



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nzeva & 2 others v Songolo (Environment and Land Appeal  
6 of 2022) [2023] KEELC 19154 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19154 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT AND LAND APPEAL 6 OF 2022**

**LG KIMANI, J  
JULY 25, 2023**

**BETWEEN**

**SYELIWA KALALA NZEVA ..... 1<sup>ST</sup> APPELLANT**

**PETER KALALA ..... 2<sup>ND</sup> APPELLANT**

**MBITI KALALA ..... 3<sup>RD</sup> APPELLANT**

**AND**

**WILSON NZILI SONGOLO ..... RESPONDENT**

**RULING**

1. The appellant filed the notice of motion dated April 18, 2023 seeking the following orders:
  1. That the applicant/appellant be granted leave to amend the memorandum of appeal as per the proposed amended memorandum of appeal.
  2. that the annexed proposed amended memorandum of appeal be deemed as duly filed and served upon the payment of the requisite court fees.
  3. That the costs of this application abide the results of the appeal.
2. The supporting and supplementary affidavits sworn by Hillary Casmir Wamunyolo Advocate for the Appellant state that the Appellants appointed the firm of Messrs CR Advocates LLP to prosecute the appeal and filed Notice of Change of Advocates dated January 18, 2023.
3. Counsel stated that after perusal of the Memorandum of Appeal, it became apparent there was necessity to amend the same in order to remove vagueness and bring clarity to the pleadings. He further stated that the amendments will assist the Court to determine the real issues in controversy in the interest of substantive justice.



4. Through the supplementary affidavit, Counsel confirmed that the Appellants have not been keen to prosecute the Appeal and that the grounds of appeal are meant to assist the Court to see the issues that the Appellant has raised.
5. On filing of submissions, Counsel deposed that the submissions in the appeal were filed at a time when there was a fallout between the Appellants and the previous advocates and the same could not be filed.
6. Counsel submitted that the Respondent's replying affidavit was commissioned by an inactive Commissioner for oaths and that it should be struck out for vitiating the prescribed provisions of the law.

#### **The Respondent's Replying Affidavit**

7. The respondent deposed that this appeal was filed on June 1, 2012 and has been pending in court for more than 10 years and that the Appellants have not prosecuted it. Further, the Respondent states that the appellants did not comply with the Court orders on conditions for grant of stay of execution.
8. He stated that the appellants have been interfering with the suit property and that the application herein is only made to buy time and prolong the matter. The respondent stated that he had already filed and served final submissions in the appeal and was expecting to be served with the appellants' submissions and take a judgment date in order to finalize the appeal.
9. The Respondent's contention is that this application is only intended to delay the finalization of the suit and that it is unfair to deny him the right to enjoy the legitimate fruits of his judgment.

#### **The Applicants Submissions**

10. Counsel for the Appellants filed written submissions reiterating the contents of the affidavits. He relied on the case of *John Mugambi & Mugambi & Company Advocates v Kiama Wangai* [2021] eKLR on amendment stating that of precision in pleadings is very crucial as was held in the case of *Brenda Mutonyi Munika & Another v Clare Nang'unda Barasa & another* (2018) eKLR.
11. Counsel implored the Court to be gracious and grant the orders as the Court in the case of *Makueni County Government v. Grace Mwelu David* (2020) eKLR adding that the Respondent will have an opportunity to file further submissions.

#### **The Respondent's submissions**

12. Counsel for the Respondent reiterated the contents of their replying affidavit, and emphasized as unjust and part of delaying tactics the Applicant's failure to deposit money as ordered by the court, delay in prosecuting the appeal and use of force to keep the Respondent out of the suit property.
13. The Respondent stated that the date for compliance with directions on filing submissions has already passed and the Respondent having filed his written submissions to the appeal, states that it is unfair to reopen the case and that the issues raised can be addressed in submissions. The Respondent also submitted that the reason for amendment was too general and vague and that the proposed amendments introduce a fresh cause of action challenging the validity of registration of the title deed.
14. Counsel submitted that there is unreasonable delay in the filing of this application since the appeal was filed on June 14, 2012 while this application was filed on April 18, 2023, stating that the delay is prejudicial to the Respondent. Counsel for the Respondent cited and relied the following cases: *Merry Beach Ltd vs Barclays Bank Ltd & Another* (2018) eKLR and *Kanawal Sarjir Singh Dhim vs Keshav Jijivraj Shah* (2010) eKLR and urged the Court to dismiss the application with costs.



## Analysis and Determination

15. Order 8 Rule 3 of the [Civil Procedure Rules](#) (2010) provides for amendment of pleadings stating that:

“Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

(2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.”

16. Specific to amendment of Memorandum of Appeal, Order 42 rule 3 of the [Civil Procedure Rules](#) (2010) provides that:

“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.”

