



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

Misc Appli 315 of 2007

MUNICIPAL COUNCIL OF GARISSA.....APPLICANT

Versus

THE DISTRICT VETERINARY OFFICER GARISSA.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Before me is the Notice of Motion dated 17th May 2007 brought by the ex parte Applicant, Municipal Council of Garissa. It is expressed to be brought pursuant to Section 3A of the Civil Procedure Act, Order 50 Rule 1 and Order 52 Rules 1, 2,3 and 4 Civil Procedure Rules. The Applicant seeks the leave of the court to amend its Notice of Motion in terms of the draft amended Notice of Motion annexed to the Affidavit in support of this Application. The Applicant also seeks to be allowed to file a further affidavit in support of the Motion. The Application is supported by the Affidavit of Aduma Owour, the Applicants Town Clerk. It was submitted that the Application for amendment of the Notice of Motion was necessitated by of the fact that the Notice of Motion as filed states that leave is sought in that Notice of Motion yet leave to bring Judicial Review proceedings had been granted by virtue of the Chamber Summons dated 28th March 2007. According to Mr. Okeyo, Counsel for the Applicant, it was an inadvertent mistake which will not cause any prejudice to the Respondents.

As regards the further Affidavit sought to be filed, the Applicant intends to bring to the attention of the court information which came to their knowledge after leave was granted to bring these Judicial Review proceedings. Counsel relied on S.100 Civil Procedure Act and Order 50 Civil Procedure Rules as giving this court unfettered discretion to grant the reliefs sought.

Mr. Meso, Counsel for the Respondent opposed the Application as follows: That Section 100 of the Civil Procedure Act and Order 50 Civil Procedure Rules do not apply to Judicial Review proceedings which are proceedings ‘sui-generis;’

That Order 53 rule 4(2) which was relied upon only allows amendment of the statement and filing of other affidavits upon leave being granted by the court and that one needs to give notice of the intended amendments which the Applicant has not done. Counsel urged the court to disallow the prayer for amendment of the Notice of Motion but that the further affidavit can be filed if the Respondents affidavit raised new matters.

Judicial Review is special jurisdiction donated by Sections 8 and 9 of the Law Reform Act and Order 53 Civil Procedure Rules. When the court exercises Judicial Review jurisdiction, it is neither exercising Civil nor Criminal jurisdiction. See the case of **R V KUNSTE HOTEL LTD CA 224/95**. The Applicant has invoked S.3A, S.100 Civil Procedure Act, Order 50 and 52 Civil Procedure Rules. All those provisions of the Civil Procedure Rules are inapplicable.

Under Order 53, Civil Procedure Rules, there is no provision for amendment of a Notice of Motion.

Order 53 Rule 4(2) Civil Procedure Rules only allows the amendment of a statutory statement and filing of further Affidavits with leave of the court after notice is duly issued to the court and the opposing parties. So there being no provision for amendment of a Notice of Motion can the court fold its hands and say it can do nothing about it? Under the inherent powers of the court, the courts have allowed such Applications to amend the Notice of Motion if no prejudice will be suffered by the Respondents.

The courts have considered the same issues in the following cases amongst others;

1. **R V PS MINISTRY OF PLANNING & NATIONAL DEVELOPMENT MISC. 1769/04**, Nyamu J. allowed an amendment of the Notice of Motion
2. **R V THE CHIEF LAND REGISTRAR ex parte JOSEPH MAINA MISC APPLICATION 803/04**, where Wendoh & Emukule JJ allowed an amendment of Notice of Motion.

In both the above cases, the courts invoked the inherent powers of the court.

In this case, the Applicant says that the mistake was inadvertent. The Notice of Motion cannot have been an Application for leave since leave had already been granted. In my view the Respondent will not suffer any prejudice by an amendment. If the amendment is refused, the Applicant will lose their chance to be heard on merit but may also seek to file another Application if their Application is struck out which will cause delay and unnecessary costs. It would be in the interest of justice and expedience that the court do allow the Application even though the court's discretion was not properly invoked.

As regard the question of filing a further Affidavit, Order 4(2) Civil Procedure Rules allows the filing of further Affidavits to deal with new matters arising out of the Affidavits of any other party to the Application. The party who seeks to amend must give notice of that intention. In this case, there is Replying Affidavit filed by the Respondents but even if there is a new matter that has been raised which the Applicant needs to counter, the court and the Respondent have not been notified of it. The court cannot allow the filing of a further Affidavit without the required notice being served. Accordingly, I will direct that the Applicant complies with Order 53 Rule 4 (2) and issue a notice of their intention to file a further Affidavit which the Respondents will consider and decide whether or not to object. The 2nd prayer seeking to file a further Affidavit is therefore disallowed. The Applicant must comply with Order 53 Rule (4) (2) Civil Procedure Rules.

In the Result, the court allows the amendment of the Notice of Motion as prayed at prayer 2 of the Notice of Motion dated 17th May 2007. Prayer 3 is disallowed.

The Applicant to bear costs of this Application.

Dated and delivered this 18th day of June 2007.

R.P.V. WENDOH

JUDGE

Read in Presence of

Mr. Nduhiu holding brief for Mr. Okeyo for the Applicant

Daniel: Court Clerk