

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM NEGERI WILAYAH PERSEKUTUAN KUALA
LUMPUR, MALAYSIA
(BAHAGIAN KUASA-KUASA KHAS)
[PERMOHONAN BAGI SEMAKAN KEHAKIMAN NO: WA-25-
222-08/2020]**

Dalam perkara keputusan yang diperolehi dan/atau dibuat pada 11.06.2020 dan 20.07.2020, atau mana-mana tarikh setelah itu, oleh Responden-Responden atau mana-mana satu dari mereka untuk menetapkan keanggotaan panel, pengerusi bagi panel, tidak menyamak kern ball keputusan Pendaftar untuk menetapkan pendengaran bagi Kes Rayuan Mai No : 14000-041-0048-2019 di Mahkamah Rayuan Syariah Wilayah Persekutuan Kuala Lumpur dan tidak memberi maklumbalas kepada surat-surat Peguamcara Pemohon bertarikh 17.07.2020 dan 06.08.2020

Dan

Dalam perkara Mahkamah Rayuan Syariah Wilayah Persekutuan Kuala Lumpur Kes Rayuan Mai No: 14000-041- 0048-2019

Dan

Dalam perkara Artikel 5, 7 dan 8 Perlembagaan Persekutuan

Dan

Dalam perkara Akta Pentadbiran Undang-Undang Islam (Wilayah-Wilayah Persekutuan), 1993 inter alia s. 41,42, 54, 55 dan 56

Dan

Dalam perkara suatu deklarasi di bawah s. 41 Akta Spesifik Relif, 1950 dan satu permohonan untuk semakan kehakiman di bawah s. 25 dan untuk relif di bawah perenggan 1 Jadual kepada Akta Mahkamah Kehakiman 1964 selaras dengan Aturan 53 dan Aturan 92 Kaedah- kaedah Mahkamah, 2012

ANTARA

HISHAM HALIM

(NO. K/P: 820216-10-6079)

... PEMOHON

DAN

1. MAYA AHMAD FUAAD

(NO K/P: 820720-71-5156)

2. KETUA HAKIM SYARIE MAHKAMAH SYARIAH

WILAYAH-WILAYAH PERSEKUTUAN

**3. KETUA PENGARAH JABATAN KEHAKIMAN SYARIAH
MALAYSIA**

4. KETUA PENDAFTAR MAHKAMAH RAYUAN SYARIAH

WILAYAH-WILAYAH PERSEKUTUAN

5. KERAJAAN MALAYSIA

... RESPONDEN-

RESPONDEN**Judgment****(Enclosure - 28)****Introduction**

[1] The Applicant filed an application by way of Notice of Application (**Enclosure 28**) dated 30.09.2020 to amend the amended application for judicial review and the Statement according to Order 53. Rule 2(3) of the Rules of Court 2012 (**ROC**).

The Grounds of Application

[2] The application for amendment was filed as a consequence of the disclosure made by the Respondents in its Affidavits. Central to this is the Federal Government Gazette that was disclosed by the 2nd to 5th Respondent which relates to the appointment of the Chief Syariah Judge.

[3] The application for amendment is bona fide, there is no prejudice occasioned to the Respondents and alternatively, any prejudice from the amendment can be compensated by way of an award of cost.

[4] The application does not turn the suit from one character to another.

[5] After considering the application, the Affidavits, written submissions filed together with the oral submissions of parties, I dismissed Enclosure 28. The grounds for my decision appear below.

Background Facts

- [6] The Applicant on 07.08.2020 filed an ex-parte leave application (Enclosure 1) for judicial review application.
- [7] On 25.08.2020 the Applicant obtained leave for the judicial review.
- [8] The 2nd to 5th Respondent filed an Affidavit in Reply dated 14.09.2020 enclosing the Federal Government Gazette to notify the general public of the appointment of the Chief Syariah Judge and which was published on 24.08.2020.
- [9] The substantive hearing for the said judicial review application (Enclosure 10) was fixed on 30.09.2020.
- [10] The Applicant filed an application to re-amend the amended application for judicial review and the Statement under Order 53 rule 3(2) of the ROC dated 30.09.2020 (Enclosure 28).

The Decision of the Court

- [11] Having perused the cause papers, the Application, the relevant Affidavits filed by the parties, I am of the view that the proposed amendments are unnecessary and useless as they will change the facts and main issues of the case.
- [12] It is my view that the proposed amendment is not just to correct the defect in the pleading but rather to change the nature of the dispute. I find that it has gone further and beyond what is allowed in the amendment application.
- [13] It is to be noted that when this Court granted leave for judicial review on 25.8.2020 it was limited to what is prayed in the application and the Statement under Order 53 rule 3(2) of the ROC.

