



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI ( MILIMANI LAW COURTS)**  
**MISC CIV APPLI 522 OF 2006**

**AHMED SALAF FANKEY.....APPLICANT**

**Versus**

**MOHAMED KHALIF & 4 OTHERS.....RESPONDENTS**

**RULING**

On 21<sup>st</sup> May 2007, the Applicant filed the Notice of Motion to amend the Notice of Motion dated 31<sup>st</sup> May 2007. The intended amended Notice of Motion was exhibited. The Applicant seeks to amend the entitlement of the Notice of Motion. Mr. Machira, Counsel for the Applicant submitted that they have moved the court under its inherent jurisdiction. That it was the mistake of the Counsel who drew the motion and brought it in the name of the Applicant instead of it being instituted in the name of the Republic.

Counsel relied on **KASSIM HAMISI MWACHIKUNYA V A G (2005) KLR MISC 627/04** where Justice Maraga held that the wrong intitlement of the Application is not fatal to the Application. In **HMISC 244/03 SALIM ALI SAID V THE COMMISSIONER OF POLICE** Justice Musinga followed the decision of **FARMERS BUS SERVICE AND OTHERS 6 V THE TRANSPORT LICENCING APPEALS TRIBUNAL (1959) EA 779**, that the defects such as the one in the Notice of Motion is curable. That all that the court needs to consider is whether the Respondent will be prejudiced by an order of amendment.

Mr. Moibi, counsel for the 1<sup>st</sup> to 4<sup>th</sup> Respondent opposed any amendment of the Notice of Motion on grounds that Order 53 does not provide for amendment of the Notice of Motion. He also submitted that there is authority in the case of **PAGREX INTERNATIONAL V MINISTER FOR FINANCE MISC APPLICATION 875/01** where Justice Nyamu held that there is no provision for amendment. That Justice Ringera made a similar finding in **NDETE V LAND DISPUTES TRIBUNAL HC 79/02**.

I have considered the submissions of both Counsel on the Notice to amend and the authorities that they have been cited. It is true that under Order 53 of Civil Procedure Rules, there is no provision for amendment of a Notice of Motion. Order 53 Rule 4 (2) civil Procedure Rules, only allows for amendment of the Statement and the filing of further Affidavits in response to new matters that may have been raised in the Affidavits filed by the opposing parties.

In this case, the Notice of Motion had been brought in the name of the Republic yet from the time of the **FARMERS BUS CASE** in 1959, the practice which has become law, is that Judicial Review Applications are brought in the name of the Republic and should be properly instituted. Justice Ringera

in the case of **NDETE (supra)** and Justice Nyamu in the **PAGREX CASE (supra)** also reaffirmed the position that Judicial Review Applications are brought in the name of the Republic since 1964 because Judicial Review is a machinery put in place by the state to check the excesses of its authorities and public officers. The Republic takes over the Application at the instigation of the ex parte Applicant.

Now that the Applicant has brought the Application in the wrong name, can the court exercise its inherent jurisdiction to amend it? The court can invoke its inherent jurisdiction in order to meet the ends of justice and if no prejudice will be suffered by either of the parties to the proceedings.

In this case, the notice to amend was filed before the hearing of the Notice of Motion and in my considered view the amendment of the Notice of Motion will not in any way prejudice the Respondent's case. It is only a name that will be changed. If any prejudice will be suffered it can be compensated by way of costs.

In the case of **KASSIM HAMISI MWACHIKUNYA** and **SALIM ALI SAID (supra)** the courts allowed amendment and though the decisions are by a court of concurrent jurisdiction, I am of the same view that the court can in such circumstances, exercise its inherent jurisdiction and grant orders to amend a Notice of Motion because no prejudice will be suffered by the Respondent. The **PAGREX & NDETE CASES (supra)** are distinguishable from the instant case because in those two cases, the incompetent Notice of Motion went to full hearing and there was no Application made by the Applicant to amend before the hearing. The court was considering the competency of the Application after hearing the Notice of Motion. Thus the defect in the Notice of Motion remained till the hearing of the motion.

In this case, an application for amendment has been made before the hearing of the Motion and the court will allow the Application to amend even though the Application only arose after the Respondent raised objection as to the competency of the Notice of Motion. The Notice to amend is hereby allowed in terms of the draft amended Notice of Motion annexed to the Notice and the same is deemed to be duly filed and served upon the Applicant paying the requisite court fees forthwith.

The Respondent will have costs of this Application.

**Dated and delivered this 9<sup>th</sup> day of November 2007.**

**R.P.V. WENDOH**

**JUDGE**

Read in the presence of:

Mr. Wachira for Applicant

Daniel: Court Clerk