



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 95 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE NATIONAL ASSEMBLY.....1ST RESPONDENT

THE CABINET SECRETARY, NATIONAL

TREASURY AND PLANNING2ND RESPONDENT

THE HON. ATTORNEY GENERAL3RD RESPONDENT

AND

THE RETIREMENT BENEFITS AUTHORITY.....INTERESTED PARTY

EX PARTE APPLICANT:

OKIYA OMTATAH OKOITI

RULING NO 3

1. This matter was coming up for hearing on 3rd February 2021 to reserve judgment on the *ex parte* Applicant’s Notice of Motion dated 21st May 2020. The *ex parte* Applicant has however filed an application by way of a Notice of Motion dated 21st January 2021 seeking the following orders.

- 1. THAT the Court be pleased to certify the application as extremely urgent and hear it ex-parte at the earliest opportunity.**
- 2. THAT leave be granted to the ex-parte Applicant herein to amend the Notice of Motion application dated 21st May, 2020 in terms of making it accord with the fact the Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020 were gazetted as Legal Notice No. 192 of the 14th September, 2020.**
- 3. THAT leave be granted to the ex parte Applicant to enjoin the Association of Retirement Benefits Schemes and Association of Pension Trustees and Administrators the as the 2nd and 3rd Interested Parties respectively.**
- 4. THAT consequent to the grant of the prayers above the Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.**
- 5. THAT costs be in the cause.**

2. The said application is supported by an affidavit sworn on 22nd January 2021 by the Applicant. The main grounds for the application are that *ex parte* Applicant has just learnt that on 25th September 2020, the 2nd Respondent gazetted the Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020 (Legal Notice No. 192 of the 14th September, 2020), which are due to commence on 14th September, 2021. Further, that pursuant to section 23(1) of the Statutory Instruments Act, No. 23 of 2013, the Regulations came into force on the date of their publication in the Gazette, being on the 25th day of September, 2020, and implement the impugned amendments to Section 38(1A) of the Retirement Benefits Act (1997) to allow the use of retirement benefits to purchase a residential house.

3. Therefore, that it is necessary to amend the instant Notice of Motion so that this litigation covers the entire substratum of these proceedings, being the *ex parte* Applicant's objection to both the amendments made by the Tax Laws (Amendment) Act, 2020 to Section 38(1A) of the Retirement Benefits Act No.3 of 1997, and their implementation vide the impugned regulations. Further, that failure to amend the Motion to address the new reality will be prejudicial to the instant application, since it will render it nugatory if successful to the extent that it does not cover the gazetted regulations.

4. In addition, that the Regulations provide that all schemes shall amend their scheme rules to comply with the provisions therein within twelve months from the date of the commencement. Consequently, the proposed 1st and 2nd Interested Parties are entities that are going to be affected by the said Regulations and their joinder to these proceedings is necessary to enable the Court have all the material it requires for it to arrive at a just decision herein.

5. The *ex parte* Applicant annexed a copy of the Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020.

The Determination

6. **The provisions of** Order 53 Rule 4(2) Civil Procedure Rules state as follows as regards to amendments of pleadings in judicial review proceedings:

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

7. While a plain reading of the rule indicates that only a statement may be amended, if a relief sought in the statutory statement is amended, then the substantive notice of motion will also require to be amended as well. This Court therefore has power and discretion to allow an amendment of a substantive Notice of Motion in judicial review proceedings in light of the foregoing provisions of the law. This purposive interpretation is favoured by the Courts and has been adopted in various decisions including **Republic vs Commissioner of Lands and 2 others ex-parte Jimmy Mutinda, Nairobi H.C. JR ELC No.9 of 2012**, **Republic v Permanent Secretary, Ministry of Planning & National Development ex-parte Mwangi S. Kimenyi [2006] eKLR** and **Resley v Nairobi City Council [2002] 1 EA 241**.

8. Likewise, in light of further actions undertaken by the 1st Respondent on the subject matter of this suit that may have the effect of rendering the *ex parte* Applicant's claim nugatory, this Court will consider the prayer for amendment of the substantive Notice of Motion *ex parte*. This Court is in this regard also guided by the overriding objectives that guides its operations in sections 1A and 1B of the Civil Procedure Act, including the just, expeditious and efficient disposal of disputes, and the provisions of section 3A of the Act on this Court's **inherent powers** to make such orders as may be necessary for the ends of justice. Lastly any prejudice that may be caused to the Respondents and Interested Parties by an amendment, will be cured by according them an opportunity to respond to any new pleadings filed by the *ex parte* Applicant.

