



**Waititu Babayao v Republic (Anti-Corruption and Economic Crimes Appeal E006 of 2025)
[2025] KEHC 4905 (KLR) (Anti-Corruption and Economic Crimes) (23 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4905 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL E006 OF 2025**

LM NJUGUNA, J

APRIL 23, 2025

BETWEEN

FERDINAND NDUNGU WAITITU BABAYAO APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant/Appellant herein has moved this court by way of the Notice of Motion dated the 18th March ,2025, which application is brought under Articles 20, 49(1) (h), 50 (2) (q) and 51 of *the Constitution* and Under Section 354 and 357 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya. It is premised on the grounds on its face and it's supported by the annexed affidavit sworn by the Applicant herein, on even date. It seeks the following Orders:-
 1. Spent.
 2. Spent.
 3. That the supplementary Petition of Appeal dated the 11th, March, 2025 be deemed as duly filed.
 4. That, as an alternative to Prayer 2 above, leave be granted to the Appellant to amend his Petition of appeal dated the 13th, February, 2025.
 5. That upon leave being granted in terms of Prayer 4, above, the Amended Petition of Appeal annexed to the affidavit in support of this application be deemed as duly filed.
 6. That the Honorable court do grant any further Orders it deems fit.



2. The Applicant depones that the Appeal herein stems from his conviction on four counts of corruption whereupon he was sentenced to serve a term of imprisonment for 12 years or in the alternative, to pay a fine of Ksh.53, 500, 000.
3. That his application is urgent in view of the twin facts that it relates to his application for bail pending Appeal dated the 14th March, 2025 and also because Directions were given on the 18th March, 2025 that were to be complied with by the 25th March, 2025.
4. That on the 12th March, 2025, he filed a Supplementary Petition of Appeal dated the 11th March, 2025 and when his application dated the 14th March, 2025, came up for hearing, the Respondent indicated that it was opposed to the supplementary Petition of Appeal dated the 11th, March, 2025 because in the DPP's view, upon admission of the appeal, the Petition of Appeal can only be amended.
5. That in view of the foregoing, his advocates have prepared an amendment to the Petition of Appeal dated the 13th March, 2025 which he seeks leave to have the same filed or deemed as dully filed.
6. The Respondent opposed the application by way of Grounds of Opposition dated the 24th March, 2025 on the following Grounds;
 1. That the respondent's Supplementary Petition of Appeal as filed offends the Provisions of Section 350 of the Criminal Procedure Code.
 2. That the instant application offends the Provisions of Section 350(2) (v) of the Criminal Procedure Code.
 3. That the instant application seeks to review /revise issues in the Applicant's application for bail pending appeal, which application is res Judicata having been determined by this court.
 4. That the Law does not envisage the amendment of a Petition of Appeal for purposes of rehearing of the application of bail pending appeal.
 5. That the instant application is vexatious and a blatant abuse of the court process.
 6. That the instant application is aimed at causing substantial and unwarranted delays in the hearing and determination of the appeal pending before this Honourable court.
7. The application was disposed of by way of written submissions.

Appellant's Submissions

8. The Appellant identified three issues of determination as follows: -
 - a. Whether the Applicant/ Appellant is entitled to leave to amend his Petition of Appeal dated the 13th, February, 2025
 - b. Whether the Respondent will suffer any prejudice if the Applicant/ Appellant amends the Petition of Appeal.
 - c. Whether the Respondent' Grounds of opposition are correct.
9. On the first issue, Counsel submitted that the Applicant is entitled to leave to amend his Petition of Appeal to have a fair trial and to assist the court to make a just decision. That under Article 50 (q) of the Constitution, the Applicant is entitled to audience before the Honourable court on all the substantial issues in his Petition of Appeal and the amendment of the Petition is crucial for his right to a fair trial.



