

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

JUDICIAL REVIEW MISC. APPLICATION NO. E003 OF 2021

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW ORDERS OF CERTIORARI,

PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF: ARTICLES 1,2,3,10,21,22,23,25,27,28,29,32,33,35,

47, 50, 73,232, & 258 OF THE CONSTITUTION

KENYA

AND

IN THE MATTER OF: PHARMACY AND POISONS ACT AND HEALTH

LAWS (AMENDMENT) ACT, 2019

AND

IN THE MATTER OF: DECISION BY 1ST & 2ND RESPONDENTS TO ON

26TH MARCH, 2021 ARREST THE APPLICANT AND

LATER RELEASE HIM ON CASH BAIL WITH VAGUE

CHARGE/REASON FOR HAVING CRITISED THE

REFUSAL OF 1ST RESPONDENT TO VACATE OFFICE

OF REGISTRAR/CEO PHARMACY AND POISONS

BOARD FOLLOWING QUASHING OF HIS

APPOINTMENT VIDE THE DECREE AND DECISION

OF HIGH COURT & COURT OF APPEAL

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

DR. FRED MOIN SIYOI.....1ST RESPONDENT

OFFICER COMMANDING STATION, NAIROBI CENTRAL

POLICE STATION.....2ND RESPONDENT

THE CABINET SECRETARY, MINISTRY OF HEALTH.....3RD RESPONDENT

INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....6TH RESPONDENT

AND

THE LAW SOCIETY OF KENYA.....1ST INTERESTED PARTY

THE PHARMACEUTICAL SOCIETY OF KENYA.....2ND INTERESTED PARTY

EX PARTE APPLICANT: DR.KINYUA MURIITHI

RULING

1. **Dr. Kinyua Muriithi**, the Ex parte Applicant herein filed a motion dated 4.04.2025 (hereafter the subject motion) seeking inter alia to amend his substantive motion herein.
2. In response, **Dr. Fred Moin Siyoi**, the 1st Respondent raised a preliminary objection (PO) to the on the following grounds:

“1) The application is defective and offends the provisions of order 53 rule 1 (1) and (2) of the Civil Procedure Rules, 2010 for the reason that:

a) it seeks to introduce reliefs/prayers – at the substantive stage – in proposed prayers i.e Nos. 2, 2A; 3A; 4A, 4B and 4C,- without first seeking leave for the new prayers as mandatorily required under order 53 rule 1 (1) of the Civil Procedure Rules, 2010.

b) The prayer for inclusion of a proposed 7th Respondent at the substantive stage is defective and offends the provisions of order 53 rule 1 (2) (b) of the Civil Procedure Rules requiring that a verifying affidavit - clearly pleading that the proceedings are neither sub judices nor res judicata between an applicant and a named respondent – must accompany the chamber summons at the leave stage.

2) The requirement for leave is mandatory and failure to seek leave renders the substantive motion defective in line with the principle set out in the case of Republic -versus- County Government of Embu Ex parte Peterson Kamau Muto t/a Embu Medical and Dental Clinic & 6 others [2022] eKLR where the court stated that: “... *under Order 53 Rule 1 of the Civil Procedure Rules 2010, it is mandatory that an applicant in such an application must seek leave before he can file the substantive application*”

3) The proposed amendments to the substantive Notice of Motion is a nullity and unsupported in law as applications under the Civil Procedure Rules, are not amendable in accordance with the principle established in the case of HCC COMM. Case No. 647 of 2015 - Jaribu Credit Traders Limited – versus– Fidelity Bank Limited & SBM Bank Limited where the court held as follows: Para. 20 *"it is my view that an Application is under the Civil Procedure Rules, not amendable,..."* Par. 21 *"I hold that it is my considered view, an application can only be withdrawn and a fresh one filed with or without leave as the circumstances of the court may direct."*

4) The proposed amendments for inclusion of the 7th Proposed Respondent, if allowed, would offend the provisions of Order 53 rule 2 of the Civil Procedure Rules, as the timeline for leave for the writ of certiorari is six months from date of the proceedings complained of, which, in this case are alleged to have occurred on/or about the year 2021/2022.

5) The application is an abuse of court process as the Ex-parte Applicant seeks orders against parties who are not party to the judicial review proceedings, in gross violation of the right to fair hearing as enshrined under article 50 of the Constitution."

Submissions

3. Pursuant to directions issued by the court, the parties filed their respective submissions to the PO. In support of the PO, the 1st Respondent's counsel

asserted concerning the first and second limbs of the PO that the subject motion improperly seeks to introduce new reliefs a new party, proposed as the 7th Respondent without first obtaining leave as required under Order 53 Rule 1 of the Civil Procedure Rules (CPR) .

4. Which leave, counsel asserts, is a mandatory procedural requirement, else the application is fatally defective, as held in **Republic v County Government of Embu Ex parte Peterson Kamau Muto t/a Embu Medical and Dental Clinic & 6 others [2022] eKLR**, and **AAR Insurance v Public Procurement Administrative Review Board, Secretary IEBC and Zamara Risk and Insurance Brokers Ltd HCJR Case No. E087 of 2021**.
5. Contending that because the proposed 7th Respondent, being a public body, was not part of the original leave application, the court had no opportunity to assess whether leave should be granted against it. An omission that violates Order 53 Rule 1(2) (b) CPR, which requires that the verifying affidavit confirm the identity of all respondents and the absence of prior proceedings. Moreover, asserting that Order 53 Rule 4 CPR, which envisages amendment by existing parties, is inapplicable here as the proposed 7th Respondent is not yet a party to the proceedings.
6. Regarding the third limb of the PO, counsel for the 1st Respondent posited that applications brought under the Civil Procedure Rules are not amendable and that the only lawful course is to withdraw and refile a fresh application. Here relying on the decision in **Jaribu Credit Traders Limited v Fidelity Bank Limited & SBM Bank Limited HCC COMM Case No. 647 of 2015**, and the Court of Appeal's endorsement of

Odunga J's reasoning in Republic v Commission on Administrative Justice; Yusuf Mahamed Fazul (Interested Party) [2020] KECA 932 (KLR). The court was urged to allow the PO.

