



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

Misc Appli 803 of 2004

JOSEPH M. MAINA.....APPLICANT

Versus

THE CHIEF LAND REGISTRAR.....RESPONDENT

RULING

By a Chamber Summons dated 23rd October 2006, the Applicant, Joseph Maina prays that this court do grant him leave to amend his Notice of Motion and statement of facts dated 28th June 2004 and that the same be deemed as filed as per intention to amend the statement and Notice of Motion dated 13th July 2006. The Applicant also asks for costs of the Application.

The Application is brought under Sections 3A and 100 of the Civil Procedure Act, Order 53 Rule 4 (2) of the Civil Procedure Rules. The grounds upon which the Application is premised are that the Notice of Motion and statement of facts are not correctly intituled, that the Applicant seeks to amend the error and that neither the Interested Party nor the Respondents will suffer any prejudice.

The Interested Parties opposed the Application. Mr. Mboroki Counsel for the 1st Interested Party filed a Preliminary Objection to dated 2nd March 2007 and Mr. Mutinda Counsel for the 2nd Interested Party filed grounds of opposition dated 7th February 2007.

In his submissions Mr. Nyagah Counsel for the Applicant submitted that the amendment sought is purely on form but not substance. He relied on the case of **FARMERS BUS SERVICE V THE TRANSPORT LICENSING APPEALS BOARD (1959) EA 179** where the court set out the format to be followed in Judicial Review Applications and that though the court found the Application not to be properly intituled, it went ahead and allowed an amendment of the documents including the Notice of Motion. Counsel also relied on the case of **R V AG MISC APPLICATION 105/01** where Justice Visram held that failure to include the Republic as the Applicant was an error of form that could be amended. In another case of **R V THE PERMANENT SECRETARY MINISTRY OF PLANNING AND NATIONAL DEVELOPMENT MISC 1769/04**. Justice Nyamu allowed an amendment of the Notice of Motion. Counsel said that this case involves a land dispute which has been subsisting for over 10 years and needs to be resolved and that the Respondent has not shown any objection to the amendment.

The 1st Interested Party's objection was two fold:-

(1) That the Application is misconceived and incompetent, an abuse of the court process because Order 53 Rule 4(2) Civil Procedure Rules does not allow an amendment of the Notice of Motion save for the statement of facts which can be amended;

(2) That the procedure followed is not envisaged by the Civil Procedure Rules.

The 2nd Interested Party raised the same objections as above.

We have now taken into account the submissions of all Counsel and the authorities that have been relied upon.

We do note that the Applicant has invoked sections 3A and 100 of the Civil Procedure Act which are not applicable to Judicial Review, Judicial Review being a special jurisdiction which is neither civil nor criminal in nature (see CA 234/1995). **The COMMISSIONER OF LANDS V KUNSTE HOTEL LTD**). Sections 8 & 9 of the Law Reform Act provide the substantive Law applicable to Judicial Review whereas Order 53 Civil Procedure Rules provides for the procedure.

The Applicant also invoked Order 53 R 4(2) Civil Procedure Rules which allows the Applicant to give notice of an intention to amend the statutory statement and that proposed amendment has to be made available to the affected parties. The Applicant had done that in the notice of intended amendment dated 13th July 2006 and therefore complied with Order 53 R 4(2) Civil Procedure Rules. Section 8 and 9 of the Law Reform Act and Order 53 Civil Procedure Rules make no provision for amendment of a Notice of Motion. The question is whether this court can allow the said amendment.

In the case of **R V PERMANENT SECRETARY MINISTRY OF PLANNING AND NATIONAL DEVELOPMENT**, Justice Nyamu allowed an amendment of the Notice of Motion by invoking the inherent powers of the court. In the circumstances though the Applicant did not invoke the inherent powers of the court, the court has the mandate to do justice to all parties. Neither of the parties will suffer any prejudice by the amendment of the Notice of Motion because what is sought to be amended is only the name of the Applicant to read the 'Republic'. The amendment only goes to form but not substance. Even if the amendment were not granted, the only order sought by the Applicant is that of mandamus and so the Applicant would still move the court by another Application for an order of mandamus. It would therefore be costly and a waste of time if the court were to refuse an order to amend the Notice of Motion.

For the above reasons, we find no good reason to deny the Applicant the prayers sought. We grant the orders in terms of prayer I & 2 of the Chamber Summons dated 23rd October 2006.

We direct that the Respondent and Interested Party be duly served with the amended Chamber Summons and statutory statement within 7 days of today's date if service had not yet been effected.

The applicant will bear the costs of the Chamber Summons dated 23rd October 2006.

Dated and delivered this 30th day of April, 2007.

R.P.V. WENDOH

JUDGE

M.J.A. EMUKULE

JUDGE

Read in the Presence of:-

Maina: Court Clerk

Nyagah: for the Applicant

Mboroki for the Interested Party

Mutinda for 2nd Interested Party