



**Kiarie v Njihia (Civil Appeal E151 of 2022)
[2023] KEHC 26886 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26886 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E151 OF 2022
JRA WANANDA, J
DECEMBER 15, 2023**

BETWEEN

GRACE MUTHONI KIARIE APPLICANT

AND

ANNE WANJIKU NJIHIA RESPONDENT

RULING

1. The Application before the Court is the Appellant’s Notice of Motion dated 25/10/2023. The same seeks the following orders:
 - a. [.....] Spent
 - b. That the Court be pleased to grant the Applicant leave to amend her Memorandum of Appeal dated 19/10/2022, in terms of the attached draft Memorandum of Appeal be admitted on record upon payment of the requisite fees, if any
 - c. The Court be pleased to give directions that the Appellant do file the Record of Appeal within 14 days of its order.
 - d. The Court be pleased to review its orders in the Ruling delivered on the 6th October 2023 and or vary it to allow stay of execution of the Judgment of the Small Claims Court/suspension of an order committing the Appellant back to civil jail pending hearing of this Appeal on condition that the Kshs 100,000/- deposited in this Court continue serving as security pending Appeal.
 - e. That the Honourable Court be pleased to make such orders as it deems just to expedite the hearing and determination of the Appeal herein.
 - f. Costs of this Application be provided for



2. The Application is filed through Messrs Kipkosgei & Co. Advocates and is stated to be brought under Order 42 Rule 3, Rule 6 and Order 45 Rule 1 of the Civil Procedure Rules 2010, Section 1A, 1B and 3A of the Civil Procedure Act and “all enabling provisions of the law”. The grounds of the Application are as set out on the face thereon and it is supported by the Affidavit sworn by the Appellant, Grace Muthoni Kiarie.
3. In the Affidavit, the Appellant deponed that the Court delivered its Judgment in Eldoret Small Claims Case No. E324/2022 on 15/02/2023 against her, she is aggrieved and dissatisfied with the Judgment and has already appealed as herein, she is ready to prosecute the Appeal within a period of 90 days and will be requesting the Court to allow her 14 days to file Record of Appeal, she has made effort to obtain certified copy of proceedings from the Small Claims Court to show her willingness to prosecute the Appeal on time, she seeks leave of the Court to allow her to amend her Memorandum of Appeal, she has an arguable Appeal with high chances of success, she has not yet withdrawn the Kshs 100,000/- that she paid earlier as a condition for her release in February 2023 and wishes that the same continues being held pending hearing and determination since the same will be rendered nugatory if she is committed to civil jail, in the interest of justice and to prevent her appeal being rendered nugatory and an academic exercise the suspension of her committal to civil jail is necessary, and that the finding of the trial Court is having serious implications on her life as a businesswoman and a mother to her children.

Response

4. The Respondent opposed the Application vide the Grounds of Opposition filed on 10/11/2023 in which it was stated that the Application is made after inordinate delay and seeks to circumvent the Court orders already issued in relation to the same parties and to that end the Court is functus officio, allowing the amendment after this Court has pronounced itself in respect of the same parties in a related matter will highly prejudice the Respondent as the Appellant continues with her fishing expedition, the orders sought are untenable and that the Application is moot.

Hearing of the Application

5. Pursuant to the directions given, the Application was canvassed by way of written submissions. The Appellant filed her Submissions on 20/11/2023 while the Respondent had filed hers earlier on 24/11/2023.

Appellant’s Submissions

6. Counsel for the Appellant submitted that this matter was brought through Miscellaneous Application No. 35 of 2023 where it sought leave of the Court to file Appeal out of time and stay of execution pending the intended Appeal through the firm of Kipkosgei & Co. Advocates, when the said Application was ready and coming up for hearing, it came to the attention of the Applicant that her former Advocates, Kamau Lagat & Co. Advocates who were then on record had lodged this particular Appeal, this was brought to the Court’s attention through a Further Replying Affidavit by the Applicant in the said Miscellaneous Application No. E35 of 2023, and that in the same Affidavit, the Appellant prayed that this Court exercises its discretion and allows the Appeal that the present Application is now pegged on.
7. Regarding the prayer for amendment, Counsel cited Order 8 Rule 5(1) of the Civil Procedure Rules and the cases of Kanawal Sarjit Singh Dhim versus Kashavji Jivraj Shah [2010] eKLR and George Gikuba Mbutia versus Consolidated Bank of Kenya Limited and Another [2016] eKLR and submitted the Appellant has annexed a draft Memorandum of Appeal which raises pertinent issues for determination and raises arguable grounds, the Appeal was filed within the prescribed time, the



failure to seek stay of execution pending Appeal was occasioned by Advocate then on record in the Small Claims Court, she has since sought legal services from another Counsel, and that mistake and/or negligence of an Advocate should not be visited upon the client. He cited the case of *Belinda Mural & 9 Others vs Amos Wainaina* [1978] eKLR in which, he stated, the case of *Shah H. Bharmal & Brothers vs Kumar* 1961] E.A. 679 was quoted. He also cited the case of *Hamam Singh & Others vs Mistri* [1971] E.A. 122.

