



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Misc Civ Appli 1654 of 2004**

**JACQUELINE RESLEY.....APPLICANT**

**VERSUS**

**THE CITY COUNCIL OF NAIROBI .....RESPONDENT**

**RULING**

At the hearing of the Notice of Motion dated 22nd December, 2004, the Ex-parte Applicant, through the Leading Counsel Mr. Sharad Rao made an application for the amendment of the Statement dated 2nd December, 2004.

The oral application was made under the provisions of Order 53, Rule 4 (2) of the Civil Procedure Rules which provides as follows:-

**“(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 matter 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 statement, and shall supply on demand copies of any such further affidavits.”**

The said rule does not require an applicant seeking an amendment of the statement to make a formal application. It can be made either orally or formally as the party may choose. The Applicant herein though submitted before the court a draft Amended Statement showing the nature and extent of the proposed amendments.

The proposed Amended statement is divided into 4 parts as follows:-

A - “The name and description of the Applicant”

B - “The facts upon which the application is made are as follows.”

C - “The Relief sought is”

D - The Grounds upon which relief is sought.”

Most of the proposed amendments fall in part A in respect of facts. The only other proposed amendment is to be found in part D under the **“Grounds upon which Relief is sought”**.

Besides the application for amendment the applicant has also applied to be given leave to file a further Verifying Affidavit to verify the proposed new facts in the draft amended statement.

This application was opposed by the Respondents which is represented by Mr. Njagi Wanjeru. He cited and relied upon the decision in **Civil Appeal No.45 of 2000 COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY THROUGH REPUBLIC –V- SILVANO ONEMA OWAKI T/A MARENGA FILLING STATION** in which the Court of Appeal held as follows:-

**“....That much is clear from some of the matters in the statement accompanying the application for leave, which the Judge in his ruling despite the statements purportedly of facts being worthless, appear to put a lot of faith in. The learned Judge decided the application for judicial review on the basis of inadmissible matters. We would observe that it is the verifying affidavit, which is of evidential value in an application for judicial review....”**

In the proposed amendments in the draft amended statement, the Applicant wants to introduce further facts in part B of the statement. The said part B already contained matters or statements of facts. The Applicant wants to present additional facts through the amendment. A careful reading of Order 53 Rule 1 (2) will show that a statement of facts is not contemplated to be contained in a statement. The rule describes what a statement ought to contain and these are:-

- Name and description of the Applicant.
- The relief sought, and
- The Grounds on which the reliefs are sought.

The said rule provides for affidavits verifying the facts relied on. This is the ratio decidendi of the **Owaki case** which is binding on this court. We therefore do hereby hold that the facts in a judicial review application must and can only be contained in the verifying affidavits or other affidavits allowed by the court. There is no provision permitting the facts to be contained in the statement.

As a result, the proposed amendments in respect of part B of the statement are hereby rejected and disallowed for the said reason.

The Respondent has asked this court to expunge the existing facts in part B of the statement on the same grounds. It is appreciated that this application for leave to amend belongs to the Applicants and that is the only application, one could say is before us. However, the question of facts in the statement have come to the fore and the present application is an informal application. We are certain that the Respondent will take it up whether as a Preliminary Issue or in reply in its submissions now that the issue has arisen.

In exercise of our inherent jurisdiction and discretion and to save on judicial time, we hereby consider the question of striking out and/or expunging part B of the Statement in its entirety. In the light of the law set out hereinabove, we hereby strike out and/or expunge part B of the Statement in its entirety. In exercise of our discretion we hereby grant the Applicant leave to amend Part D in terms of the draft Amended Statement and paragraph 19 in particular. The said amendment clarifies the Ground in paragraph 19 and does not cause any prejudice to the Respondent.

The Applicant has applied to this court to be granted leave to file a Further Affidavit verifying the facts relied upon. The said further affidavit were intended to verify the new facts proposed to be introduced in part B (now struck out). Since the proposed amendment of Part B in respect of the statement has been disallowed, we do not think that there is any basis or justification to allow this proposed Further Verifying Affidavit. The purpose for which it was intended no longer exists.

Besides the foregoing, under the provisions of Rule 4 (2), the court may allow Further Affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application. The Applicant did not submit or claim that any new matter had arisen through the Respondent's Replying Affidavit to justify the new affidavit. The application was pegged on the proposed facts in part B as disclosed in paragraph 3 of the proposed Further Affidavit:-

**“3. That I make this Further Affidavit to verify the Further and/or Additional facts relied on in the Amended Statement of facts.”**

As a result of the foregoing, we hereby disallow the application for leave to file a Further Verifying Affidavit. The Applicant shall file its Amendment Statement within 7 days of today’s date.

As this Application is partly successful and partly unsuccessful, costs shall be in the Main Cause.

Dated and delivered at Nairobi on this 25th of May, 2005.

**A. VISRAM**

**JUDGE**

**M.K. IBRAHIM**

**JUDGE**