



**Musundi v Bental Services Limited (Commercial Case E130 of 2023)
[2025] KEHC 3265 (KLR) (Commercial and Tax) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3265 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E130 OF 2023**

MN MWANGI, J

MARCH 6, 2025

BETWEEN

PHILLIP MUSUNDI PLAINTIFF

AND

BENTAL SERVICES LIMITED RESPONDENT

RULING

1. In the Notice of Motion dated 21st November 2024, the applicant seeks leave to amend the Memorandum of Appeal dated 16th June 2023 in terms of amended Memorandum of Appeal annexed to his supporting affidavit. The applicant avers that he initially instructed the law firm of Emmanuel Wanyonyi & Co. Advocates to file an appeal on his behalf. That later, on 5th July 2025 he instructed the firm of KWEW Advocates LLP to take over conduct of the appeal to represent his interests.
2. The applicant deposed that his current Advocates advised him on the need to amend the Memorandum of Appeal as the grounds of appeal enumerated thereon, were made in a general manner and do not reflect specific arguments that he intends to raise during the hearing of the substantive appeal.
3. He expressed the view that he will be highly prejudiced if his application is not allowed as justice may not be served adequately if he proceeds to have his appeal heard based on the said grounds appeal.
4. Mr. Simiyu, learned Counsel for the applicant explained that the delay in filing the application dated 2nd November 2024 was due to a communication breakdown between applicant's Advocates, and the applicant who was unwell.
5. The respondent filed grounds of opposition dated 5th February 2025 stating that the application dated 21st November 2024 is misconceived, bad in law, incompetent and an outright abuse of the Court



process, and that it has been brought after unexplained delay, after the applicant's current Advocates came on record on 5th July, 2023.

6. Further, the respondent stated that the appellant has a remedy available to him in law against his Advocate, and that the proposed amendments introduce a new and inconsistent cause of action.
7. I agree with the respondent's Advocate Mr. Muuo that the inordinate delay in filing the application dated 21st November 2024 should have been explained by the applicant in his affidavit. The applicant however skirted clear of the said issue in his supporting affidavit. The explanation given by Mr. Simiyu that there was a communication breakdown between the applicant's current Advocates and the applicant, and that the latter was sick, were allegations made from the bar as they are not captured in the applicant's affidavit.
8. The respondent filed Grounds of Opposition but failed to file a replying affidavit to oppose the instant application. It has been said time without number that Grounds of Opposition cannot be relied upon to respond to factual issues as they are regarded as mere averments. In the case of Kennedy Otieno Odiyo & 12 Others v Kenya Electricity Generating Company Limited [2010] eKLR, the Court held as follows when addressing the issue of reliance on Grounds of Opposition-

The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant.

9. I do agree with the respondent that there has been inordinate delay in filing the present application, which should have been explained. However, since there is a pending appeal and the application herein calls for the exercise of my discretion, in the interest of justice, I will give the applicant fourteen (14) days to file and serve his amended Memorandum of Appeal.
10. He will however pay the respondent Kshs.15,000/= as thrown away costs within seven (7) days from today or the said orders granted herein shall automatically stand vacated.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MARCH, 2025.

Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Simiyu h/b for Mr. Wabuge for the appellant/applicant

Mr. Muuo h/b for Ms Mbaabu for the respondent

Ms B. Wokabi – Court Assistant.

NJOKI MWANGI, J.

