



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

**Misc. Civ. Appli. 98 of 2005**

**SAMUEL OLUOCH ONUONGA.....1<sup>ST</sup> APPLICANT**

**HENRY MUMBO OREMO.....2<sup>ND</sup> APPLICANT**

**JAMES MUIRURI NDERU.....3<sup>RD</sup> APPLICANT**

**-V E R S U S-**

**NATIONAL HOUSING CORPORATION.....1<sup>ST</sup> RESPONDENT**

**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

A Notice of Motion dated 15<sup>th</sup> February, 2005 was filed by M/s King'oo – Wanjau & Company advocates on the same date, pursuant to leave of the court granted on 25<sup>th</sup> January, 2005. The Notice of Motion seeks for the following orders-

**1. *An order of certiorari do issue to remove to this***

***Honourable Court the decision made by the First Respondent and communicated in Notices dated 27<sup>th</sup> October, 2004 for the purposes of being quashed.***

**2. *A declaration that the decision to increase rent***

***is arbitrary and the notice inadequate and that the Respondents should repair the premises before considering increment of rent.***

The Notice of Motion was purported to be brought under Order LIII of the Civil Procedure Rules. The applicants are named as **SAMUEL OLUOCH ONUONGA (1<sup>st</sup> applicant)**; **HENRY MUMBO OREMO (2<sup>nd</sup> applicant)**; and **JAMES MUIRURI NDERU (3<sup>rd</sup> applicant)**. The respondents are named as **NATIONAL HOUSING CORPORATION (1<sup>st</sup> respondent)** and **CITY COUNCIL OF NAIROBI (2<sup>nd</sup> applicant)**.

After filing the Notice of Motion, on 30<sup>th</sup> March, 2006, the applicant's counsel filed a Notice to apply to amend the statutory statement and to file a Supplementary affidavit under Order LIII rule 4 (2) of the Civil Procedure Rules, with the intention of invoking the provisions of the Local Government Act (**Cap. 265**) the counsel for the applicants filed and Amended Notice of Motion dated 29<sup>th</sup> March, 2005 in which

the Local Government Act (**Cap. 265**), and the Housing Act (**Cap 117**) are cited on the face of the Notice of Motion. In the same Notice of Motion, the **REPUBLIC** is named as the applicant, while **M/s SAMUEL OLUOCH ONUONGA, HENRY MUMBO OREMO and JAMES MUIRURI NDERU** are listed as ex-parte applicants. On the 17<sup>th</sup> May, 2005, M/s King'oo Wanjau & Company advocates for the ex-parte applicants filed an amended Statutory Statement dated 16<sup>th</sup> May, 2005.

Subsequently, on 4<sup>th</sup> May, 2007, M/s Nderitu & Partners advocates for the National Housing Corporation filed a Notice of Motion under Section 3A of the Civil Procedure Act, Order LIII of the Civil Procedure Rules and Section 9 of the Law Reform Act (**Cap. 2B**) asking for the following orders that-

- 1. The Notice of Motion herein be struck out with costs to the respondents.**
- 2. The Honourable Court be pleased to terminate these Judicial Review Proceedings.**

Following the filing of the above application, on 25<sup>th</sup> September, 2007 M/s King'oo Wanjau & Company advocates filed an application by way of Notice of Motion under Order XLIII of the Civil Procedure Rules and the inherent powers of the court, seeking for orders that-

- 1. Leave be and is hereby granted to the applicant to file an amended Notice of Motion and Statutory Statement.**
- 2. The Amended Notice of Motion herein dated 29<sup>th</sup> March, 2005 and the Amended Statutory Statement dated 16<sup>th</sup> May, 2005 be deemed as duly filed and served.**
- 3. Costs of this application be provided for.**

M/s King'oo – Wanjau & Company advocates also on the same 26<sup>th</sup> September, 2007 filed grounds of opposition to the application dated 4<sup>th</sup> May, 2007 filed by M/s Nderitu & Partners advocates on the ground that the same was an abuse of the law and the court process and should be struck out.

On 1<sup>st</sup> October, 2007 M/s Wanjau Maina & Co. advocates for City Council of Nairobi filed grounds of opposition dated 20<sup>th</sup> September, 2007 to the application filed by M/s King'oo Wanjau & Company advocates dated 25<sup>th</sup> September, 2007.