10. The Applicant contended that he adhered to the procedure as provided in Law in making the application herein for amendment of the Petition of Appeal, and in case there were procedural mistakes made whatsoever, he pleads with the court to exercise its discretion in accordance with Article 159 (2) (d) of *the Constitution* which mandates the court to administer justice without paying undue regard to procedural technicalities.
11. Counsel for the Applicant submitted on the general principles regarding amendment of pleadings as stated by the court in the case of Geyser International Assets Limited Vs. Attorney General & 3 others (2019) KEELC 4900 (KLR) & Mombasa Cement Limited Vs. Speaker of the National Assembly & two others (2016) eKLR and that of Central Kenya Limited Vs. Trust Bank Limited & 5 others (2000) eKLR.
12. It was submitted that the application has been made in absolute good faith in order to secure substantial justice for the Appellant. Further, that the proposed Amended Petition of Appeal shows important issues of law and errors in the impugned judgment which were not captured when the Appeal herein was filed, and the proposed amendments are material to the proper determination of the issues before the court.
13. The Applicant contended that the Respondent has not alleged that it will suffer any prejudice whatsoever if the proposed amendments are allowed. They placed reliance on the case of Gladys Nduku Nthuki Vs. Letshego Kenya Limited in which the court stated that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other party can be compensated by costs.
14. With regard to the Grounds of opposition, Counsel submitted that the Appellant having abandoned Prayer (2) of the Notice of Motion dated 18th March, 2025, Ground 1 was rendered an academic exercise. That the Provisions of Section 350(2) (v), read together with Article 159 (2) of *the Constitution*, and Section 7(1) of the Sixth Schedule cannot render the Appellant's application defective.
15. On the part of the Respondent, it was submitted that the application dated the 18th March, 2025, is spent and has no orders capable of being granted, the court having allowed the Applicant's Prayer (2) in its directions that it issued on the 26th March, 2025. That Prayer (3) was withdrawn by the Applicant in court and as a consequence, once prayer (2) had been granted, the alternative prayer does not stand. The Respondent contended that where reliefs are sought in the alternative, the granting of one precludes the need for the court to consider the alternative prayer, in that, alternative prayers are mutually exclusive in the sense that the grant of one satisfies the Applicant's primary concern, rendering the other unnecessary or inapplicable. That in light of the foregoing, the Applicant's prayer (4) is devoid of substantial merit and should be dismissed. That consequently, once prayer (4) is dismissed, prayer (5) which is hinged on prayer 4 also cannot stand.
16. Relying on the famous case of Anarita Karimi Njeru vs. Republic, the Respondent submitted that a party seeking relief from the court must plead their case with reasonable precision, setting out the basis of their claim; the prayers sought and the legal provisions relied on. Further, that parties are bound by their pleadings as they form the foundation of all the proceedings, and consequently, a party cannot be granted reliefs that it has not sought. The Respondent relied on a number of decisions to wit; Diamond Trust Bank Limited Vs. Mrima Filing Station Limited & ANO (2024) eKLR, Raila Amollo Odinga & Another V IEBC & 2 others (2017) eKLR; Lamba Vs. National Social Security Fund & another (civil Appeal E 168 of 2021) (2023) KECA 124(KLR) and Trojan & Company Vs. R.M.N.N Nagappa Chettiar AIR 1953 SC 235 to emphasize the point that parties are bound by their pleadings.



17. The Respondent further submitted that Section 350 of the *Criminal Procedure Code*, does not envisage the filing of a Supplementary Petition of Appeal. That the Law only allows the Applicant to amend the Petition of Appeal with leave of the court, and as such, the supplementary Petition of Appeal is irregular and ought to be struck out. Reliance was placed on the case of *George Otieno Opudo vs. Republic (2010)* in support of that contention.
18. The Respondent contends that the proposed amendment to the Petition of Appeal is not intended to further the appeal but instead, the Applicant's primary interest is in having his application for bail pending appeal dated 14th March, 2025 heard. That the Applicant's move to amend the Petition of Appeal after the court dismissed his application for bail pending appeal, and the respondent's objection to the Applicant's subsequent application raises concerns as to whether the amendment sought in the instant application is being made in good faith or as a tactic to circumvent the court's ruling on bail pending appeal. Reliance was placed on the case of *Stanley Kiplangat Cheruiyot & 12 others Vs. DPP & another (2017) eKLR* referred to, in the case of *Mburu Kinyua vs. Gachini Tuti (1978) KLR*.
19. That though it is well established that courts have discretion to allow amendments, this discretion must be exercised judiciously and should not be used to allow amendments that would result to injustice, undue delay or procedural manipulation. The Respondent relied on the case of *George Gikubu Mbuthia Vs. Consolidated Bank of Kenya Limited & another (2016) eKLR* to buttress its submission that the Courts have unfettered discretion to allow amendment of pleadings but the same should be used judiciously.
20. On the Applicant's reliance on Article 159 of *the Constitution*, the Respondent relied on the case of *Nicholas Kiptoo Arap Korir Vs. Independent Electoral and Boundaries Commission & 6 others (2013) eKLR* in which the court emphasized on the importance of procedure.

