



REPUBLIC OF KENYA



**Omwoyo v Attorney General (Miscellaneous Application 97 of 2018)  
[2023] KEHC 20094 (KLR) (Judicial Review) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20094 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
MISCELLANEOUS APPLICATION 97 OF 2018**

**JM CHIGITI, J**

**JULY 13, 2023**

**BETWEEN**

**JANE MONGINA OMWOYO ..... EXPARTE APPLICANT**

**AND**

**THE ATTORNEY GENERAL ..... RESPONDENT**

**RULING**

1. Before this Honourable Court is a Notice of Motion Application dated 19<sup>th</sup> day of May, 2022 seeking for Orders:
  - a. That an Order of Mandamus do issue directed upon the Respondents jointly and or severally to pay the Applicant herein Jane Mong'ina Omwoyo Kshs. 5,435,337.49 being the decretal amount with interest and costs as at 31<sup>st</sup> May, 2022 in Chief Magistrate's Court Civil Case No. 13286 of 2006 at Nairobi.
  - b. That the cost of this Application be also awarded to the Applicant.
2. The Respondent herein filed a notice of Preliminary Objection dated 5<sup>th</sup> October 2022 opposing the Notice of Motion Application dated 19<sup>th</sup> May 2022 on the following grounds: -
  - a. THAT in the Chamber Summons Application dated 29<sup>th</sup> November, 2019, the Attorney General was sued as the only Respondent. However, when leave was granted to file the Substantive Notice of Motion, the Applicant added two more parties without explanation and also without leave of Court i.e. the Ministry of Youth and Sports as the 2<sup>nd</sup> Respondent and the National Youth Service as the 3<sup>rd</sup> Respondent.
  - b. THAT in the Chamber Summons Application, the Applicant sought leave to apply for an Order of mandamus directed to the Respondent for payment of the sum of Kshs. 1,521,351/=.



However, in the substantive Notice of Motion dated 19<sup>th</sup> May, 2022, the Applicant is seeking payment of Kshs. 5,435,337.49/= which is not the amount that she was stated in the Chamber summons and the in the Statement. Again, the Respondent has changed the amount without leave of Court.

- c. THAT the Notice of Motion application goes against the provisions of Order 53 (1) (1) of the Civil Procedure Rules which states that no application for an order of Mandamus, Prohibition or Certiorari shall be made unless leave therefore has been granted.
  - d. THAT the Notice of Motion application goes against the provisions of Order 53 (4) (1) of the Civil Procedure Rules which states that “...no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.”
3. In response, the Applicant herein filed grounds of opposition dated 28<sup>th</sup> March 2023 opposing the Respondent’s Notice of Preliminary Objection on the following grounds: -
1. THAT the Respondent raised a Preliminary Objection to the Application dated 29<sup>th</sup> November, 2019(Chamber Summons), citing improper addition of two parties to the Suit. The Preliminary objection acknowledges that the Court granted to the Applicant leave to file the Notice of Motion to among other things demonstrate that the deceased had adequately shown on the records where he worked until his ultimate demise.
  2. THAT the Applicant clearly specified in her Chamber Summons payment to her of Kshs. 1,521,351/= with interest and costs being the decretal amount in the Chief Magistrate Courts Case No. 13286 of 2006 at Nairobi. The sum of Kshs. 5,435,337.49/= indicated in the Notice of Motion dated 19<sup>th</sup> May, 2022 is the said decretal amount with interest and costs as at 31<sup>st</sup> of May 2022, hence no change whatsoever to what the Applicant stated in her Chamber Summons.
  3. THAT the Applicant filed an application (Chamber Summons) dated on 29<sup>th</sup> November, 2019 seeking leave to file an application for Mandamus in which leave was granted. This is well in line with Order 53(1) (1) of the Civil Procedure Rules.
  4. THAT the Notice of Motion Application is in align with Order 53(4) (1) of the Civil Procedure Rules and should be read entirely.
4. The Ex-Parte Applicant on the 29<sup>th</sup> of November, 2019 filed an application seeking leave to apply for Judicial review orders of Mandamus directing the respondent, the Office of the Attorney General to pay the applicant the sum of Kshs. 1,521,351/= with interest and costs being the decretal amount in CMCC NO. 13286 of 2006 at Nairobi.
5. On 16<sup>th</sup> May, 2022, the Applicant was granted leave to file substantive motion in terms of prayer two whose subject was an Order of Mandamus.
6. On 20<sup>th</sup> May, 2022, the Applicant filed a substantive Notice of Motion seeking for among other orders an Order of Mandamus directed upon the Respondents jointly and or severally to pay the Applicant herein Jane Mong’ina Omwoyo Kshs. 5,435,337.49 being the decretal amount with interest and costs as at 31<sup>st</sup> May, 2022 in Chief Magistrate’s Court Civil Case No. 13286 of 2006 at Nairobi.
7. In the Chamber Summons Application dated 29<sup>th</sup> November, 2019, the Attorney General was sued as the only Respondent. However, when leave was granted to file the Substantive Notice of Motion, the Applicant added two more parties without explanation and also without leave of Court i.e.