17. Rule 13 of Order 42 regulates filing of a proper record of appeal and directions on the hearing. On whether or not to grant an order for amendment of pleadings, Warsame JA in the case of [John Mugambi & Mugambi & Company Advocates v Kiama Wangai](#) [2021] eKLR relied on by the Appellants found as follows while allowing a similar amendment:

“My view therefore as was the view of this Court in *George Gikubu Mbuthia v Consolidated Bank of Kenya Ltd & Another* (2016) eKLR, that parties to a suit have the right to amend their pleadings at any stage of the proceedings before judgment and that courts should liberally allow such amendments. There are situations when the court will refuse to exercise its discretion to allow amendments. Such cases include where a new or inconsistent cause of action is introduced; where vested interests or accrued legal rights will be adversely affected; where prejudice or injustice which cannot be properly compensated in costs is occasioned to the respondent.”

18. In the case of [John Nyagaka Osoro v Reynold Karisa Charo & 5 others](#) [2021] eKLR the Court cited from [Halsbury's Laws of England](#), 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, on the purpose of amendment to pleadings stating: -

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. ...”

19. Ordinarily, amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice to be if the other side can be compensated by costs. This was held in the case of *Eastern Bakery – Versus – Castelino* (1958) E.A 461 (U) at Page 462 and Civil Case No. 7 of 2017, [St. Patrick's Hills School Limited - Versus - Bank of Africa](#)



Kenya Limited” eKLR (2018) quoted by the Court in the case of Basil Criticos v AIC Makutano & 39 others [2022] eKLR. The Court further held that:

“The power to amend pleadings is discretionary. In that case the court must act judicially in the exercise of its discretion within the ambit of the Principles of natural justice. In any case as stated by the Plaintiff/Applicant, the instant Plaintiff’s suit and the relief sought against 139 other Defendants expressly pleaded in the Plaint would directly and adversely affect the proposed Defendant. The Court notes that the instant suit is still at its hearing stage and the pleadings had not closed hence the application was bona fide, timeously brought and meritorious as the amendment will not be introducing a new cause of action which is substantially different from the already existing one not offending Order 8 Rule 3(5) of the Civil Procedure Rules, 2010. Besides, the Court will allow the 40th Defendants corresponding leave and the opportunity to respond to the amendment if they so wished to do.”

20. From the foregoing cited authorities it is clear that the court has unfettered discretion to grant leave to amend pleadings before final judgement but that the said discretion ought to be exercised judiciously. The cited authorities confirm that that parties to a suit have the right to amend their pleadings at any stage of the proceedings before judgment and that courts should liberally allow such amendments as long as it is not prejudicial to the Respondent and within the principles of natural justice.
21. The Respondent herein states that he is aggrieved by delay in prosecution of the appeal and that the grant of the orders sought will further delay hearing and determination of the appeal. He states that he has already filed his written submissions.
22. It is the courts view that the amendments sought by the Appellant will bring to the fore the real issues in controversy in this appeal as the Appellant seeks to remove vagueness and bring clarity in the grounds contained in the Memorandum of Appeal. It will be in the interests of justice that the appeal is heard substantively and no party’s issues are locked out by virtue of incorrect pleadings.
23. In the courts view the Respondents concerns may be addressed by giving the Appellant limited time within which to file the amended Memorandum of Appeal and directions on filing of submissions and general conclusion of the appeal itself.
24. The Appellant also raised the issue that the Respondent’s Replying Affidavit was commissioned by an inactive Commissioner for Oaths, attaching a Law Society of Kenya Advocates Search Result that Mwinzi Nzuki Advocate is currently inactive. They attached a screenshot of the LSK search engine as proof of this contention. It is however noted that the court is not informed the particulars of the person who took the screenshot and the same is not dated. It is further noted that the screenshot was attached to the Applicants supplementary affidavit and the Respondent had no right of reply to the allegations made.
25. The Supreme Court in the case of National Bank of Kenya Limited v Anaj Warehousing Limited [2015] eKLR held as follows:

“The facts of this case, and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate..... While securing the rights of the client whose agreement has been formalised by an advocate not holding a current practising certificate, we would clarify that such advocate’s obligations under the law remain



unaffected. Such advocate remains liable in any applicable criminal or civil proceedings, as well as any disciplinary proceedings to which he or she may be subject.”

26. The final orders of the court are that the application herein has merit and the same is allowed on the following terms:
1. That the Applicant/Appellant be and is hereby granted leave to amend the Memorandum of Appeal as per the proposed Amended Memorandum of Appeal.
  2. The Appellant to file and serve the Amended Memorandum of Appeal within seven days from the date hereof.
  3. The time within which the Appellant was directed to file and serve written submissions on the appeal herein is extended by a period of seven days from the date of this ruling.
  4. The Respondent is hereby granted leave to file and serve supplementary submissions within seven days from the date of service of the amended Memorandum of Appeal and written submissions.
  5. Mention on September 28, 2023 to confirm compliance with directions given and take a judgement date on the appeal.
  6. The Appellant/Applicant to pay costs of this application.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 25<sup>TH</sup> DAY OF JULY, 2023.**

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE - KITUI**

**Ruling read in open court and virtually in the presence of-**

C/A Musyoki

Gali holding for Wamunyolo for Appellant/ Applicant

Mutisya holding brief Mbaluka for the Respondent