9. On the joinder of the proposed Interested Parties, the decision whether or not to join a party is an exercise of discretion. Order 1 Rule 10 (2) of the Civil Procedure Rules provide for a party who may be enjoined in a suit as a necessary party as follows:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

10. The Supreme Court of Kenya defined an interested party in the case of **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others [2014] eKLR**, as follows:

“[18] Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause *ab initio*. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”

11. The considerations before a court admits a proposed interested Party were elaborated on by the Supreme Court in the case of **Francis Kariuki Muruatetu and Another vs Republic, Petition No 15 of 2016** as follows:

“From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

One must move the Court by way of a formal application. Enjoinder is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

ii. The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the

satisfaction of the Court. It must also be clearly outlined and not something remote.

iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

12. Specifically with respect to judicial review proceedings, a party may be joined to proceedings under Order 53 rule 3(2) if it is demonstrated that he or she is directly affected. J. Odunga in explaining how such direct effect is to be demonstrated in judicial review proceedings held as follows in Republic vs Office of the Director of Public Prosecution & 2 others Ex-Parte Sylvia Wairimu Njuguna also Known as Sylvia Wairimu Muli [2018] eKLR:

“25. Since judicial review orders are concerned with the decision making process rather than the merits of the decision, a party who contends that he or she is directly affected by the proceedings ought to bring himself or herself within the ambit of the judicial review jurisdiction and ought not to apply to be joined thereto with a view to transforming judicial review proceedings into ordinary civil litigation. In my view, for a party to be joined to the proceedings under Order 53 rule 3(2) aforesaid the applicant ought to disclose to the Court how he or she is directly affected. The Court cannot be expected to act in the dark by joining such a person with a view to satisfying itself as to the effect of the orders sought on the applicant at a later stage of the proceedings.

26. However, the decision whether or not to join a party is an exercise of discretion and if no substantial purpose or benefit will be gained by the joinder of a person to the proceedings and where the said joinder will militate against the expeditious disposal of the said proceedings which by their nature ought to be heard and determined speedily, the Court will be reluctant to join the intended party to the proceedings.

27. In an application of this nature, the applicant ought to adduce some material upon which the Court can determine whether the applicant is directly affected by the proceedings. In judicial review especially where a party’s interests can be catered for by another party participating in the proceedings, there would be no reason to join the party intending to join the proceedings as a party thereto. It is therefore upon the applicant to satisfy the Court that the issues it intends to raise, which issues are relevant to the matter for determination before the Court, cannot adequately be canvassed by any of the parties before the Court.”

13. The issue in the present judicial review proceedings is the legality of the amendments made by section 38(1A) of the Retirement Benefits Act No.3 of 1997 and of the Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020. The proposed interested parties are actors and stakeholders in the retirement benefits industry, and will not only be directly affected, but also have a direct interest in the impugned amendments and regulations. In addition, in the interests of the expeditious disposal of the suit herein, it is prudent that the said Proposed Interested parties be joined at this stage as opposed to later.

The Disposition

14. In light of the foregoing observations and findings, the *ex parte* Applicants’ Notice of Motion application dated 21st January 2021 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants’ Notice of Motion application dated 21st January 2021 is hereby certified as urgent, and admitted to hearing *ex parte*.

II. The *ex parte* Applicant is granted leave to amend the Notice of Motion dated 21st May 2020 and the Statutory Statement dated 8th May 2020 in terms of making them accord with the fact the Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020 were gazetted as Legal Notice No. 192 of the 14th September, 2020.

III. The Association of Retirement Benefits Schemes and Association of Pension Trustees and Administrators are joined as the 2nd and 3rd Interested Parties herein respectively.

IV. The *ex parte* Applicant shall file the Amended Notice of Motion, Amended Statutory Statement, and a Supplementary affidavit if need be, within twenty-one (21) days of today’s date.

V. The costs of the *ex parte* Applicant’s Notice of Motion dated 21st January 2021 shall be in the cause.

VI. The *ex parte* Applicant shall serve the 2nd and 3rd Interested Parties with the Chamber Summons dated 8th May 2020 and the Notice of Motion dated 21st May 2020 within twenty-one (21) days from today’s date.

VII. The *ex parte* Applicant shall serve all the Respondents and Interested Parties with (i) the Amended Notice of Motion, Amended Statutory Statement, and Supplementary Affidavit if need be; (ii) and supplementary submissions; (iii) a copy of this ruling; and (iv) a hearing notice, within twenty-one (21) days from today’s date.

VIII. The Respondent and Interested Parties are granted leave to file and serve their responses and/or supplementary affidavits, and submissions and/or supplementary submissions as the case may be, to the *ex parte* Applicant’s Amended pleadings within twenty-one (21) days from the date of service by the *ex parte* Applicant.

IX. The hearing of the Amended Notice of Motion shall be held on 22nd April 2021.

X. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the *ex parte* Applicant's Amended Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

XI. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.

XII. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XIII. The parties shall also be required to file their respective affidavits evidencing service in the Judiciary's e-filing system.

XIV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 22nd April 2021.

XV. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant by electronic mail by close of business on Thursday, 12th February 2021.

XVI. Parties shall be at liberty to apply.

15. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF FEBRUARY 2021

P. NYAMWEYA

JUDGE