[14] However, upon perusal of the Applicant's application for amendment, I find that the Applicant seeks to add the following:-

14.1 a new scope of relief against the Respondents;

14.2 a new cause of complaint/ decision for challenge; and

14.3 a new prayer of relief against the Respondents i.e a writ of *quaranto*.

[15] It is evident from the above, the proposed amendment has the intention to add and/or alter the subject matter and relief of the judicial review application in which leave was granted.

[16] I view that it is not proper for the Applicant to expand the application for the judicial review at this stage exceeding what has been granted by the Court at the leave stage.

[17] Further, I find that the Applicant had filed the amendment application at a very late stage i.e on a hearing date, 30.09.2020 in which all parties had filed their written submissions.

[18] In *Raphael Pura v. Insas Bhd & Anor* [2000] 1 MLRA 700; [2001] 1 NILJ 49; [2000] 4 AMR 4475; [2000] 4 CLJ 830, the Court of Appeal held as follows:- "With respect, this is no excuse for the appellant to delay the application for the amendment of his defence at a very late stage without placing sufficient material before the court and to give cogent reasons thereof.

In dealing with the amendment to the defence, we would quote a passage from *Gatley on Libel*, 9th edn. (1998) under the caption 'Granting of leave in discretion of court' at p. 447:

. ..the court has shown itself reluctant to grant a defendant leave to amend his defence where the

application is made late in the day, either at, or close to, the trial...It has been held that where delay has been due to the defendant's own default in some respect, that circumstances should be taken into consideration by the judge as part of the matters to be weighed in deciding whether or not to allow an amendment. The mere fact that delay may be capable of being compensated in money is not conclusive of the question whether the amendment should or should not be permitted."

(emphasis added)

[19] Further, the Federal Court in the case of *Hong Leong Finance Bhd v. LowThiam Hoe and Another Appeal* [2016] 3 MLRA81; [2015] 8 CLJ 1; [2016] 1 MLJ 301, held that:-

“[27] In our instant case, there had been five case managements since 2011 and there was no indication at all that an amendment application was contemplated by the defendant. **The only explanation given by the defendant in his affidavit for the delay was that he had only discovered that these new issues were not pleaded when preparing for trial. Such an explanation in our view cannot be acceptable.**”

(emphasis added)

[20] On the issue of allowing the amendment at the submission stage, the Federal Court in the case of *Mahari bin Endut v. Dato Hj Mat Razali bin Kassim & Ors* [2009] 5 MLJ 153, [2009] 1 MLRA 629; [2009] 4 CLJ 488 had this to say:-

“[27] **Allowing the amendment at the submission stage would have given the appellant undue advantage over the respondents, let alone surprise.** It would have meant that the appellant could then rely on the evidence adduced

while the respondents would have focused only on the unamended pleaded case where such evidence were adduced.”

(emphasis added)

[21] It is clear from the above that the Applicant was fully aware that the Substantive Hearing was fixed on 30.09.2020, had only informed the court of his intention to file this application on the same day.

[22] Further, I find that the Applicant’s excuse that the pandemic had caused hardship and interfered in their process to get instructions and preparations for this case cannot be accepted by this court.

[23] This is because the leave application for judicial review (Enclosure 1) was filed on 07.08.2020 whereby at that point of time, Recovery Movement Control Order (RMCO / PKPP) has been enforced by the government of Malaysia.

[24] I am of the opinion that there should not be any difficulty for the Applicant to take his client’s instruction and/or to prepare for his case during RMCO as all businesses and activities are allowed to operate as usual.

[25] Since this application was filed at the very late stage and the delay is not reasonable, it is clear that the proposed amendment was not made bona fide and had caused prejudice to the Respondents.

[26] Upon perusal of the cause papers, it is clear the amendment application was only made after seeing the Respondent’s evidence showing that a new Ketua Hakim Syarie has been appointed by the Yang Di Pertuan Agong (YDPA) and it was the

newly appointed Ketua Hakim Syarie who had formed the corum of judges for the Syariah Appeal Court.

[27] I find that Applicant now seeks to alter the scope of the judicial review application by attacking the validity of YDPA's decision to terminate and appoint Ketua Hakim Syarie as well as to question the execution of power and function by the appointed Ketua Hakim Syarie. As such, the amendment application is not bona fide as it is a tactical manoeuvre to defeat the Respondent's defence.

