stop both pending prosecutions and further prosecutions.

The amendments sought in the Statement para C (2) include the following in line 3 - "**any pending or further**" and in addition the last sentence thereof to read:-

"Including the further prosecutions of the applicant in criminal case numbers 518 and 519 of 2006 already pending before the Chief Magistrates Court, Nairobi."

Similar amendments have been sought in prayer 2 of the Notice of Motion dated 18.9.2006.

The applicant has relied on the following authorities.

(1) **JOSEPH M. MAINA v THE CHIEF LAND REGISTRAR HC Misc. 803 of 2004** (unreported), a decision by Hon WENDOH J.

(2) **ADAM BROWN & COMPANY LTD v COMMISSIONER OF LANDS HCMC 1692/2002 (unreported) a decision by HON EMUKULE J.**

(3) **R v 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.**

All the decisions deal with the courts inherent right to allow amendments.

FINDINGS

The Applicant seeks to amend the Statement. In our view Rule 4 (2) gives the court a discretion to allow amendments to the Statement and secondly the filing of further affidavits where notice has been given and a new matter has been introduced by way of an affidavit by a party to the proceedings.

In this matter it is not the contention of the Respondent that they have not been served with the notice to amend the Statement. The contention that the court should not allow the amendments to the Statement because no new matter has arisen is a misreading or misinterpretation of Rule 4 (2) and the contention is clearly misconceived even on the reading of words used in the Rule.

Rule 4 (2) gives the court a wide discretion to allow amendments to the Statement. The Rule does not define or limit the scope or the substance of the amendments to be allowed.

On the hearing of the Notice of Motion the amendments may be allowed in order to meet the ends of justice. By analogy, the Civil Procedure Act and the Rules have given the courts a wide discretion to amend and we find that there are no restrictions whatsoever on the scope of the amendments to be allowed under the O 53 rule 4 (2), including new grounds and reliefs provided the amendments do not prejudice the other party. In our view we find that the courts hands are not fettered because the respondents could, if they so request, be given sufficient time to respond to the changes brought about by the amendments and they could also be compensated by way of costs occasioned by the amendments, if the court considers it just to do so.

As regards the time to make or bring an application to amend the rule provides, that this is at the time of the hearing of the motion. Ideally the application should be brought before the actual hearing, which is what the applicants have done.

By analogy, we find that the discretion to allow amendments pursuant to order 53 rules 4 (2) is similar to the one described in Section 100 of the Civil Procedure Act in these words:-

“the court may at any time and on such terms as to costs or otherwise as it may think fit, amend any defect or order in any proceedings in a suit and all necessary amendments shall be made for the purposes of determining the real question or issue raised by or depending on the proceeding.”

The only difference is that the s 100 discretion to amend is wider and can be exercised any time before judgment whereas under the Judicial review discretion, the amendments must be in the Statement before the commencement of the case.

We find that the proceedings in the two criminal cases namely CM Cr cases 518 and 519/2006 were sufficiently covered or included in the Statement and Verifying Affidavit and the intended amendments are necessary because otherwise, the applicant would be barred from relying on any new grounds or seeking any new relief at the hearing. Order 53 rule 4 (1) does not allow or permit reliance on any grounds or the seeking of new reliefs not included in the Statement.

Order 53 rule 4(1) reads:

“Copies of the statement accompanying the application for leave shall be served with the notice of motion and copies of any affidavits accompanying the application for leave shall be supplied on demand and no ground shall subject as hereafter in this rule provided, be relied upon, or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.”

We find that the two pending cases were contemplated by the applicant at the time of seeking leave and were specifically mentioned in the Statement and the Verifying affidavit when leave was granted. Leave is granted on the basis of the Statement and Verifying Affidavit and therefore the two pending cases were covered by the Order for leave and stay granted by our brother, Hon Justice Emukule on 27th July 2006.

We further find that the order for leave and stay does cover the pending criminal cases because the pleadings as at the stage of leave, did make specific reference to them, and they formed one of the grounds for the application for leave. In this regard the specific reference to the two cases appear in paragraphs 5 and 7 at page 3 and 4 of this ruling.

The upshot is that, we find that the applicant is not seeking to introduce any new grounds or reliefs and even if he was to do so he would still be allowed to include them in an application to amend.

Turning to the amendments to the Notice of Motion although the Order 53 rules are silent on whether amendments to the Notice of Motion should be allowed, as held in the three cases cited above, amendments may be allowed so that the Notice of Motion tallies with the Statement (which is the main

pleading in judicial review). In our view, we find and hold that the court has inherent powers to allow such amendments.

On the contention that the amendments sought are substantial or drastic or brought at the last minute we find no justification for the contention in that Rules 4 (1) and 4 (2) clearly allow amendments to seek new reliefs or rely on new grounds.

In the case of the applicant, he is in the interest of clarity, seeking amendments aimed at clarifying the position as at the date of leave and stay and also in order to preserve the subject matter in the notice of motion and also to stop the application from being rendered nugatory before the hearing on merit. He further seeks to prevent further proceedings in the two pending criminal cases, without which serious prejudice could be occasioned, unless and until the judicial review application is heard on merit. We find that the reasons for the amendments are not inconsistent with the courts inherent power to allow amendments which touch on the real issue before the court or which touch the proceedings before the court

On the contention that the applicant had not in the notice to the registrar sought the orders he is now seeking or that he has not sought certiorari against the Attorney General's decision to charge and prosecute, our finding is that the Notice to the Registrar has its purpose, but it is not as held above, the main pleading in judicial review. Notwithstanding what is initially stated in the Notice to the Registrar, an applicant is not constrained to seek any deserving amendments as per the Rule set out above. And on the issue of the applicant having not applied for certiorari this is a matter which goes to the merit of the application, and has nothing to do with the application to amend. The Applicant could still seek a further amendment at the hearing if so advised since the Rule does not have a time bar. After all, as analysed herein above an applicant can apply to amend any time before the hearing or on the hearing date. Moreover it is our tentative view that any pending cases could be stopped by an order of prohibition if and when given, as happened in *GITHUNGURI II* case.

This cannot in our view debar the court to allow the amendments now being sought.

Finally, we wish to observe that the proposed amendments notwithstanding, the inclusion of the two criminal cases in both the Statement and Verifying affidavit meant that the order for leave and stay was given on the state of the Statement and Verifying affidavit and the cases were therefore contemplated by the order.

In the light of the above, we have no hesitation in allowing the application for amendments as prayed and in particular, the amendments sought in respect of the statement and the notice of motion. 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 and for the avoidance of doubt surrounding the initial order of leave, we hereby invoke this court's inherent powers and forthwith order that leave shall operate as stay in relation to CM Cr. Cases 518 and 519/2006 and that the order of stay shall remain in force until the determination of the judicial review application.

DATED and delivered at Nairobi the 23rd day of May 2008.

JG NYAMU

JUDGE

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R WENDOH

JUDGE

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G DULU

JUDGE