Kiniu v Deputy County Commissioner Mutomo Sub-County & 2 others; Munyalo (Interested Party) (Judicial Review Application E011 of 2022) [2023] KEELC 16399 (KLR) (14 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16399 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

JUDICIAL REVIEW APPLICATION E011 OF 2022

LG KIMANI, J

MARCH 14, 2023

IN THE MATTER OF AN APPLICATION BY JUMA KINIU TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

IN THE MATTER OF THE LAND ADJUDICATION ACT (CAP 284)

IN THE MATTER OF PARCEL NUMBER 130 NDATANI ADJUDICATION SECTION

IN THE MATTER OF ORDER 53 CIVIL PROCEDURE RULES 2010 AND ALL OTHER ENABLING PROVISIONS OF THE LAW

BETWEEN

JUMA KINIU .... APPLICANT

AND

THE DEPUTY COUNTY COMMISSIONER MUTOMO SUB-COUNTY .... 1ST RESPONDENT

THE DISTRICT LAND REGISTRAR ADJUDICATION & SETTLEMENT OFFICER MUTOMO .... 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL .... 3RD RESPONDENT

AND

ANN MBUA MUNYALO .... INTERESTED PARTY

RULING

1. The Ex parte applicant filed the Notice of Motion dated November 17, 2022 seeking the following orders:

1. That this Honourable Court be pleased o grant leave to the applicant to amend his Notice of Motion herein dated September 8, 2022 to correct the error terming the ex-parte applicant as the applicant instead of the Republic.
2. That the annexed amended Notice of Motion be deemed duly filed upon payment of filing fees.
3. That the costs of this application be provided for

2. The application is supported by the affidavit of Nzilani Makundi, counsel for the Ex-parte applicant and is based on grounds that the amendment is sought for purposes of correcting an inadvertent error in the Applicant's Notice of Motion dated September 8, 2022

3. She deposed that the omission was not deliberate and will help in determining the real parties as well as the real questions in controversy and that it is in the interest of justice that the application be allowed. The applicants Counsel further stated that the mistakes of Counsel ought not to be visited on the applicant.

Applicants' submissions

4. Counsel for the Applicant relied on Order 8(3) and Order 53 rule 4(2) of the Civil Procedure Rules on amendments, submitting that the applicant in the notice of motion is intended to be the exparte applicant as shown in the name and description contained in the Statement of facts filed in court. The applicant stated that amendments of statements of facts and the filing of further affidavits is allowed under Order 53 rule 4(2) of the Civil Procedure Rules and the same rule should apply to amendments of the notice of motion.

5. The Applicant further submitted that the court should exercise its discretion in favour of the applicant and allow the amendment and relied on the case of *Republic v Commissioner of Value Added Tax Ex parte Iron Art Limited* (2012) KLR. Further, the Applicant stated that the amendment sought does not go into the root or substance of the case but is intended to properly distinguish the parties to the suit. Counsel asked the court to find that the error sought to be corrected as one which arises out of a genuine mistake. Counsel relied on the decision in *Belinda Muras & 6 others v Amos Wainaina* (1978) KLR where Madan JA defined what constitutes a mistake.

Interested Party's Case

6. The Interested Party opposed the application vide Grounds of Opposition dated December 2, 2022 based on the following grounds:
   1. The Application sought to be amended dated September 8, 2022 is incurably defective and cannot be cured by an amendment.
   2. Section 8 and 9 of the *Law Reform Act* and Order 53 of the Civil Procedure Rules do not provide for amendment of an application save for statements only.
   3. Judicial Review proceedings are sui generis, neither civil or criminal in nature and Section 100, Order 8 Rules 3, Order 5 rules 1 *Civil Procedure Rules* and Article 159(2) of *the Constitution* do not apply.
   4. The orders sought in the application are unknown in judicial review proceedings and are therefore untenable.
   5. The application was prompted by the submissions, filed by the Interested Party, that the motion as drawn and filed is incompetent and bad in law.

6. Where a party intentionally or by mistake moves the court contrary to the provisions of the law, the court has a duty to nullify what is brought contrary to the law.