Analysis and Determination

21. The court has considered the application and the supporting affidavit, Grounds of Opposition and the submissions by both the Applicant and the respondent. The only issue for determination is whether the Applicant is entitled to leave to amend his Petition of Appeal dated the 13th, February, 2025.
22. Section 350 (IV) & (V) of the *Criminal Procedure Code* provides as follows;
 - “(iv) A Petition of Appeal may only be amended with the leave of the High court and on such terms and conditions, as to costs or otherwise, as the High court may seem fit to impose.
 - (v) Notice in writing of an application for leave to amend a Petition of Appeal shall be given to the Registrar of the High Court and to the Attorney General not less than three clear days, or such a shorter period as the High Court may in any particular case allow, before the application is made; and the application for leave to amend a Petition of Appeal shall be made either at the hearing of the appeal or, if made previously, by way of Motion in open court.”
23. It is a well-established principle that the court has unfettered discretion to allow amendments, but the discretion must be exercised judiciously as was stated in the case of *George Gikubu (supra)*, in which the court stated as follows: -
 - “As regards the law, the High court readily accepted that the court has unfettered discretion to allow amendment of pleadings, which discretion must be exercised judiciously. It accepted



too, as a general position that parties to a suit have the right to amend their pleadings at any stage of the proceedings before judgment and that court should liberally allow such amendments. However, he also noted 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 interest or accrued legal rights will be adversely affected; where prejudice or injustice which cannot be properly compensated in costs is occasioned to the other.”

24. Also in the case of Gladys Nduku Nthuki Vs. Letshego Kenya Limited (supra), the court has this to say about amendment of pleadings:

“The general rule is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other party can be compensated by costs. The court will not refuse amendments simply because of introduction of a new case. However, there is no power to enable one distinct cause of action neither to be substituted for another nor to change by amendment, the subject matter of the suit. The court will refuse leave to amend where the amendment will change the action into one of substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g. depriving him of a defence of limitation accrued since the issue of the writ. The main principle is that an amendment should not be allowed if it causes injustice to the other side and no injustice is caused if the other side can be compensated by costs.”

25. In the case of Central Kenya Limited Vs. Trust Bank Limited (supra), the court set out the guiding legal principles that guide the discretion of the court in the amendment of pleadings as follows;

- a. The court needs to be satisfied that the application is made in good faith.
- b. whether the amendment is material for a proper determination of the issues before the court.
- c. Whether the amendment, if allowed, will be prejudicial to the Respondent or can they be compensated by way of costs
- d. The overriding consideration be whether the amendments are necessary for the just and final determination of the issues between the parties.

26. According to the Applicant, the application is made in good faith in order for him to secure substantial justice and the same are necessary for the just and final determination of the case. That the intended amendments will not in any way prejudice the respondent’s case as it will have an opportunity to respond to the amended Petition of Appeal.

27. On its part, the Respondent contend that the application is brought in bad faith as the primary interest is in having the Applicant’s application for bail pending appeal heard, and termed the application as an abuse of court process, as the Applicant had filed another application for bail which was dismissed. That the Applicant’s move to amend the Petition of Appeal after the court dismissed his earlier application, and the respondent’s objection to the Applicant’s subsequent application, raises concerns as to whether the amendment sought is being made in good faith or as a tactic to circumvent the court ruling on bail pending appeal.

28. The Respondent has also argued that the application dated 18th March, 2025 is spent and has no orders capable of being granted in that the Applicant, had on 26th March, 2025 withdrawn the prayer seeking leave to have the supplementary Petition of Appeal deemed as duly filed. Further, that since prayer 4, for



leave to amend the Petition was an alternative prayer, it cannot stand, as alternative prayers are mutually exclusive in the sense that the granting of one satisfies the Applicant's primary concern, rendering the other unnecessary or inapplicable.

29. In this regard, the court has revisited the proceedings of the 26th of March, 2025 and the record shows that what was withdrawn was prayer (2) of the application dated the 14th March, 2025 and not of the application dated the 18th March 2025. Even assuming the same prayer was the subject of withdrawal in the application dated 18th March, 2025, the same was withdrawn and not granted, in which case, prayer (4) cannot be an alternative prayer which is a technical flaw which this court is ready to overlook and excuse under Article 159(2) (d) of *the Constitution*.
30. The court has perused the draft Petition of Appeal annexed to the affidavit in support of the application, and in my considered view, the amendments are material for proper determination of the appeal.
31. As to the prejudice that the Respondent is likely to suffer, it has submitted that it has a legitimate interest in the finality of the proceedings. That interest weighed against the Applicant's right to a fair Trial under Article 50 of *the Constitution*, the balance tilts more towards granting the application than in dismissing the same.
32. In the end, I find that the application has merit, and it is allowed in the following terms;
 - “ 1) Leave is hereby granted to the Applicant to amend his Petition of Appeal dated the 13th February, 2025.
 - 2) The amended Petition of Appeal to be filed within three (3) days from today.”
33. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT ON THIS 23RD DAY OF APRIL 2025.

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L.M. NJUGUNA

JUDGE

In the presence of: -

Mr. Mwasharu appearing with Mr. Moda for the DPP

Mr. Kibe Mungai for the 1st Appellant

Mr. Swaka appearing with Mr. Kibe

Mr. Wachanga holding brief for Mr. Njenga for the 3rd Appellant

Mr. Swaka for the 2nd Appellant

Court assistant - Aden