8. Counsel submitted further that the degree of prejudice to the Respondent shall not be elephantine if the Application is granted for the reason that the Appellant has undertaken to deposit a sum of Kshs 100,000/- as security pending Appeal, she has indicated that she is ready and willing to abide by the Court's direction relating thereto. He cited the case of *Henry Sakwa Maloba v Boniface Papando Tsubuko* [2020] eKLR where, he submitted, the case of *Century Oil Trading Company Limited vs Kenya Shell Limited Nairobi* [2008] eKLR. In conclusion, Counsel submitted that the Appellant is on the verge of being committed to civil jail over the same subject matter and if the same is done, the Appeal stands to be rendered nugatory and an academic exercise, and that the Respondent has not demonstrated her ability to compensate the Appellant and her source of income is unknown.

Respondent's Submissions

9. On his part, Counsel for the Respondent submitted that ordinarily, amendment of pleadings should be allowed freely, however, where amendment seeks to defeat an accrued right, the same should only be allowed in exceptional cases. He cited the case of *Kenneth Kariuki Githii v Royal Media Services Ltd* [2009] eKLR and submitted that in the instant case, the Memorandum of Appeal already filed was challenging the finding of Court in law and in fact contrary to Section 38 of the Small Claims Court, the draft attached to the Application is dated 25/10/2023 yet the Appeal was filed in the year 2022, from the draft it is not clear what is being amended as envisaged under Order 8 Rule 7(2) of the Civil Procedure Rules 2010, failure to disclose amendments sought is fatal to the Application and cannot be cured under the "oxygen" principles. He also cited the case of *Peter G. N. Nganga & Another v Kenya Finance Bank Limited (in Liquidation, Liquidating Agent The Deposit Protection Fund) & 3 Others* [2014] eKLR.
10. On whether the Court should review its orders issued in another matter that is not before Court, Counsel answered that the answer is in the negative. He cited Order 45 of the Civil Procedure Rules and submitted that there is no order issued in this matter capable of being reviewed or varied, a perusal of the Application also does not mention in which matter the order sought to be reviewed was issued neither is there any Application for consolidation of files, and that issues cannot be introduced at the Submission stage. He cited the case of *Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Another* [2014] eKLR and submitted further that the Application has been brought after inordinate delay of more than 1 year that has not explained, and neither has the Applicant proved any substantial loss since execution by committal to civil jail is a lawful process. He also cited the case of *Ruth Wanjiku Mwangi v Nancy Muthoni Nyaruai* [2020] eKLR.
11. In conclusion, Counsel submitted that as regards security, none has been offered and orders issued elsewhere cannot be varied in this matter as the Court became *functus officio* once it rendered itself in that other matter, the only recourse available to the Applicant lies in Appeal, unfortunately the import of Section 38(2) of the Small Claims Court is that the High Court is the final destination for Small Claims matters, the Applicant's fate is sealed and that she should be content with consequences of her indolence.



Analysis and Determination

12. Upon considering the record, including the Affidavits and Submissions presented and authorities cited, the issues that arise for determination, in my view, are the following:
 - i. Whether leave to amend the Memorandum of Appeal filed herein should be granted.
 - ii. Whether this Court should review or vary its orders made in a related but separate Cause and instead, grant an order of stay of execution.
13. I now proceed to analyze and answer the said issues.

i. Whether leave to amend the Memorandum of Appeal filed herein should be granted

14. On amendment of pleadings, Order 42 Rule 3 of the Civil Procedure Rules 2010 is premised as follows:

“[Order 42, rule 3.] Amendment of memorandum of appeal.

3.

- (1) The appellant may amend his memorandum of appeal without leave at any time before the court gives directions under rule 13.
- (2) After the time limited by subrule (1) the court may, on application, permit the appellant to amend his memorandum of appeal.”

