



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Civil Appli 1622 of 2004

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF
MANDAMUS PROHIBITION**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE ARMED FORCES ACT (CHAPTER 199 OF THE LAWS OF
KENYA)**

AND

IN THE MATTER OF THE LAW REFORM ACT (CHAPTER 26 OF THE LAWS OF KENYA)

AND

**IN THE MATTER OF THE GOVERNMENT PROCEEDINGS ACT (CHAPTER 40 OF THE
LAWS OF KENYA)**

AND

IN THE MATTER OF THE REPUBLIC OF KENYA.....APPLICANT

VERSUS

THE DEFENCE COUNCIL OF THE ARMED

FORCES OF THE REPUBLIC 1ST RESPONDENT

THE MINISTER FOR DEFENCE 2ND RESPONDENT

EX-PARTE

LT COLONEL BENJAMIN MUEMA 1ST APPLICANT

JUDGMENT

The application before the Court is dated 25th November, 2004 seeks various orders including orders of mandamus against the Defence Council of the Armed Forces of the Republic and the Minister for Defence.

The Attorney General has declined to file any affidavit in reply citing grounds of national security this being a military related matter but he has filed written skeleton arguments on 30th March 2006. The applicants too filed skeleton arguments on 23rd March 2006.

In the course of his submissions the Attorney General has argued that the orders sought in the application cannot be granted because the applicants have not sought the same orders in the statement. In the statement they have only sought leave to apply for judicial review orders whereas in the application they have sought the judicial orders of mandamus against at least two Respondents. He contends that the application is incompetent as it violates Order 53 rule 4(1) of the Civil Procedure Rules. The applicants, did not at the hearing seek leave to amend the statement to tally with the Notice of Motion.

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 grounds 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."

In the case of ***R v PERMANENT SECRETARY MINISTRY OF PLANNING AND NATIONAL DEVELOPMENT ex-parte THE NATIONAL COUNCIL OF NON-GOVERNMENTAL ORGANISATIONS H C Misc 1124 of 2005*** (unreported) this Court held that where judicial orders have not been sought in the statement and where reliefs sought in the Notice of Motion do not tally with those sought in the statement the application for judicial review is incompetent.

I agree with the submissions of the learned counsel for the respondents Mr Ombwayo that the statement is bare and has not sought any judicial orders. The Court has nothing to hear and it cannot move a step further in the face of a clear violation of O 53 rule 4(1) of the Civil Procedure Rules. The statement is the main pleading in judicial review.

In the face of the incompetence described, I decline to go into all the other issues raised because I would have no reason to adjudicate on them. I reiterate my holdings on the point in the case cited herein. The application is struck out with costs to the respondents.

DATED and delivered at Nairobi this 25th day of November, 2008.

J G NYAMU

JUDGE

Advocates

Mr Agina for the Applicants

Mr Ombwayo for the Respondents