



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Misc Appli 92 of 2002

ADAMS BROWN & COMPANY LTD.....PLAINTIFF

VERSUS

COMMISSIONER OF LANDS & ANOTHER.....DEFENDANT

RULING

By an application dated 14.06.2005, the Applicant seeks leave for orders that:

- (a) Leave be granted to the Applicant to amend the Statutory statement filed herein in the manner set out in the draft amended statutory statement***
- (b) Leave be granted to the Applicant to file an affidavit so as to render the annexures which were inadvertently not annexed to the statutory statement.***
- (c) Costs be provided***

The application is supported by the Affidavit of Fredrick Ngatia, sworn on 17th June 2005. In it learned Counsel for the Applicant depones that the amendment, and proposed further affidavit was caused by pure inadvertence on the part of staff employed in the Advocate's firm who failed to attach the necessary annexures to the original Supporting Affidavit attached to the application dated 12.02.2002.

Mr. Ngatia, learned Counsel for the Applicant reiterated the above position and urged the court to grant the application as a whole. Counsel relied upon the provisions of order LIII rule 4(2) which donates to the court jurisdiction in Judicial Review to permit amendment(s) of any application such as the one sought herein. Counsel referred the court to the case of **AGA KHAN EDUCATION SERVICE KENYA VS REPUBLIC through ALI SEIF BENSON WAIRAGU JOSEPH NGETHE & ATTORNEY GENERAL** (Civil Appeal No. 257 of 2003) where the Court of Appeal upheld the decision of Waki J. (as he then was) that at the application stage, the Court is only concerned with the prima facie view that the applicant has an arguable point on the material presented to the court ex parte.

On the other hand in the case of **REPUBLIC, Ex Parte Juma Vs Commissioner of POLICE, THE OFFICER IN CHARGE FLYING SQUAD and ATTORNEY GENERAL** (Misc Application No. 447 of 2005) Nyamu J. held inter alia that where the rules are silent, the court is entitled to invoke its inherent jurisdiction to deal with any situation before it where it is clear that it has jurisdiction to deal with the matter in issue. Both Mr. Kipkorir learned Counsel for the 2nd Respondent and Mr. Mwaniki learned State Counsel for the 1st Respondent had no objection to granting the applicant prayers (a) of the application but were opposed to the grant of prayer (b) that is the use of further affidavits by the Applicant. Both Counsel contended that Order LIII rule 4 (2) allowed the amendment of the Statement and use of further affidavits where there were new matters arising out of or from the affidavit of any other party to the application. As there were no affidavits in reply the Applicant could not rely upon the said

rule 4(2) of Order LIII.

These Counsel further submitted and quite correctly so, in my view, that the issue of filing of grounds of opposition and Replying Affidavits smacks of invoking the provisions of Order L rule 16, which had no application to Judicial Review proceedings. In the circumstances therefore these Counsel urged that the application was incapable of amendment, was incurably defective and should be dismissed with costs.

Having considered the respective Counsels arguments, I will now consider the effect and import of Order LIII rule 4(2) of the Civil Procedure Rules. For completeness of record I set out in full the said rule 4(2)

4(1)

(2) The High Court may on the hearing of the motion allow the 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 his statement, and shall supply on demand copies of any such further affidavits.”

(3) Every party to the proceedings shall supply to any other party on demand, copies of the affidavits which he proposes to use at the hearing.

Rule 4(2) of Order LIII when read in a composite manner may be broken into several components. Firstly the Court has jurisdiction on the hearing of the motion to allow the statement to be amended. Secondly the Court will allow the use of further affidavits if they deal with new matter arising out of the affidavit of any other party to the application . Those are two occasions when the Court will allow a statement to be amended.

The third occasion when the court will allow the statutory statement to be amended is where the applicant intends to ask the court to be allowed to amend his statement or use further affidavits.....

In this third category of intention to amend the statement or use further affidavits, the applicant need only give notice of his intention and of the proposed amendment of his statement. The only condition in this third category which is also applicable for the first and second category is that the applicant shall supply on demand copies of the affidavits he proposes to use at the hearing.

In the current application the applicant is not relying on the first and second categories of this rule. The Court has a discretion to allow a statement to be amended upon the hearing of the Notice of Motion. That is not unlike the power to a party to amend his pleading under Order VIA rule 5(1) of the Civil Procedure Rules. The applicant is also not relying upon the second limb of this rule, as it was common to all the parties that there were no affidavits in Reply, and there was no evidence of new matters being raised. So, the applicant relies upon the third limb of the rule, namely that the applicant is asking the court to be allowed to amend his statement and to use further affidavits. To be allowed to do so (i.e. to amend his statement or to use further affidavits), the applicant must give notice of his intention and also give notice of any proposed amendment of his statement, and supply on demand copies of any such further affidavits.

It is my view without even invoking the court’s inherent power to make such an orders as would meet the ends of justice, that an applicant may amend his statement, and use further affidavits without necessarily there being in place, any Replying Affidavit from the other party.

Learned Counsel for the 1st Respondent and the 2nd Respondent told the court that they did not oppose the Applicant’s first prayer, that is the prayer to amend the Statement. They however opposed the grant of leave to use further affidavits. To follow this line of argument would really amount to having or placing a cart before a field to harvest maize, and then driving away the horses or oxen to pull the cart. The Amended statement without the further affidavit would be like a headless chicken which is only good for

the oven.

In the circumstances therefore I allow the Applicant's application dated 14.06.2005, and further order that costs be in the cause.

Dated and delivered at Nairobi this 22nd day July of 2005

ANYARA EMUKULE

JUDGE