15. In view of the foregoing express provisions, and since, to my knowledge, the Court has not yet given directions in this Appeal, it is not clear to me why the Appellant has still chosen to approach the Court for leave when by dint of Rule (3)(1) above, she is still within the window of amending the Memorandum without leave. Be that as it may, since the Court has been formally moved, I will proceed to consider the prayer.
16. Amendment of pleadings is generally governed by Section 100 of the *Civil Procedure Act* and Order 8 Rule 3 of the Civil Procedure Rules 2010. Indeed, it has been held that a Memorandum of Appeal is a pleading like any other and the rules that apply to amendment of pleadings also apply to a Memorandum of Appeal. In regard thereto, in *Uhuru Highway Development Ltd vs Central Bank of Kenya* (2002) 1 EA 314, the Court of Appeal held that:

“a memorandum of appeal, subject to the interests of justice, is always amenable to amendment”.
17. The initial Memorandum of Appeal was filed herein on 19/10/2022. The Appellant now wishes to amend the same. The Respondent’s Counsel has however correctly pointed out that the draft attached is a totally new version of the Memorandum and not an amended copy. What Counsel seems to intend to do is to withdraw the Memorandum of Appeal now on record and substitute with a totally fresh and new one. It is clearly a misnomer to refer to such as an “amendment”.
18. Counsel for the Respondent referred to Order 8 Rule 7 of the Civil Procedure Rules which provides as follows:

“7



- (2) All amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to make them legible, and by underlining in red ink all added words.
- (3) colours other than red shall be used for further amendments”

19. Faced with a similar situation, Mugo Kamau J, in the case of *Angelina Chepng’etich Kimaiti v Tom Mong’are Nyariki & another* [2021] eKLR stated as follows:

“Secondly, the Draft amended Defence and Counterclaim is poorly done. Other than the paragraphs I have mentioned above, there are no amended prayers introduced. What the Applicant has done is to introduce new prayers in place of the original ones. There is no striking through of the initial prayers followed by new underlined prayers as is the law but the old ones have been done away with and totally new prayers introduced. This is very poor draftsmanship which should not be entertained. It confuses everyone.

20. On the same issue, while dealing with the older version of the Civil Procedure Rules before it was amended and the numbering sequence changed, Hayanga J in *Nyamodi Ochieng Nyamogo V Kenya Posts & Telecommunications Corporation* [2003] eKLR also stated as follows:

“The purpose of pleading is clarity. To make the opposite party know what case is against him. He should not be made to indulge in guesses as to what was or was not pleaded or ought to have been pleaded or was originally or not originally pleaded the purpose of pleading is not to play a game at the expense of the litigant;

The obvious interpretation of Order 6A Rule 7(2) is that shades of colour must be used and omitting to do so is a contravention

21. There is also the case of *Tripat Singh Mangat (Suing on his behalf and on behalf of Mangat I. B. Patel (MIBP) Limited) v Manjeet Singh Bhachu & 3 others* [2021] eKLR where Ngenye-Macharia J, held as follows:

“66. Also glaring from the Draft Amended Plaintiff is the removal of the 4th Defendant, Mangat I.B. Patel & Partners (sued as a firm) and replaced by Ishwar B.Patel & Partners(sued as a firm). The Applicant in doing so has blatantly failed to indicate the change in red pen by crossing the name of the 4th Defendant and underlining in red pen the name of the proposed new 4th Defendant. This clearly contravenes Order 8 Rule 7(2) which provides that “All amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words.” (emphasis added).

67. Further, and as correctly submitted by the Respondents, the Applicant has completely removed some of the paragraphs in the original Plaintiff, and more specifically paragraphs 13, 14, 16 and 17 which do not feature in the Draft Amended Plaintiff. Again, and as an example, paragraphs 14 and 15 of the Draft Amended Plaintiff are not in the original Plaintiff, yet they are not underlined in red ink.

68. Order 8 Rule 7(2) is couched in mandatory terms so that its violation goes into the root of the amendment. The rationale to this underpinning is that the amendments must be properly understood so as to enable a Respondent



to respond curtly to the changes in a pleading. It must be understood that whilst an amendment will not unnecessarily be declined, the court must grant it within the threshold set by the law. In that regard, a contravention of the Rule cannot be salvaged by Article 159(2)(d) of *the Constitution* that requires courts to ignore procedural technicalities for the sake of doing justice.

69. Ignoring the mandatory provision obviously means that the Respondents cannot point out what has been added or deducted from the Amended Pleadings, consequent which their right to mount a formidable and concise Statement of Defence is fettered, yet it is trite that a pleading forms largely the basis of a determination by the court. In fact, a pleading is the genesis of the course the suit takes.
70. That is why I entirely concur with the holding in the case of *Co-operative Insurance Company of Kenya Limited v Paem Agencies Company Limited* [2014] eKLR, where the court held that:-

“Any pleadings and or documents relied upon by the parties should be self-explanatory. The court finds that the issue of the underlining of the amended parts in red and the heading of the draft pleading is not a procedural technicality that could be saved by the provisions of Article 159(2)(d) of *the Constitution* of Kenya, 2010. Rather it is a fundamental error that goes into the root of the Plaintiff’s application as it sought that the Amended Pleadings be filed and served in terms of the draft Amended Pleadings...