- the Ministry of Youth and Sports as the 2<sup>nd</sup> Respondent and the National Youth Service as the 3<sup>rd</sup> Respondent.
8. The Applicant in response to the above objection stated that the preliminary objection acknowledges that the court granted leave to file the notice of motion to among other things demonstrate that the deceased had adequately shown on the records where he worked until his demise.
  9. At no point did the Respondent raise any issue with regards to the deceased's place of work. That can be confirmed from the Court record.
  10. The Respondent contends that for the Applicant to join another party as a Respondent, an application must be made seeking leave and must give reasons why the said party needs to be joined. No such application was made neither was leave granted to add the alleged 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. As such, the Orders sought against them should not issue.
  11. In order for an Applicant to seek orders against a Respondent in judicial Review proceedings, they need leave pursuant to the provisions of Order 53 Rule 1. Which provides as follows:

“No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.”
  12. The Respondent submitted that no application by way of Chamber summons was filed seeking leave to institute judicial review proceedings in the form of Mandamus directed to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents; neither was leave granted to seek judicial review orders of Mandamus directed to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. Therefore, the substantive application dated 19<sup>th</sup> May, 2022 is fatally defective and should be dismissed forthwith with costs to the Respondent.
  13. The Respondent further averred that the Ex parte Applicant, in his substantive Notice of motion dated 19<sup>th</sup> May, 2022 included prayers that were not initially in the Chamber Summons contrary to Order 53 Rule 2 (1) of the [Civil Procedure Rules](#), 2010.
  14. In the Chamber Summons Application, the Applicant sought leave to apply for an Order of mandamus directed to the Respondent for payment of the sum of Kshs. 1,521,351/=. However, in the substantive Notice of Motion dated 19<sup>th</sup> May, 2022, the Applicant sought payment of Kshs. 5,435,337.49/= which was not the amount that she stated in the Chamber summons and in the Statement. Again, the Applicant has amended the amount without leave of Court contrary to the provisions of order 53.
  15. Order 53 Rule 2 of the [Civil Procedure Rules](#) thus provides: -

“An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.”
  16. In support of the Notice of Motion dated 19<sup>th</sup> May, 2022 and the grounds of opposition dated 28<sup>th</sup> March, 2023, the Applicant filed written submissions dated 17<sup>th</sup> April 2023.
  17. The Applicant on the 27<sup>th</sup> of May 2006 filed a Chief Magistrate's Court Civil Case No. 13286 of 2006 at Nairobi seeking compensation out of a fatal accident against the Respondent.



