



**Republic v Commissioner for Cooperative Development; Wambua & 3 others (Exparte)
(Judicial Review E141 of 2022) [2024] KEHC 3928 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3928 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW E141 OF 2022
JM CHIGITI, J
MARCH 20, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

COMMISSIONER FOR COOPERATIVE DEVELOPMENT RESPONDENT

AND

CLINTON WAMBUA EXPARTE

CHARLES MBONDO EXPARTE

CAREN MUTUA EXPARTE

COSMAS KALOKI EXPARTE

RULING

1. The applicant that is before this court is the one dated 12th January 2023 filed by the ex parte applicants wherein they are seeking to include three additional prayers into their judicial review application, namely;
 - a) That this Honourable court be pleased to grant the Applicants an order of prohibition to restrain the Respondent from barring the Applicants from being elected to any cooperative society in Kenya as indicated in paragraph 9 of the recommendations in the Inquiry Report, which illegally infringes against the Applicant’s right to equality and non-discrimination, right to freedom of association, and right to participate in public affairs.
 - b) That this Honourable court be pleased to grant the Applicants an order of prohibition to restrain the Respondent from barring the Respondents from being employed by any cooperative society in Kenya as indicated in paragraph 9 of the recommendations in the Inquiry Report.



- c) That a declaration that the Respondent has breached the Ex-parte Applicants' constitutional rights, such as the right to Fair Administrative Action contrary to Article 47 of the Constitution be issued.
2. The applicants believe that the Application for leave to amend the Statutory Statement dated 19th December 2022 and consequently the Notice of Motion Application dated 12th January 2023 was made in the right format.
 3. They argue that Order 53 Rule 4(2) Civil Procedure Rules provides that,

“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 a new matter arising out of the affidavits of any other party to the application.”
 4. In Republic v Betting Control and Licensing Board & 3 others; Ex parte: Standard Global East Africa Limited [2021] eKLR and Republic v Commissioner of Lands & another Interested Party Masai Villas Limited Ex-Parte Jimmy Mutinda [2013] eKLR the courts allowed the Ex-parte Applicant's applications for amendment brought by way of Notice of Motion Applications.
 5. The Application falls within the ambit of Order 53 Rule 4(2) of the Civil Procedure Rules.
 6. The Applicants submit that the amendment seeks to address violations, prevent future violations, and to provide necessary remedies to the Applicants.
 7. Reliance is placed in Republic v Commissioner of Lands & another Interested Party Masai Villas Limited Ex-Parte Jimmy Mutinda [2013] eKLR held that a new prayer can be introduced in a substantive notice of motion, even where leave was originally not granted to seek relief in terms of the new reliefs to be introduced by a proposed amendment. The court further held that:

“The application for leave to amend is accompanied by a statement and affidavits verifying the facts relied upon. The leave is granted on the basis of the contents of the statement and affidavits. When a Court allows a statement to be amended, it follows that it has granted leave for the commencement of judicial review proceedings in the terms of the amended statement. As such, if a relief sought in the statutory statement is amended, then the substantive notice of motion should be amended to take care of the amended relief in the statement.”
 8. In the case of Republic v Betting Control and Licensing Board & 3 others; Ex parte: Standard Global East Africa Limited [2021] eKLR held that;

“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”.
 9. It is the applicants' case that it is well within the discretionary powers of this Honourable Court to grant the application to incorporate the new prayers in the Judicial Review Application.
 10. The three new prayers relate to the other prayers in the filed judicial review application and arise from the same facts pleaded therein. They will help the court make a just determination in the matter.



11. They argue that the first prayer seeks an order of prohibition to restrain the Respondent from barring the Applicants from being elected to any cooperative society in Kenya as indicated in paragraph 9 of the recommendations in the Inquiry Report. This prayer relates to the prayers made in the Notice of Motion Application dated 12th January 2023 in that they both arise from the Inquiry Report that was adopted at the illegal Special General Meeting held on 3rd July 2021. The same applies to the second prayer.
12. The Applicants submit that the recommendations in the Inquiry Report, infringe upon the Applicants' rights to participate in the cooperative sector and their rights to seek employment contrary to the principles of legality, fairness, natural justice, and equality, hence are founded on illegality.
13. The third prayer seeks to declare that the Respondent breached the Ex-parte Applicants' constitutional right to Fair Administrative Action contrary to Article 47 of the Constitution. The rest of the constitutional breaches are merely appurtenances to this right, and thus the Applicant submits that leave be granted to include this prayer as far as Article 47 is concerned.
14. The Applicants submit that this prayer is also related to the other prayers raised in the Notice of Motion Application dated 12th January 2023 and arises from the same facts pleaded therein.
15. It is their case that the delay in filing the Application for leave is not inordinate.
16. They submit that the omission to include the three prayers in the substantive notice of motion was not deliberate but due to an oversight.
17. They submit that the Respondent will not suffer any prejudice if leave to amend is granted since they will have an opportunity to respond to any issues raised in the amended notice of motion.

Respondent's Case:

18. The Respondent filed grounds of opposition. It is the respondents' case that the leave sought has since elapsed and thus the same cannot be relied upon for the purposes of proposed amendments.
19. It is their case that the leave that was initially granted cannot be relied on to file the proposed amendments, since the is spent and the Exparte Applicant ought to seek for a fresh leave via a chamber summon application.
20. They argue that the delay to file the proposed amendments is inordinate and failure to include proposed additional prayers for prohibition in the motion dated 12th January, 2023 therefore meant that the Applicant abandoned those prayers and the same were mere afterthought and inconsequential.
21. That the declaration prayer as proposed does not fall under the purview of judicial review orders and thus the same cannot be granted.
22. The Applicant is not seeking for the enlargement or the extension of the time within which to lodge the prayers for the above remedies.
23. This court cannot ignore the 21 days 'time limitation set out under Order 53 Rule 3(1) of the Civil Act.
24. Section 53 Rule1(1) (2) of the Civil Act sets out the following: -
 1. No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
 2. Application for such leave shall be made Exparte 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

affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and that the cause of action relates to the applicants named in the application.

Analysis and determination

25. Order 53 Rule 4(2) Civil Procedure Rules provides that,

“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 a new matter arising out of the affidavits of any other party to the application.”

26. In Republic v Betting Control and Licensing Board & 3 others; Ex parte: Standard Global East Africa Limited [2021] eKLR and Republic v Commissioner of Lands & another Interested Party Masai Villas Limited Ex-Parte Jimmy Mutinda [2013] eKLR the courts allowed the Ex-parte Applicant’s applications for amendment brought by way of Notice of Motion Applications.

27. The Application falls within the ambit of Order 53 Rule 4(2) of the Civil Procedure Rules and I so hold.

28. The amendment that the applicant seeks to introduce are in my assessment germane to the other prayers raised in the Notice of Motion Application dated 12th January 2023. The intended amendments arise from the same facts pleaded therein.

29. In any event Article 159 (2) (d) of the Constitution provides that justice shall be administered without undue regard to procedural technicalities.

30. The application cannot be defeated on the basis of a technicality.

Order:

The application dated 12th January 2023 is allowed.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 20TH OF MARCH, 2024.

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J. CHIGITI (SC)

JUDGE

