



**Republic v Director of Public Prosecutions & 2 others; Ochieng & another (Ex parte);  
Rentco Africa Limited (Interested Party) (Miscellaneous Judicial Review E114 of 2024)  
[2025] KEHC 19006 (KLR) (Judicial Review) (30 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 19006 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
MISCELLANEOUS JUDICIAL REVIEW E114 OF 2024  
RE ABURILI, J  
DECEMBER 30, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**MATHEW OCHIENG ..... EX PARTE**

**ANTONY OPIYO ..... EX PARTE**

**AND**

**RENTCO AFRICA LIMITED ..... INTERESTED PARTY**

**JUDGMENT**

1. The ex parte Applicants were at all material times employees of Rentco Africa Limited, the Interested Party herein. Their employment was terminated following allegations of gross misconduct, insubordination, and fraud committed against the Interested Party in the course of their employment.
2. The Interested Party contends that as a consequence of the Applicants' conduct, it suffered financial loss amounting to KES. 35,500,000. The matter was subsequently reported to Capitol Hill Police Station, Nairobi, whereupon the Directorate of Criminal Investigations commenced investigations into the alleged criminal conduct.



3. That the DCI opened an Inquiry file and forwarded it to the DPP for perusal and advise and a decision to charge the exparte applicants for the offence of Stealing by Servant Contrary to section 281 of the Penal Code was reached by the DPP on the 14th day of August 2024.
4. The exparte applicants were aggrieved by the said decision of the DPP to charge them. They instructed their counsel Ochieng Opiyo and Company Advocates who by their letter dated 3rd September 2024, wrote to the DPP seeking for a review of the decision to charge them, claiming that the matter in issue was of a civil nature.
5. The DPP called for and reviewed the material in the investigations file and upheld the decision its earlier decision to charge the applicants and notified the exparte applicants' counsel vide letter dated 11<sup>th</sup> September 2024 that the exparte applicants would remain charged with the offence of Stealing by Servant Contrary to section 281 of the Penal Code in addition to the offence of Money Laundering Contrary to Section 3 (b) (i) as read with Section 16 (1) (a) of the Proceeds of Crime and Anti- Money Laundering Act and the offence of Conspiracy to Commit a Felony Contrary to Section 393 of the Penal Code.
6. It was following the DPP's final decision to charge the applicants that the applicants instituted these proceedings by way of chamber summons dated 11/9/2024 and on 13/9/2024, Chigiti J, SC granted them leave to apply for Judicial Review orders and the learned Judge also ordered that the leave so granted do operate as stay of the decision by the Respondents to charge the exparte applicants with criminal offences aforesaid.
7. On 19<sup>th</sup> September, 2024, the exparte applicants filed Notice of Motion dated 11<sup>th</sup> September, 2024, under Order 53(3) of the Civil procedure Rules.
8. In the said Notice of Motion, and part from the title of Notice of Motion, all other prayers seek leave of this Court to be granted to apply.
9. The application was opposed by the respondents and the nterested party. All parties filed written submissions which they adopted canvassing the Notice of motion.
10. Without delving into the merits of the orders sought as the applicants seek leave of court to apply, which leave was already granted by Chigiti J, SC on 13/9/2024, together with the prayer for stay, all sought in the chamber summons dated 11/9/2024 which was certified as urgent and admitted for hearing during the High Court recess, are the same prayers which are replicated in the Notice of Motion. Thus, the difference is in the heading of Notice of Motion.
11. The question is, can this court consider such an application as a substantive Notice of Motion? The straight answer is NO. This is because, once leave is granted to apply, the exparte applicant is expected to file the Notice of Motion containing substantive prayers which he or she expects the Court to grant on merit. A party cannot reproduce the prayers for leave, seeking leave to apply, in the main motion.
12. Parties are bound by their pleadings and in this case, the Notice of motion dated 11/9/2024 is the one that is contemplated in Order 53 Rule 3 (1) of the Civil procedure Rules, once a party is granted leave to apply under Order 53Rule (2) of the Civil Procedure Rules.
13. Submissions cannot substitute pleadings in any given case. In *Associated Electrical Industries Ltd vs. William Otieno* [2004] eKLR, Visram J, (as he then was) stated as follows:

“I entirely agree with the Appellant counsel’s submissions. Parties are bound by their pleadings. The Respondent here pleaded one thing, and sought to prove another. In such a situation the Defendant/appellant was highly prejudiced. It ought to defend the case



against it as stated in the Plaintiff, and the case stated in the Plaintiff was never proved. The respondent having found himself at variance made no application to amend the Plaintiff. The trial magistrate also noted the disparity between what was pleaded and still went ahead to entered judgment, which was clearly wrong in law.”

14. In *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* (2014) eKLR, the Court cited the Malawi Supreme Court of Appeal in *Malawi Railways Ltd vs. Nyasulu* (1998) MWSC 3, where it was stated, an article by Sir Jack Jacob entitled “The Present Importance of Pleadings” published in [1960] *Current Legal Problems* at p 174 wherein the author posited that: -

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings ...for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

15. On the same point, Emukule J, in *Erastus Kihara Mureithi vs. Josphat Njoroge Ragi & 2 Others* [2011] eKLR, held that:

“... In this case there was no basis for granting orders (b) & (c) of the motion dated 7th May, 2010 as the said Motion prayed for none of those others but for an order of detention for 6 months, the attachment of the applicant’s property and sale thereof to compensate the applicants. Those were the specific remedies sought. The court could only grant those prayers, and no other prayers not prayed for.”

16. In *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, A C Mrima stated:

“11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano. v Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court



of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002* where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

17. The Supreme Court in *Raila Amolo Odinga & Another v IEBC & 2 others (2017) eKLR* held as follows:

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...”

18. In other words, a Court, properly so moved, can only make such a specific order related to the prayers sought and not craft its own orders that tend to aid a party advance its case before it. To do otherwise in my view, would be to allow the Court which is an arbiter to descend into the arena of the case and plead the case for one party. That is impermissible in law.
19. This Court cannot redraft the pleadings for the parties and the issue at hand where the applicant in the Notice of Motion reproduced the prayers for leave to apply, cannot be said to be a mere procedural defect or error curable by application of Article 159(2) (d) of *the Constitution*. The error goes to the substance of this case such that this Court is not enabled to consider the merits of the orders sought since they are orders for leave to apply for judicial review orders.
20. I reiterate that despite the leave to apply being granted, the applicants in the Notice of Motion dated 11/9/2024 never sought for any substantive order of judicial review pursuant to Order 53 Rule (3) of the Civil procedure Rules which provides that when leave has been granted to apply, the application shall be made within 21 days by notice of motion to the High Court.
21. In this case, the only relevant thing is the heading “NOTICE OF MOTION”
22. As there is no substantive prayer for the substantive orders, and as this court cannot convert the pleadings for leave into substantive orders for consideration, I find that there is nothing capable of being considered on merit. The Notice of Motion dated 11/9/2024 is found to be devoid of any substance and the same is hereby dismissed.
23. I make no orders as to costs.
24. This file is closed.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF DECEMBER, 2025**



**R.E. ABURILI**  
**JUDGE**