Interested Party's submissions

7. Counsel for the Interested Party filed written submissions, stating that their submissions in the judicial review application prompted the applicant to file the present application, after they raised the legal challenge that the application was incurably defective as it was not brought in the name of the Republic in accordance with the decision in the cases of *Farmers Bus Service & others v Transport Licensing Appeal Tribunal* (1959) E.A 779 and Jotham Mulati Welamondi v The Electoral Commissioner of Kenya (2002) eKLR

8. It is their submission that this defect cannot be corrected nor amended and relied on the case of In the matter of an application by the Owners of Motor Vessel "Globe Tour"(1996) eKLR where it was decided that when a prescribed form of procedure is not followed, the offending application is incompetent. They also relied on the holding in the case of *Christopher Musau v the Attorney General* (2013) eKLR.

9. Further, counsel submitted that judicial review is sui generis and Section 100, Order 8(1), Order 5(1) of *Civil Procedure* do not apply and neither does Article 159(2) of *the Constitution*. Counsel relied on the holding in the case of *The Commissioner of Lands v Kunste Hotel Ltd* CA 234 of 1995.

Analysis and Determination

10. The Application to amend the substantive judicial review Notice of Motion Application is pursuant to Article 159(2) (d) of *the Constitution*, Section 100 of the *Civil Procedure Act*, Order 8(3) and Order 5(1) of the *Civil Procedure Rules.*

11. Section 100 of the *Civil Procedure Ac* cap 21 provides for the general power to amend and states that:

> "The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding."

12. Order 8(3) of the *Civil Procedure Rules((2010)* provides power of the court to at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

13. However, the Interested Party contends that judicial review proceedings are special in nature as they are neither criminal nor civil, and that the rules of Civil Procedure do not apply in this case. G V Odunga J held as follows in the case of *Christopher Musau v Attorney General* [2013] eKLR relied on by the Interested Party:

> "Before dealing with the merits of the case, it is important to deal with the issue of entitlement of the application herein. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See Farmers Bus Service & Others v Transport Licensing Appeal Tribunal [1959] EA 779.The rationale for this was given in Mohamed Ahmed v R [1957] EA 523 where it was held:
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> "This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The

appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be instituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter".

14. In *Jotham Mulati Welamondi v The Electoral Commission of Kenya* Bungoma HC Misc Appl No 81 of 2002 [2002] 1 KLR 486 Ringera, J (as he then was) expressed himself as follows:

> " Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of Certiorari, Mandamus or Prohibition are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for Mandamus is: -
>
> "Republic..applicant
>
> V
>
> The Electoral Commission of Kenya.........respondent.
>
> Ex Parte
>
> Jotham Mulati Welamondi"

15. From the foregoing it is noted and the court agrees that the title to the notice of motion herein ought to show the applicant as the Republic and not as currently shown as Juma Kiniu who ought to be correctly described as the Ex parte applicant. The applicant wishes to correct the mistake made and the question before court is whether it has the power to allow the amendment.

16. Ringera J (as he then was) held in the case of *Jotham Mulati Welamondi v Chairman, Electoral Commission of Kenya* (Supra) that:

> " I agree that Judicial Review Proceedings under Order 53 of the Civil Procedure rules are a special procedure. The provisions of the order are invoked whenever orders of certiorari, mandamus, or prohibition are sought. That may be so in either civil or criminal proceedings. So, in the exercise of its power under the order, the court is exercising neither a civil nor a criminal jurisdiction in the strict sense of the word. It is exercising a jurisdiction sui generis. It follows therefore that it is incompetent to invoke the provisions of sections 3 A and order 1 rule 8 of the civil procedure rules. It is equally incompetent to invoke sections 42, 79 and 80 of *the constitution* of Kenya."

17. Is the court to find the main notice of motion as incompetent and incapable of amendment for having incorrectly described the parties to the suit? In my view the court has discretion to look at the application for amendment in light of the provisions of Article 159 (2) (d) of *the Constitution of Kenya 2010.* I have also considered the ruling in the case of *Republic v Commissioner of Value Added Tax Ex parte Iron Art Limited* (2012) KLR relied on by the applicant where the court held that:

