



**Ali & another v Sake (Environment & Land Case 004 of 2021)  
[2022] KEELC 3977 (KLR) (25 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3977 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
ENVIRONMENT & LAND CASE 004 OF 2021  
PM NJOROGE, J  
JULY 25, 2022**

**BETWEEN**

**HADIJA HUSSEIN ALI & ANOR & ANOTHER ..... PLAINTIFF**

**AND**

**ADAN TELE SAKE ..... DEFENDANT**

**RULING**

1. This application states that it has been brought to court under order 8 rule 3 (1), rule 5 of the [Civil Procedure Rules 2010](#) and section 1A, 1B and 3(A) of the [Civil Procedure Act](#) and all other enabling provisions of the law.
2. The application seeks the following orders:
  1. That the appellant/applicant be granted leave to amend her memorandum of appeal dated and filed on the September 20, 2018 as per the draft annexed hereto.
  2. That the amended memorandum of appeal annexed hereto be treated as the appellant/applicant's memorandum of appeal and that the same be deemed as having been duly filed and served.
  3. That any other order the court deems fit to grant.
  4. That the costs of this application be costs in the cause.
3. The application is supported by the affidavit of Hadija Hussein Ali.  
Sworn on February 25, 2022 and has the following grounds;
  1. The proposed amendments are intended to bring before this honourable court the real matters in controversy between the parties herein so that the same are determined on their true and substantive merits.



2. The proposed amendments are further necessitated by information relevant for the fair and just determination of the real questions in controversy in this suit which came to the appellant/applicant's knowledge subsequent to the filing of the appellant/applicant's memorandum of appeal.
  3. The time allowed under the Civil Procedure Act and the Civil Procedure Rules for amendments of pleading has since expired.
  4. The proposed amendments will not occasion any prejudice to the respondent.
  5. The proposed amendments arise out of the same facts or substantially the same facts in respect of which relief is claimed by the appellant in this suit.
  6. It is therefore in the interest of justice that the appellant/applicant should be granted leave to amend her memorandum of appeal filed herein.
4. The application was canvassed by way of written submissions.
  5. The appellant has submitted that the proposed amendments are intended to bring before the court the real matters in controversy between the parties so that the same are determined on their true and substantive merits.

The court notes that this application has been brought to court years after the appeal was filed and wonders if at the filing of the appeal the appellant did not know or understand the real issues in controversy. The appellant submits that his position is supported by articles 50 and 159 of the Constitution and sections 1, 3 and 3A of the Civil Procedure Act. The appellant proffers the case of Philip Chemwolo & another v Augustine Kubeude [1986] eKLR for his assertions that courts exist for the purpose of deciding the rights of parties and not for the purpose of imposing discipline.

6. The respondent submits that the impugned ruling was delivered on August 22, 2018 by Hon BM Ombewa, Principal Magistrate at Marsabit, in Marsabit PMCC No 15 of 2018. This is almost 4 years ago, He says that the filing of the application evinces inordinate delay. He says that after the appeal was filed the matter has been mentioned on May 13, 2019, August 27, 2019, October 2, 2019, November 18, 2019, February 26, 2020, March 25, 2020, November 1, 2021, November 29, 2021, February 21, 2022 and February 28, 2022. The respondent laments that at no time during those ten mentions did the appellant indicate any wish to amend the memorandum of appeal.
7. The respondent has proffered the case of Uchumi Supermarkets Limited & another v Sidhi Investments Limited [2018] eKLR for his assertion that applications for amendment ought to be filed within reasonable time.
8. The respondents submit that the appellant has not laid satisfactory grounds for the court to exercise its jurisdiction to allow amendments of the memorandum of appeal. He says that the application was filed after parties had filed their final submissions. He re-cites the case of Uchumi Supermarkets Limited & another v Sidhi Investments Limited (*supra*) where the Court of Appeal opined as follows:
 

“In the circumstance of this case and as argued by the respondents, the basis upon which I would exercise discretion in favour of the application has not been laid. The respective parties had prepared, filed and exchanged written submissions in respect of the appeal and the appeal was ready for canvassing but for the amendment sought”.
9. Having considered all pertinent issues, I find that the appellant has not satisfactorily laid the basis upon which I would buttress my Judicial discretion to allow the amendment of the memorandum



of appeal. The appeal was mentioned at least 10 times and at no time did the appellant indicate the intention to amend the memorandum of appeal. It is not in all circumstances, that the oxygen principles enunciated in sections of the Civil Procedure Act can come to the aid of an indolent litigant. Also, it is not in all circumstances that article 159 (2) (d) of the Constitution can be used to claim that an issue is a procedural technicality. Where the parties have filed their final submissions, it cannot be a procedural technicality that one of them can seek to amend a memorandum of appeal. Such an application amounts to a clever, nay ingenious, contrivance of re-litigating the issues in question. I opine that in this case, the appellant all along knew the issues in contention. It cannot be right that after reading the respondent's submissions, the appellant wants to re-open the case.

10. In the circumstances, the following orders are issued:

- a) This application is dismissed.
- b) Costs are awarded to the respondent.

**DELIVERED IN OPEN COURT AT ISIOLO THIS 25<sup>TH</sup> DAY OF JULY, 2022 IN THE PRESENCE OF:**

Court assistant: Balози.

Muthomi Njeru for the respondent.

No one for the appellant.

**HON JUSTICE PM NJOROGE**  
**JUDGE**