7. For his part, the Ex parte Applicant argued, first, that the subject motion seeks discretionary orders, and thus cannot be defeated by a PO, citing a statement made in **Mukisa Biscuit Manufacturing Co Ltd v. West End Distributors (1969) EA 696**, that a PO cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Hence, relying on **Consolata Kihara & 21 Others v. The Director of Kenya Trypanosomiasis Research Institute Nairobi [2003] KLR 582** and **Republic v Public Procurement Administrative Review Board & another Ex-Parte Transcend Media Group Limited [2018] eKLR** for the proposition that the question whether there has been a misjoinder of the Respondent cannot therefore be raised as a preliminary point of law.
8. Contending that the prayer for the joinder of the proposed 7th Respondent is part of the subject motion seeking leave to amend pleadings under Order 53 Rule 4 of the Civil Procedure Rules, counsel submitted that the joinder of new parties is discretionary and thus not amenable for determination via a PO. Citing here **National Environment Management Authority; Water Service Providers Association (WASPA) (Intended Interested Party/Applicant) Ex parte Nairobi City Water and Sewerage Company & Nahashon Muguna Maingi [2021] eKLR** and **Civicon Limited Vs Kivuwatt Limited & 2 Others [2015] eKLR**.
9. Secondly, taking issue with contested factual issues assertedly raised in the PO, the Ex Parte Applicant submitted that such disputes cannot be resolved

without evidence, and the PO does not qualify as a pure point of law. He relied on **Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others [2018] eKLR** and **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR**.

10. In addition, disputing the 1st Respondent's claim that no verifying affidavit was attached, pointing to annexure **MK-3** in the subject motion, and that the said motion does not improperly introduce new reliefs but merely seeks leave to amend. Whereas the draft pleadings are annexed as required under Order 53 Rule 4 CPR. These factual matters in contest render the objection unsuitable for preliminary determination, according to the Ex Parte Applicant.

11. Thirdly, the Ex Parte Applicant states that the High Court has discretion under Order 53 Rule 4(2) CPR to allow amendments to both the statutory statement and the substantive motion. As held by the Court of Appeal in **Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR**, while interpreting Order 53 Rule 4 CPR and **Republic v Commissioner of Value Added Tax Ex-Parte Iron Art Limited [2012] eKLR**, **Republic v Commissioner for Cooperative Development Wambua & 3 others (Exparte) [2024] KEHC 3928 (KLR)**.

12. Finally, the Ex Parte Applicant submitted that even if the PO was sustained on the issue of amending the substantive motion, the said and statutory statement would survive. Hence the PO would not have the effect of disposing of the entire application, as described in **Mbaya v Kamau &**

another (Civil Appeal E012 of 2023) [2023] KEHC 24945 (KLR).

The Ex Parte Applicant urged the court to dismiss the PO.

Analysis and Determination

13. The court has considered the PO and the rival submissions of the parties as well as the pleadings on record including the subject motion. In the Court's view, the PO stands or falls on the question whether it raises a pure point of law. The locus classicus on the definition of a PO remains **Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696[supra]** where it was held as follows:

“----a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

14. In his judgment, **Sir Charles Newbold, P** sated in the above case that:

“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. The improper raising of preliminary objections does nothing but

unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

15. **Ojwang J** (as he then was) in the case of **Oraro v Mbaja (2005) KLR 141**, reiterated the foregoing by stating that: -

“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.

Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

16. The Court of Appeal in **Kigwor Company Limited v Samedy Trading Company Limited [2021] eKLR** cited with approval the decision of the Supreme Court in **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR** where the latter court emphasized that:

“[16] It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of

law. (See Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 14 of 2014, [2014] eKLR)."

17. Applying the foregoing to the PO herein, it is evident that it is a cocktail of sorts; certain matters raised in the limb 1 (a) and (b) and limb 4 of the PO are ex facie not pure points of law, calling as they do for an inquiry and factual determination. The remainder of the points as raised go the heart of the merits of the subject application itself, and unsurprisingly strong arguments, including matters relating to the court's discretion, were raised on both sides regarding the said motion. One would be forgiven for viewing the rival submissions as canvassing the subject application itself.

18. In the court's view some issues raised by the PO may well be strong grounds of opposition to the subject motion and because of the orders the court proposes to make, it would be pre-emptive for the court to make any findings thereon at this stage. In the circumstances, the PO is not sustained and is dismissed. However, for the avoidance of doubt, any points raised therein may be argued during the hearing of the subject motion as either party deems appropriate.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 20TH DAY OF NOVEMBER 2025.



**C. MEOLI
JUDGE**

In the presence of:

For the Ex Parte Applicant: N/A

For the 1st Respondent: Mr. Kubai

C/A: Lepatei

ORIGINAL