18. Upon the case being heard and determined, judgment was delivered in favour of the Plaintiff on the 31<sup>st</sup> of May 2011 and a decree issued on the 13<sup>th</sup> of August, 2015 indicating that the Applicant ought to be paid Kshs.1,521,351/= in full and final settlement of the claim.
19. As at 31<sup>st</sup> May, 2022 the Applicant has then sought payments of Kshs.5,435,337.49/= in full with costs and interest at Court rates from the Respondent as per the decree in vain.
20. In response to Paragraph 5 of the Respondent's submissions, the Applicant avers that the two parties were indirectly added. They do not offer the right and obligation of the Respondent and thus can be ignored and or deleted.
21. In response to Paragraph 15 of the Respondents submissions the Applicant contends that the amount of Kshs.1,521,351/ = together with interest at 12% per annum from 31<sup>st</sup> May,2011 to 31 May,2022 amounts to Kshs.5,435,337.49/=. Thus the amount higher and above is merely interest at 12% per annum and cost as ordered by the court.
22. The Applicant further contends that her application is well within the Provisions of Order 53 Rule 4(1) of the *Civil Procedure Rules* 2010. The Applicant has not added any new facts or at all other than simplification of the calculation.

### **Analysis & determination**

23. Upon considering the preliminary objection, the response thereto and submissions filed by the parties, I find that the issue for determination is whether the preliminary objection raised is merited.
24. In the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, the court had the following to say on circumstances when a Preliminary Objection may be raised.
 

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
25. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.
26. Order 53 Rule 1(1) of the *Civil Procedure Rules* provides that:
 

“No application for an order of Mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule. (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.”
27. The Respondent argues that it is evident from a reading of these provisions that seeking leave is a prerequisite to seeking the courts intervention in issuance of Judicial Review remedies.
28. The requirement for leave provided for under Order 53 of the *Civil Procedure Rules* is a statutory requirement with a substantive purpose and not a procedural technicality.



29. In response to Paragraph 5 of the Respondent's submissions, the Applicant avers that the two parties were indirectly added. They do not offer the right and obligation of the Respondent and thus can be ignored and or deleted.
30. The rules of procedure must not be taken lightly.
31. On the 29th of November, 2019 The Ex-Parte Applicant filed a Chamber Summons seeking leave to apply for Judicial review orders of Mandamus directing the Office of the Attorney General to pay the applicant the sum of Kshs. 1,521,351/= with interest and costs being the decretal amount in CMCC NO. 13286 of 2006 at Nairobi.
32. On 16<sup>th</sup> May, 2022, the Ex-Parte Applicant was granted leave to file substantive motion in terms of prayer two whose subject was an Order of Mandamus.
33. On 19<sup>th</sup> May, 2022 the Ex-Parte Applicant filed a Notice of Motion Application adding the Ministry of Youth and Sports as the 2<sup>nd</sup> Respondent and the National Youth Service as the 3<sup>rd</sup> Respondent.
34. The Ex Parte Applicant prayed for an Order of Mandamus to issue directed upon the Respondents jointly and or severally to pay the Applicant herein Jane Mong'ina Omwoyo Kshs. 5,435,337.49 being the decretal amount with interest and costs as at 31<sup>st</sup> May, 2022 in Chief Magistrate's Court Civil Case No. 13286 of 2006 at Nairobi.
35. Counsel for the Exparte Applicant erroneously interpreted the leave as granted as allowing them to amend or modify the orders sought and introduce new Respondents and new prayers in the substantive Application.
36. The Exparte Applicant cannot be allowed to introduce new prayers in the substantive notice of motion without seeking leave under Order 53(1) of the Civil Procedure Rules. No leave was sought nor granted for the new prayers.

#### **Order**

1. The Notice of Preliminary Objection dated 5<sup>th</sup> October 2022 upheld.
2. Consequently, the ex parte Applicant's Notice of Motion dated 19<sup>th</sup> day of May, 2022 is hereby struck out with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF JULY, 2023.**

**JOHN CHIGITI (SC)**

**JUDGE**

