



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT (MILIMANI LAW COURTS)**  
**MISC CIV APPLI 102 OF 2007**

**MURINGA HOLDINGS LTD.....APPLICANT**

**Versus**

- 1. TELKOM KENYA LTD.)**
- 2. PERMANENT SECRETARY MINISTRY OF INFORMATION & COMMUNICATION)**
- 3. ATTORNEY GENERAL).....RESPONDENTS**

**RULING**

**On 8<sup>th</sup> August 2007**, the ex parte Applicant filed a Notice of intention to amend the Statement of facts dated 14<sup>th</sup> February 2007, the Notice of Motion dated 19<sup>th</sup> February 2007 as well as the title of the Notice of Motion, and to amend the documents/pleadings filed herein and join the Public Complaints Review & Appeals Board as the 4<sup>th</sup> Respondent and to a file further affidavit in support of the Application in terms of the documents exhibited to the Supporting Affidavit of Charles Njuru Kihara, Counsel for the Applicant.

Mr. Kihara deponed that the matter in dispute concerns a Public Company and procurement process and that by an oversight some tender documents and correspondence were inadvertently left out when the Judicial Review Application was filed and they are now annexed at paragraph 5 of the Affidavit of the deponent. That the letters were part of the tender process and need to be put in for the fair determination of this Application.

It is Mr. Kihara's contention that no prejudice will be suffered by any of the parties and if any is suffered they can be compensated by way of costs. That the Application is a challenge to the tender process and they are only adding grounds in support of the prayers of an order of certiorari. Counsel cited the case of **REP V THE PERMANENT SECRETARY MINISTRY OF PLANNING & NATIONAL DEVELOPMENT ex parte PROF MWANGI KAMENYI HC MISC APPLICATION 1769/04**, where Justice Nyamu considered and allowed amendment of the Statement and introduction of a new cause of action without leave having been sought in the Chamber Summons.

Mr. Wekesa, Counsel for the 1<sup>st</sup> Respondent opposed the Application to amend and a Replying Affidavit of Paul Bongo Jilani dated 28<sup>th</sup> September 2007 was filed and submissions filed on 12<sup>th</sup> October 2007. Counsel submitted that Order 53 Rules 4(2) limits the court's jurisdiction to amendment of the Statutory Statement and filing of further Affidavits. Counsel said that in the instant case, the proposed amendments are intended to institute fresh proceedings and therefore instituting a new cause of

action.

Secondly, it is Counsel's contention that the decision that is impugned was made in 2006 and is time barred. Counsel also submitted that this matter is partly heard, the submissions having been filed and ready to be highlighted and the applicants notice to stand is intended to stand and match against the other parties and if a fresh cause of action is filed they will be prejudiced. That the Applicant has not explained why the proposed amendments were not included in the pleadings in the first place. He urged the court to decline to grant the prayers.

Mr. Meso, Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents also opposed the Notice to amend and filed grounds of opposition dated 5<sup>th</sup> October 2007. The grounds are as follows; that no new matter has arisen out of the Affidavits and responses of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and that if the court allows the application, the 3<sup>rd</sup> defendant will be prejudiced in that they will be deprived of their defence under S. 9 (3) of Law Reform Act, that under Order 53 Rule 2 Civil Procedure Rules and Regulation 42 of the Exchequer and Audit Procurement Regulations 2001, the decision of the Tender Committee is final unless Judicial Review is commenced within 30 days of the decision; That no leave was granted to question the order of the Public Procurement Complaints Review and Appeals Board and the amendment introduces a new cause of action; That a party against whom no leave was obtained to commence Judicial Review proceedings can only be enjoined as a Respondent to the proceedings. That the notice offends Order 53 civil Procedure Rules and should not be allowed.

I have now considered the rival arguments on the notice to amend. Order 53 Rule 4 (2) of the Civil Procedure Rules only provides for amendment of the Statutory Statement and the filing of further Affidavits with the leave of this court. It reads as follows:-

**“O. 53 Rule 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 affidavits.”**

Order 53 therefore specifically provides for amendment of the Statement and filing of further Affidavits but does not provide for amendment of the Notice of Motion.

In the Statement in support of the Notice to amend the Applicant's Counsel has sworn an Affidavit and at paragraph 5 thereof, introduces some documents in support of the fresh prayers that are now introduced in the Notice of Motion and the Statement. Order 53 Rule 4 (2) is clear, that further Affidavits that may be allowed on application by the Applicant are those that will be replying to new matters raised in the Affidavits of the opposing parties. The documents exhibited at paragraph 5 of the Counsel's Affidavit are not a response to new matters raised in the Respondent's Affidavits. They introduce new evidence which the Counsel depones had been inadvertently left out.