On 8<sup>th</sup> October, 2007 Hon. Justice Nyamu ordered that the application dated 4<sup>th</sup> May, 2007 and 25<sup>th</sup> September, 2007 be heard on 14/2/2008. The two applications however, do not appear to have been consolidated. On 14/2/2008 Nyamu J. ordered that the matter be heard on 16/5/2008 before any Judge in the Constitutional and Judicial Review Division.

When the matter came up before me on 16/5/2008, Mrs King'oo was present for the ex parte applicants in the main Notice of Motion. Mr. Mwenda was present for 1<sup>st</sup> respondent National Housing Corporation, while Mrs. Maina was present for 2<sup>nd</sup> respondent City Council of Nairobi. Parties counsel present could not agree to have the two applications dated 4/5/2007 and 25/9/2007 consolidated, nor could they agree on which of the two applications should be heard first. I decided that the application which was filed first dated 4/5/2008 be heard first.

In his submissions on the application dated 4/5/2007, Mr. Mwenda submitted that the Notice of Motion dated 15/2/2005 should be struck out with costs. Counsel submitted that the application was premised on the affidavit of **WILLIAM KEITANY** the Senior Legal Officer of the National Housing Corporation. Counsel contended that the Notice of Motion in question was fatally defective, as it was not brought in the name of the **REPUBLIC**. Therefore, the applicants therein did not have a *locus standi* as Judicial Review proceedings were usually instituted by the Republic. In addition, the subject matter of the proceedings were tenancies and the applicants were individuals unknown to the National Housing Corporation. The proper parties should have been the actual tenants.

Counsel also submitted that the Notice of Motion was fatally defective as it sought declaratory orders which could not be granted under Judicial Review process. In addition paragraph 13 of the supporting affidavit related to private tenancies rather than statutory breaches. Counsel contended that Nyamu J. in fact commented on this aspect in granting leave. Lastly, Counsel argued that there had been a lapse of more than 1 ½ years from the time leave was granted to the time that the National Housing Corporation filed this application, and the applicants in the Notice of Motion in question had not progressed the matter. Counsel sought to rely on several case authorities.

Mrs. Maina for the City Council of Nairobi submitted that she supported the contention that the Notice of Motion in question was fatally defective. Counsel sought to rely on the case of **WELAMONDI –VS- CHAIRMAN OF ELECTORAL COMMISSION OF KENYA [2002] IKLR 486**. Counsel also submitted that the applicants in the Notice of Motion had no *locus standi* as they had not filed any document in court to support their interest. They merely annexed a draft lease agreement which was not signed. In addition the affidavit in support of that application was sworn by one, **ONUONGA**, who described himself as Chairman of a welfare association. He did not state that he was a tenant. Lastly, counsel submitted that there was inordinate delay in prosecuting the application. For 1 ½ years the applicants did not do anything until this application by National Housing Corporation was filed.

Ms. King’oo for the ex-parte applicants in the Notice of Motion responded by submitting that they relied on the grounds of opposition dated 25/9/2007. Counsel submitted that the application was not an abuse of the court process as the issue as to whether the application was fatally defective could only properly be raised at the hearing of the motion. In view of the fact that leave had already been granted, the objection should be raised at the substantive hearing of the motion. The same argument, Counsel contended, applied to the issue of whether the reliefs sought were public law or private law remedies.

Counsel contended that the Notice of Motion was not fatally defective. The defect could be cured by amendment, and an amended statement and Notice of Motion had already been filed on 30/5/2005 trying to bring the **REPUBLIC** on board as the applicant. Counsel contended in the case of Ex-parte applicant **JACOB JUMA –VS- COMMISSIONER OF POLICE** – it was held that the co-business of Judicial Review was to do justice. In that vein dismissing applications merely because of want of form should be avoided. An application for amendment was actually filed on 25/9/2007. Counsel sought to rely on the case of **D.T. DOBIE –VS- MUCHINA** (1978) especially the holding No. 9 which was orbiter – whether it was held that courts should aim at sustaining rather than striking out suits. Counsel submitted that the Judicial Review court was a special court, and relied on the case of **WELAMONDI –VS- CHAIRMAN ELECTORAL COMMISSION OF KENYA**. As the court was neither exercising civil or criminal jurisdiction, it should not be tied to civil or criminal procedure.