> " On the Prayer for amendment of the Notice of Motion in order to properly describe the Respondent, I find that though it has not been disputed that the office of Commissioner of VAT does not exist, the Respondent has not denied the Applicant's claim that the correct Respondent in this case is the Commissioner for Domestic Taxes who was the same person named as the Respondent in the application for leave but wrongly described as

the Commissioner for VAT. This demonstrates the Applicant's claim that the amendment sought seeks to properly describe the Respondent and does not go to the substance or root of the application. The application was made without inordinate delay and there is no evidence to suggest that any prejudice will be occasioned to the Respondent if the prayer for amendment of the Notice of Motion is allowed. In the event, Order 53 Rule 4(2) of the Civil Procedure Rules allows amendment of the statement of facts supporting a notice of motion provided that a notice of intention to amend is given to all parties and the proposed amendment is availed to the parties affected. If the rules under Order 53 Civil Procedure Rules allows for amendment of a statutory statement which in my view is a mirror of the substantive motion, I find that no injustice or prejudice would be caused to parties who have had notice of intention to amend the notice of motion and of the proposed amendment if the court exercised its discretion under its inherent powers to allow an amendment to the notice of motion .In this case, I find that the filing of the instant application and the attachment of the draft amended notice of motion as an annexture to the application constitutes notice of intention to amend and nature of the proposed amendment.... For all the foregoing reasons, I am inclined to allow the prayer for amendment for the correction of the Name of the Respondent but not of the Name of the deponent in the supporting affidavit"

18. I do concur with the applicant that the application herein seeks to properly describe the parties to this suit and does not go to the substance or root of the main application. In the case of *John Nyagaka Osoro v Reynold Karisa Charo & 5 others* [2021] eKLR the Court cited from Halsbury's Laws of England, 4th Ed (re-issue), Vol 36 (1) at paragraph 76, about amendments of pleadings: -

> "...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. .... The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side..."

19. While ordinary rules of civil procedure may not apply to judicial review proceedings, the courts still must be guided by Article 159(2) of *the Constitution* and not give undue regard to procedural technicalities in the dispensation of justice.

20. The Court of Appeal grappled with an almost similar issue in the case of *Republic v Charles Lutta Kasamani & another ex parte Minister for Finance & Commissioner of Insurance as Licencing and Regulating Officers* [2006] eKLR where the Republic was wrongly cited as the Appellant and observed that:

> "As correctly submitted by Mr Ombwayo, the problems of intitulment of pleadings in judicial review matters is as old and intractable as the law that provides for that remedy. Indeed the predecessor of this Court was grappling with similar problems in the East African region half a century ago on matters of form in intituling proceedings under the Law Reform Ordinance, as it then was by name, and has since remained in substance. The two cases which illustrate the historical foundation of the problem are Mohamed Ahmed v R [1957] EA 523 and Farmers Bus Service & Others v Transport Licensing Appeal Tribunal [1957] EA 779. The court also gave guidelines on the proper form to be adopted in such proceedings and

the decisions have been cited with approval on many occasions by this Court. It is evident however that the problem still persists in our courts fifty years after a solution was made available but it is not for want of authoritative precedent. Perhaps it is a matter that might have to be revisited by the Rules Committee to iron out the creases for the benefit of legal practitioners. Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment. This Court said so in Dipak Panachod Shah & Another v The Resident Magistrate Nairobi and the Attorney General - Civil Application Nai 81/00 (UR). Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court......In view of those decisions we find no impropriety in citing the "Republic" as "the appellant" in this matter when in truth it is the Minister for Finance and the Commissioner of Insurance, who are the aggrieved parties in the appeal. That objection also fails."

21. Even though this case is not an appeal, I do find that the defect in form in the title or heading of the notice of motion is is an irregularity that does not go to the substance of the suit and is curable by amendment. The simple amendment envisaged would not cause the other parties any prejudice and it is in the interest of justice that the case be fully determined on merit in order that all questions in issue may be determined.

22. The final order of the court is that the application dated November 17, 2022 be and is hereby allowed in the following terms;

    1. The Applicant is hereby granted leave to amend the Notice of Motion dated September 8, 2022 to correct the error terming the ex-parte applicant as the applicant instead of the Republic.

    2. The amended Notice of Motion to be filed within seven days from the date of this ruling.

    3. The Respondents and interested parties are granted leave to file any further replies to the Notice of Motion if need be.

    4. Costs of the application are awarded to the Interested Party to be paid by the Applicant.

DELIVERED, DATED AND SIGNED AT KITUI THIS 14TH DAY OF MARCH, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Ruling read in open court and virtually in the presence of-

Musyoki: Court Assistant

No attendance for the Applicant

Mwendwa holding brief for Kalili for the Interested Party/Respondent