The court does not look kindly at parties who do not adhere and follow the laid down procedures and rules. For the reason that the Plaintiff failed to comply with the provisions of Order 8 Rule 7 (2) of the Civil Procedure Rules, 2010, its application would not succeed.”

71. On this ground, the application would also not definitely succeed.”

22. However, unlike in the above cases where the Pleadings had already been filed, in this case the Memorandum of Appeal is still in draft form and has not yet been filed. In the circumstances, I choose to invoke Article 159 of *the Constitution* and the “oxygen” principles which both command Courts to dispense substantial justice in an efficient, proportionate and cost-effective manner. I have also considered that, as already stated, directions not having been given in this Appeal as yet, under Order 42 Rule 3 of the Civil Procedure Rules, the Appellant did not even require leave to amend the Memorandum of Appeal in the first place. I will not therefore use the said omissions to deny the Appellant the opportunity to amend the Memorandum of Appeal.
23. The Respondent’s Counsel objects to the amendment mainly on the grounds of delay and on the ground that the amendment seeks to deprive the Respondent of an accrued right and that as a result, the Respondent shall suffer prejudice. Counsel argues that the Memorandum filed was challenging the finding of the Small Claims Court on matters of law and fact, contrary to the provisions of Section 38 of the Small Claims Act. Granted, Counsel is right and has raised valid points. However, these grievances can be safely laid to rest. This is because a Court has powers to allow amendments to pleadings at any stage of the proceedings, even where the effect of the amendment is to introduce a new cause of action. The overriding consideration in applications for leave to amend pleadings is whether the amendments



are necessary for the just determination of the controversy between the parties. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs (see Court of Appeal decision in Central Kenya Ltd versus Trust Bank Ltd & Others C.A Civil Appeal No 222 of 1998 [2002] eKLR).

24. On the basis thereof, and despite the Appellant's failure to strike out in red ink all deleted words, but in such a manner as to leave them legible, and by failing to underline in red ink all added words, I will allow the amendment save that I will order that the version to be filed do comply with the express requirements of Order 8 Rule 7 of the Civil Procedure Rules.

ii. Whether this Court should review or vary its orders made in a related but different Cause and instead, grant an order of stay of execution

25. Prayer (d) of the Application is presented as follows:

“The Court be pleased to review its orders in the Ruling delivered on the 6th October 2023 and or vary it to allow stay of execution of the Judgment of the Small Claims Court/ suspension of an order committing the Appellant back to civil jail pending hearing of this Appeal on condition that the Kshs 100,000/- deposited in this Court continue serving as security pending Appeal.”

26. The Grounds of the Application and Supporting Affidavit also perpetuate the above prayer in the same manner. However, a perusal of this file does not anywhere reveal the existence of any orders or Ruling delivered in this matter on 6/10/2023 as alleged above or any order at all relating or connected to the matters aforesaid. Up to this point therefore, the order sought to be reviewed or varied remains unknown.
27. In his Submissions however, Counsel for the Appellant for the first time discloses that the orders and/ or Ruling sought to be reviewed and/or varied herein were in fact not given in this instant Cause, but in a separate Cause, namely, Eldoret High Court Miscellaneous Application No. 35 of 2023.
28. It is on this basis therefore that in his Submissions, Counsel for the Respondent correctly took up the objection that there is no order issued in this matter capable of being reviewed or varied under Order 45 of the Civil Procedure Rules. Counsel also submitted that a perusal of the Application also does not mention in which matter the order sought to be reviewed was issued neither is there any Application for consolidation of files, and also that new matters cannot be introduced at the Submission stage
29. I am constrained to uphold the above argument. There is no known procedure in law allowing a Court to review or vary in one Cause, a Ruling or orders made or issued in a separate Cause no matter how related the two may be and regardless of the fact that the parties and the issues arising are similar or even the same. The only way a Court can do so is where the two Causes have been consolidated. For this reason, I find that I have no mandate to consider or determine the said prayer (d).

Final Orders

30. The upshot of my findings above is that the Notice of Motion dated 25/10/2023 partially succeeds. Consequently, I issue the following orders:
- i. The Appellant's is granted leave to amend her Memorandum of Appeal filed herein in terms of the draft attached to the Application herein.



- ii. The amended Memorandum of Appeal shall be filed and served within seven (7) days and the same shall be in compliance with Order 8 Rule 7(2) of the Civil Procedure Rules 2010 to the effect that all amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words.
- iii. Prayer (d) of the Notice of Motion is struck out.
- iv. The Appellant shall bear the costs of the Application.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 15TH DAY OF DECEMBER 2023

.....

WANANDA J.R. ANURO

JUDGE