[28] This has been stated by Abdul Kadir Sulaiman J (as he then was) in the case of *Lim Nyang Tak Michael v. ACE Technologies Sdn Bhd* [1995] 4 MLRH 442; [1995] 4 MLJ 616 where it was held that:-

“It was not a question of negligence to plead all those matters in the original defence but a tactical manoeuvre and done in bad faith to delay the rights of the plaintiff on his claim. The application to amend the defence after exposure by the plaintiff in his affidavit in support was a tactic to confuse the issues by creating imaginary ‘triable issues’ and to stall the plaintiff of his rights. If this was allowed, it would unnecessarily cause prejudice to the plaintiff which could not be compensated by costs.”

(emphasis added)

[29] Further, I am of the view that the application is not bona fide, an afterthought and an attempt to circumvent the mandatory requirement of Order 53 of the ROC.

[30] From the above, it is clear that when leave was granted by this court, the subject matter of the judicial review application is concerning the decision of the Syariah Appeal Court to adjourn and fix the appeal for re-hearing and also in respect of the

composition of the Syariah Appeal Court to re-hear the appeal. The Grounds supporting the judicial review application centered on the absence of a Ketua Hakim Syarie to perform the function as provided under the law.

[31] However, the proposed amendment seeks to enlarge the subject matter of the judicial review by challenging the YDPA's power to terminate and appoint Ketua Hakim Syarie and the execution of power and function by the Ketua Hakim Syarie.

[32] To my mind it is clear that the proposed amendment does in effect alter the subject matter of the judicial review application and alter the character of the judicial review application contrary to the subject matter where leave was granted by this court.

[See *Sumita Development (M) Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor* [2014] 9 CLJ 406; [2014] MLRHU 935; [2014] 5 AMR 357]

[33] Based on the above, I view that the proposed amendment is nothing more than a tactical manoeuvre to improve the judicial review application and to introduce new subject matters to frustrate the Respondents' defense.

[34] This is evident when the Applicant had only realized the weaknesses of his case after he has filed the submission and/or after going through the Respondents' submissions and thus decided to file the proposed amendment.

[35] This can clearly be seen in the Applicant's statement in paragraph 7 of the Applicant's Affidavit 4 that only in his cause of preparation for the Hearing, the Applicant received instructions from his client to file this application to re-amend the amended application for Judicial Review and the Statement pursuant to Order 53 Rule 3(2) of the ROC.

[36] In the case of *Dato' Tan Heng Chew v. Tan Kim Hor & Ors* [2008] 7 MLJ 184; [2007] 4 MLRH 147, Abdul Malik Ishak J (as he then was) held that:-

[54] It is also my judgment that the proposed amendments to the statement of claim may be construed as an **attempt to have a second bite at the proverbial cherry especially after having the benefit of hearing the submissions** of the learned counsel for the defendants before Abdul Wahab Patail J.

(emphasis added)

[37] All in all, it is my view that the Applicant in filing this re-amendment application was actually making an attempt to have another chance to strengthen his case which is not allowed under the law.

Conclusion

[38] Premised on the aforesaid reasons, I dismissed the Applicant's application (Enclosure 28) with a global costs of RM 3000.00 to be paid by the Applicant to the 1st Respondent subject to the allocator fee except for the 2nd to the 5th Respondent where the Applicant is to pay costs for RM 3000.00 without the allocator fee.

Dated: 31 MARCH 2022

(AHMAD KAMAL MD SHAHID)

Judge

High Court Kuala Lumpur

COUNSEL:

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Case(s) referred to:

Raphael Pura v. Insas Bhd & Anor [2000] 1 MLRA 700; [2001] 1 NILJ 49; [2000] 4 AMR 4475; [2000] 4 CLJ 830

Hong Leong Finance Bhd v. LowThiam Hoe and Another Appeal [2016] 3 MLRA81; [2015] 8 CLJ 1; [2016] 1 MLJ 301

Mahari bin Endut v. Dato Hj Mat Razali bin Kassim & Ors [2009] 5 MLJ 153, [2009] 1 MLRA 629; [2009] 4 CLJ 488

Lim Nyang Tak Michael v. ACE Technologies Sdn Bhd [1995] 4 MLRH 442; [1995] 4 MLJ 616

Sumita Development (M) Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor [2014] 9 CLJ 406; [2014] MLRHU 935; [2014] 5 AMR 357

Dato' Tan Heng Chew v. Tan Kim Hor & Ors [2008] 7 MLJ 184; [2007] 4 MLRH 147

Legislation referred to:

Rules of Court 2012, O. 53. rr. 2(3), 3(2)