Counsel argued that this court had jurisdiction as the people who swore the verifying affidavit on 21/1/2005 swore on behalf of members of an association, who were tenants. Counsel contended that tenants had a right to bring Judicial Review proceedings. Counsel sought to rely on the case of **NJAU – VS- CITY COUNCIL OF NAIROBI** – which was a case relating to tenants at Pumwani Estate.

Counsel argued that in the amended statutory **STATEMENT** the applicants challenged the increase of rent under Section 177 (1) of the Local Government Act, as such increase of rent should have been reasonable and should not be abused. Counsel contended that it was only by hearing the substantive motion that reasonableness could be determined.

Counsel further argued that that the National Housing Corporation took over the management and, under Section 12(2) of the Housing Act (**Cap. 117**) they took over the benefits and liabilities. They therefore took over the tenancies and could only increase rent reasonably. Counsel contended that her clients had *locus standi* to bring this action.

Counsel further argued that the High Court could grant the orders of certiorari sought. Counsel appreciated that the court could not grant a declaration in Judicial Review proceedings. However, Counsel argued, the fact that they sought leave to apply for a declaration did not make the application fatally defective.

On breach, Counsel argued that the alleged breach is in the proposed amended motion. Counsel sought to rely on the case of **NJAU –VS- CITY COUNCIL OF NAIROBI [1983] KLR 625-** in which the Court of Appeal stated that a resident of premises could question the exercise of statutory powers.

Counsel submitted that there were no stay orders granted, therefore alleged delay did not cause any prejudice to other parties. Counsel relied on the case of **WELAMONDI –VS- CHAIRMAN, ELECTORAL COMMISSION OF KENYA (2002) IKLR 486** and submitted that even where a representative suit was filed, there was need for leave. However there were provisions that a suit could be brought without leave counsel submitted that as the applicants had come to court, they should be allowed to be heard. Counsel contended that Judicial Review looked at the procedure rather than the merits, and that an opportunity should be given to parties to be heard. Counsel urged me to dismiss the objection.

In response, Mr. Mwenda, submitted that the application was brought because the applicants in the main motion had failed to take steps to progress their motion. On defects, Counsel argued that the failure to name the Republic was a defect of substance and not of form. Counsel sought to rely on the case of **HENRY AMWANI –VS- CHAIRMAN LANDS DISPUTES TRIBUNAL – Bungoma HCCMA No. 79 of 2002.** Counsel also relied on the case of **PAGREX -VS- MINISTER FOR FINANCE – HCCC No. 875 of 2001.**

On amendment, the courts jurisdiction had not been properly invoked. Counsel contended therefore that the court had no jurisdiction.

Counsel contended that the respondents would suffer prejudice, as there was no evidence that the applicants were tenants. On amendment to the **STATEMENT**, Counsel submitted that the submissions of counsel for the applicants should not be taken into account as leave to amend had not been granted under Order 53 rule 4(2).

Counsel further argued that the Judicial Review court could not grant declaratory orders, and, if that prayer is ignored, the entire application would serve no purpose. Counsel sought to distinguish the case of **DT DOBIE & COMPANY LTD -VS- MUCHINA [1982] KLR 1**, in that the case was not a Judicial Review case. Counsel argued that amendments could only be allowed, if they did not go to jurisdiction. Counsel further argued that the National Housing Corporation took over proprietorship of the houses, not management. Therefore Section 177 of the Local Government Act, and Section 12 (2) of the Housing Act, did not apply.

Counsel lastly argued that in Judicial Review Proceedings, the prosecution matters should be expected, otherwise the proceedings can be terminated like in the case of **MUENI -VS- DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER MWINGI – HCCCMA 1108 of 2004** in which Hon. Justice Nyamu terminated the proceedings due to delay.

Mrs. Maina, on the other hand submitted there was no provision for amendments in Judicial Review proceedings. Counsel sought to rely on the case of **PAGREX -VS- MINISTER FOR FINANCE**, in which, Counsel submitted, Nyamu J. stated that there was no room for amendments to Notice of Motion. The only amendment that could be allowed was in filing a further affidavit.

In any event, Counsel argued, an amendment would be an exercise in futility as prayer 2 asked for a declaration which could not be granted in Judicial Review proceedings. Counsel emphasized that courts should not act in vain. Counsel asked that the motion should be struck out as no complaint had been disclosed against the City Council of Nairobi.