Whereas I do not agree with Mr. Wekesa's submission that this matter is partly heard because arguments had been filed, introducing fresh evidence by the Applicant at this stage would mean that the case be reopened afresh so that the Respondents can reply to the new facts that have been introduced at paragraphs 4 & 5 of Mr. Kihara's affidavit. Order 53 Rule 4(2) Civil Procedure Rules intention is the amendment of the statement or filing of further Affidavits to be done at the very last minute that is, at the hearing of the Notice of Motion when the case is ready for hearing. It cannot have been intended for tendering of new evidence because that would be prejudicial to the parties. The filing of further Affidavits in response to the Affidavits by opposing parties is supposed to clarify the issues and to enable the court reach a fair decision in the matter but not so that one party has an advantage over the others by introducing documents/facts that should have been introduced at the filing of the Chamber Summons when the statement and Affidavits to support the Notice of Motion were filed. I will not allow the evidence introduced by the Applicant at paragraphs 4 & 5 of Mr. C.N. Kihara's Affidavit dated 30<sup>th</sup> July

2007 and will hereby strike those two paragraphs off the Affidavit.

Order 53 R 4 (2) Civil Procedure Rules allows amendment of the Statutory Statement, and the scope and ambit of the amendment has not been specifically defined. In this case, the Respondents are objecting to the amendment of the Statement because it is introducing a new cause of action in that prayers that were not sought earlier have now been introduced and a new party also introduced. The questions for the court to consider is whether the said amendments will be helpful to the just disposal of the case; whether the amendments will enable the court to determine the real issues in contention; whether the amendments are frivolous and vexatious and whether they will prejudice the Respondents in any way.

In the instant Application, though the Public Procurement Appeals Review Board had not been cited as a party, the first prayer in the Notice of Motion seeking an order of certiorari was directed at that Board, seeking to quash its decision of 15<sup>th</sup> January 2007. The amendment to the prayer of certiorari merely seeks to clarify it. It is really not a fresh prayer as such and that being the case, that amendment would not be prejudicial to the Respondents' case. In the case of the **REP V PERMANENT SECRETARY MINISTRY OF PLANNING AND NATIONAL DEVELOPMENT ex parte PROF KAIMENYI (supra)** Justice Nyamu observed that amendment of the Statement did not exclude the inclusion of a new party or new cause of action to the claim provided that such an amendment was arguable, would help the court determine the real issues in contest and not prejudicial to the other parties.

In the **KAIMENYI CASE** the party who was sought to be enjoined as a Respondent had been served with the Application. It is unlike the instant case where the Public procurement Appeals & Review Committee though mentioned, had not been served with the Application. But since an order was sought against them, I find that it will not prejudice any of the parties to join the new party save that all the evidence as relates to that new party must be on record to support the Applicants claim against the new party.

The Respondent's Counsel tended to attack the merits of the Notice of Motion but at this stage all that the court will consider is whether the amendment is merited? It will not consider the merits of the Notice of Motion and whether there will be sufficient evidence in relation to the new party in that has been brought into the suit.

Though Order 53 of Civil Procedure Rules does not provide for amendment of the Notice of Motion, the courts in exercise of their inherent jurisdiction taking into account the principles considered in amendment of pleadings have allowed such amendments. In this case the proposed amended Notice of Motion intends to include two other new prayers which were not in the earlier Notice of Motion. Will this prejudice the Respondents and Interested Party?

Like Justice Nyamu in the ex parte **KAIMENYI CASE (supra)**, there would be no prejudice suffered if an amendment of the Statement would entail an inclusion of new prayer or a new party. The same prayers contained in the Statement would need to be included in the Notice of Motion which has to be amended too. The issues raised by the Respondent's Counsel touching on the merits of the main Motion like the Application being time barred, or the Application offending the Exchequer and Audit Act or the competency of that amended Notice of Motion are premature and would really be canvassed and determined on the merits during the hearing of the Notice of Motion.

In sum, I do grant leave to the Applicant to amend the Statement and Notice of Motion in terms of the drafts dated 30<sup>th</sup> July 2007 and filed in court on the same day and the drafts be deemed as duly filed and served. I however, do strike out paragraphs 4 and 5 of the Affidavit in support of the Notice in that it purports to introduce new evidence to the Notice.

The Applicants will bear the costs of this Notice of Amend.

**Dated and delivered this 17<sup>th</sup> day of November 2007.**

**R.P.V. WENDOH**

**JUDGE**

Read in the Presence of:

Mr. Kevin holding brief for Mr. Kihara for Applicant

Mr. Wekesa for 1<sup>st</sup> Respondent