



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MISC APPLI 97 OF 2005

JONATHAN NZIOKA MUTISO.....APPLICANT

Versus

DIRECTOR OF PENSIONS.....RESPONDENT

RULING

By a Notice of Motion dated 13th March 2007, the Applicant seeks an order that the amended Notice of Motion dated 23rd March 2005 and filed in court on 30th March 2005 be deemed as duly filed and served and that costs be provided for. The Application is brought under the inherent powers of this court and supported by grounds found in the body of the Application and an affidavit of Ms Kingoo, an advocate who has conduct of this matter. She depones that she erroneously filed an amended Notice of Motion without seeking leave of the court and that the amendment sought only touch on the form of the Application but not the substance and will not be prejudicial to the Respondents. Counsel relied on the case of **REP V THE COMMISSIONER OF POLICE HC MISC 447/05** where the court held that the court has inherent powers to amend a Notice of Motion though it was not specifically provided for.

Ms Mwaniki, Counsel for the Respondent opposed the Application on grounds that Order 53 Civil Procedure Rules does not allow for amendment of the Notice of Motion and that even if that were so, notice should have been issued by the Applicant regarding the amendment.

Order 53 Civil Procedure Rules does not provide for amendment of a Notice of Motion. Order 53 4(2) Civil Procedure Rules only allows amendment of a Statutory Statement and the filing of further Affidavits with leave of the court, after notice has been duly issued to the court and the opposing parties. However despite there being no provision for amendment of a Notice of Motion, the courts have not sat back and folded their hands. They have invoked the inherent powers of the court and allowed situations which are not specifically provided for in order to do justice to the parties.

The courts have allowed for amendment of the Notice of Motion in the following cases:

- 1) **R V P S MINISTRY OF PLANNING & NATIONAL DEVELOPMENT 1769/04** where Justice Nyamu allowed an amendment if the Notice of Motion.
- 2) **THE CHIEF LAND REGISTRAR ex parte JOSEPH MAINA HC MISC APPLICATION 803/04** where Wendoh and Emukule JJ allowed an amendment of the Notice of Motion. Similarly in the case cited before this court **Ex parte JACOB JUMA**; the court allowed amendment of a Notice of Motion

In all these cases and others, the court has invoked its inherent powers to amend the Notice of Motion in order to do justice.

In considering such an Application the court takes into account whether any prejudice will be suffered by the other parties to the proceedings. In this case what is sought to be amended is only the title of the Application so that the Republic is reflected as the Applicant in place of the ex parte Applicant. Judicial Review Applications are normally brought in the name of the Republic on behalf of the affected party who is the ex parte Applicant. In this case, the intended amendment only affects the form of the Application but not the substance. The Respondents will not suffer any prejudice by that amendment.

On the contrary if the Notice of Motion proceeds to hearing in the form in which it was filed, it is likely to be struck out and the Applicant would then be forced to file another Application if still within time or the matter would be finalised before the merits are considered due to a technicality.

The justice of this case dictates that the Application to amend be allowed so that the case proceeds to hearing on merit by having both parties substantively.

In the result, I grant prayers 1 and 2 of the Notice of Motion dated 13th March 2007. The Applicant bears the costs of the Notice of Motion.

Dated and delivered this 11th day of June 2007.

R.P.V. WENDOH

JUDGE

Read in Presence of:

Mr. Bosire holding brief for Mrs. Kigoo for Applicant

Daniel: Court Clerk