I have considered the submissions of the Counsel who appeared before me. I have perused the documents filed. I have also considered the authorities cited to me.

At the risk of repetition, I wish to state that the application for decision before me is the Notice of Motion dated 4<sup>th</sup> May, 2007 filed on the same date by M/S Nderitu & Partners advocates for the National Housing Corporation. It seeks orders relating to the Notice of Motion dated 15<sup>th</sup> February 2005, filed by

M/s King'oo Wanjau & Co. advocates for the ex-parte applicants. The Notice of motion dated 4<sup>th</sup> May, 2007 seeks for the following orders that-

- 1. The Notice of Motion herein (dated 15<sup>th</sup> February, 2005) be struck out with costs to the respondent.**
- 2. The honourable court be pleased to terminate these Judicial Review proceedings.**

The grounds for seeking the above two orders are that –

**(a) The Notice of Motion dated 15<sup>th</sup> February, 2005 purporting to take out Judicial Review proceedings is fatally defective and bad in law.**

**(b) The applicants have no locus standi.**

**(c) The applicants seeks for orders that the High Court cannot grant.**

**(d) The orders sought are within the realm of private law.**

**(e) There has been such inordinate delay in the prosecution of these proceedings as to disentitle the applicants of the courts exercise of discretion in their favour.**

Parties counsel have made several arguments before me. It appears to be admitted that on the face of it the notice of motion dated 15<sup>th</sup> February, 2005 is defective. It does not list the **REPUBLIC** as the applicant as required by the law, and decided court cases. However, an application seeking to amend the Notice of Motion to name the **REPUBLIC** as the application was filed on 30<sup>th</sup> March, 2005. The same has not been heard to date. Arguments have been made that this court cannot amend a Notice of Motion, but can only allow amendment of a **STATEMENT**. Reliance was placed on Order 53 rule 4 (2) which provides-]

**“4(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matters arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavit.”**

The above rule does not say that the format of the motion itself cannot be amended. In addition, under Order 53 rule 1 (2) the statement is required to set out the name and description of the applicant, the relief sought, and grounds on which it is sought. It is normal practice that the reliefs sought are also stated on the face of the motion. Therefore, it follows, in my view, that an amendment to the statement could as well amount to an amendment of the motion. It is ultimately the court's discretion to allow the amendment sought, at the appropriate time. In my view this preliminary stage is not the point to determine the defectiveness of the motion filed or the competence or merits of the application for amending the motion. I will not strike out the motion filed at this stage on the above grounds.

Arguments have been put across on delay and that the issues in the whole matter are private law issue, and that there is no proof that the applicants are tenants. Indeed, Judicial Review matters need to be handled expeditiously. They usually have far reaching effects on actual and interested parties. Admittedly, there appears to be a delay on the applicants counsel fixing the matter for hearing. However, in my view, either of the parties can initiate or progress the hearing process. The court however, does not condone inordinate delays in hearing and determining matters before it. All Counsel and parties in this matter must take the expeditious hearing and disposal of this case seriously. The other issues regarding private law remedies, and the *locus standi* of the ex-parte applicants will be determined and follows the determination by the court of the main motion. In my view, in Judicial Review matters, it is preferable to grant the parties an opportunity to ventilate their substantive position, rather than dismiss the cause on preliminary technicalities. This is because, it is usually the process or jurisdiction that is being

challenged, and this can only be brought out clearly after the parties are allowed to ventilate their substantive position before the court.

For the above reasons, I find no merits in the application dated 4<sup>th</sup> may, 2007. I order as follows-

- 1. The application dated 4<sup>th</sup> May, 2007 is hereby dismissed.**
- 2. The applicant's Counsel do take necessary action to fix the main motion for hearing in the registry within the High Court term which commences on 16<sup>th</sup> September 2008, at which hearing the application for amendment will be determined first.**
- 3. Parties to file written submissions and lists of authorities before hearing date.**
- 4. Costs in the cause.**
- 5. Mention on 24<sup>th</sup> October, 2008 (9am), to confirm action taken by ex-parte applicants Counsel.**

Dated and delivered at Nairobi this 29<sup>th</sup> day of September, 2008.

**GEORGE DULU**

**JUDGE.**

**In the presence of-**

Ms. King'oo for ex parte applicants

Mr. Nderitu for 1<sup>st</sup> respondent

Mrs. Maina for 2<sup>nd</sup> respondent.