



**Simuyu & 2 others v Chepkosgei & 2 others (Civil Appeal
3B of 2020) [2024] KEHC 1223 (KLR) (17 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 1223 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CIVIL APPEAL 3B OF 2020
AC MRIMA, J
JANUARY 17, 2024**

BETWEEN

MARK STEPHEN SIMIYU & 2 OTHERS APPELLANT

AND

SALINA CHEPKOSGEI & 2 OTHERS RESPONDENT

*(Being an appeal from the Ruling and Order by Hon. S. K. Mutai
(Principal Magistrate) in Kapenguria Senior Principal Magistrate's
Court Civil Suit No. 7 of 2019 delivered on 3rd November, 2020)*

JUDGMENT

1. The First Respondent herein, Salina Chepkosgei, instituted Kapenguria Senior Principal Magistrate's Court Civil Suit No. 7 of 2019 (hereinafter referred to as 'the suit') against 5 Defendants. She instituted the suit in her capacity as the Administratrix of the Estate of Charity Jepchirchir Kosgei (Decreased).
2. On 3rd November, 2020, the trial Court rendered a ruling declining an application for leave to amend the defence and to file and serve Further List of Statements and Lists of Documents out of time. The application was made by Counsel for the Appellants herein.
3. Dissatisfied with the ruling, the Appellant lodged the appeal subject of this judgment.
4. The appeal was heard by way of written submissions where both parties duly complied.
5. It is now for this Court to determine whether the application for leave to amend the defence and to file and serve a Further List of Statements and Documents out of time was rightly declined.
6. The suit was filed on 7th March 2019. All the Defendants entered appearance in the suit. The 1st, 2nd and 3rd Defendants were initially represented by Messrs. Kairu & McCourt Advocates whereas the 4th and 5th Defendants were represented by Messrs. B.O. Akong'o & Co. Advocates. The suit was later



- fixed for a Pre-Trial conference on the 10th September, 2019. On the said date, the Defendants did not attend Court despite service.
7. The suit was later fixed for hearing on 5th November, 2019. Service was effected on the Defendants. On the hearing date, Learned Counsel Miss Opondo held brief for Mr. Kibe for the 4th and 5th Defendants. There was no appearance for the 1st, 2nd and 3rd Defendants. The matter was, however, adjourned on account of Counsel's illness.
 8. The next hearing was scheduled for 14th January, 2020 where the Plaintiff testified. Again, there was no appearance for the 1st, 2nd and 3rd Defendants. The matter was adjourned for further hearing on 11th February 2020.
 9. Given the then state of Covid-19 in the country, the hearing was held in abeyance. On 6th October 2020, all parties fixed a hearing date by consent. The matter was to be heard on 3rd November, 2020.
 10. When the matter came up on the said date, Counsel for the 1st, 2nd and 3rd Defendants made an oral application for an amendment. That was the application that was declined.
 11. Learned Counsel Mr. Amihanda, made the following oral application: -

I appear for the 1st, 2nd and 3rd Defendants and Mr. Nyolei appears for the Plaintiff. The matter is coming up for hearing. We pray for leave to amend our defence and to file Further List of Statements and Documents.
 12. The application was vehemently opposed by Learned Counsel Mr. Nyolei for the Plaintiff. In a rejoinder, Mr. Amihanda stated as follows: -

We intend to amend paragraph 11 of our defence.
 13. The trial Court declined the application for the reasons that pleadings were closed in 2019 and since the Plaintiff had already testified, she stood to be prejudiced if the application was granted.
 14. Several issues arose out of the application. One, the application was orally made on the hearing date. Two, the firm of Messrs. Kimondo Gachoka & Company Advocates had long taken over the conduct of the case from the initial Advocates. The delay in making the application was not explained. Three, no basis was made for the Court to exercise its discretion in favour of the Appellants herein. In other words, there were no grounds in support of the application. Four, the nature of the intended amendments was not disclosed.
 15. To this Court, and with profound respect to Counsel, it appears that the Learned Counsel for the 1st, 2nd and 3rd Defendants did not handle the application appropriately. The nature of the application called for a formal application where factual matters would have been deposed to and evidence adduced. For instance, there was need for the Appellants to give the reasons in support of the application and to explain the delay and to also disclose the nature of the intended amendments. That, did not happen.
 16. This Court must so say that the trial Court did not err in the manner it handled the application. The application was such a serious one, but was instead not handled with the seriousness it deserved. Any Court faced with such an application cannot allow it. Any application must be properly made before Court whether orally or otherwise. There must be reasons in support of an application. An application not supported by any grounds and evidence, if need be, cannot succeed.



17. The Appellants have referred to several decisions to the effect that amendments ought to be freely allowed. This Court wholly agrees with such being the general position. However, there are exceptions. The Court's discretion can only be exercised in favour of a party which plays within the rules of litigation. Where an amendment is likely to prejudice the other party, say by introducing different issues or expanding the subject matter, such is not to be allowed.
18. In this case, the trial Court was not made aware of the nature of the amendment so as to determine whether it would cause any prejudice to the rest of the parties or not, more so since the matter was partly heard. In fact, the Appellants disclosed the grounds and nature of the amendment in their written submissions in support of this appeal. That is impermissible (See the Supreme Court in *Raila Amolo Odinga & Another vs. IEBC & 2 others* (2017) eKLR and the Court of Appeal in *Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others* (2014) eKLR).
19. Therefore, neither the decisions referred to nor the invocation of Article 159(2)(d) of *the Constitution* would persuade this Court otherwise. After all, the Supreme Court of Kenya in *Law Society of Kenya v. The Centre for Human Rights & Democracy & 12 Others*, Petition No. 14 of 2013 held that: -
- Article 159(2)(d) of *the Constitution* is not a panacea for all procedural shortfalls.
20. And, in *Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission (IEBC) & 4 others* [2015] eKLR, the Supreme Court further held that: -
- Not all procedural deficiencies can be remedied by Article 159....
21. The upshot is that the application was rightly disallowed and the impugned ruling cannot be faulted. The trial Court arrived at the best decision given the nature of the application before it and the manner it was presented.
22. Having said as much, this Court finds no merit in the appeal and hereby makes the following final orders: -
- a. The appeal is wholly unsuccessful. It is hereby dismissed.
 - b. The Appellants shall jointly and severally bear the costs of this appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 17TH DAY OF JANUARY, 2024.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Amihanda, Learned Counsel for the Appellants.

Mr. Nyolei, Learned Counsel for the 1st Respondent.

No appearance, for the rest of the Respondents.

Chemosop/Duke – Court Assistants.

