



**ANM v JMW & another (Miscellaneous Application E005 of 2023)  
[2024] KEHC 7995 (KLR) (Family) (21 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7995 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MISCELLANEOUS APPLICATION E005 OF 2023  
PM NYAUNDI, J  
JUNE 21, 2024**

**BETWEEN**

**ANM ..... PETITIONER**

**AND**

**JMW ..... 1<sup>ST</sup> RESPONDENT**

**JAMUWE LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. ANM (the Petitioner), filed a Petition against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents dated 6<sup>th</sup> February 2023. She later filed an amended petition dated 11<sup>th</sup> April 2023. She now seeks to further amend the petition *vide* a Notice of Motion dated 28<sup>th</sup> February 2024 and seeks the following orders;
  1. That this Honourable court be pleased to grant the petitioner leave to amend her amended petition for division of matrimonial property dated 2<sup>nd</sup> June 2023 in terms of the attached draft limited to converting the petition into an originating summon and introducing information about the appeal.
  2. That costs of this application be in the cause.
2. The application is presented pursuant to Order 8 Rule 3, 4 and 5 of the [Civil Procedure Rules 2020](#) and all enabling provisions of the law and is supported by the affidavit of the petitioner of even date.
3. The application is based on the following grounds;
  - a. That this petition has previously been instituted as an omnibus petition for divorce and division of matrimonial property when it was instituted.



- b. That the petitioner later amended the petition to remove all issues about divorce between herself and the 1<sup>st</sup> Respondent and take them before the Chief Magistrate in Mcdc No. E160 of 2023.
  - c. That the court made a judgment in the said Mcdc Case No. E 160 of 2023 dismissing the petitioners petition for divorce on 6<sup>th</sup> November 2023. The petitioner preferred an appeal through Hcca No. E132 of 2023 which has been given directions and is due for hearing on 25<sup>th</sup> April 2024 before Honourable Justice Riechi in this division.
  - d. That there is a need to amend the parent pleading herein to reflect this factual development over time and the need to convert the petition into an Originating Summon in compliance with the procedural requirement of the matrimonial property rules and the Act.
  - e. That the amendment does not change or affect the cause of action and or the existing interim orders. It is necessary for the effectual hearing and determination of the suit. No objection has been raised by the respondents in their answer to petition but it is necessary that the amendment be undertaken for the court to do substantive justice the issues in dispute.
4. In his supporting affidavit, she avers that she requires leave of the court to amend pleadings as pleadings already closed and directions been taken.
  5. Both respondents have filed replying affidavits in opposition to the Application.
  6. Parties elected to rely on their affidavits opting not to file written submissions.

#### **Analysis and Determination**

7. The only issue for determination is whether the application dated 28<sup>th</sup> February 2024 is merited and the Applicant be allowed to amend the Petition.
8. Order 8 rule 3, 4 and 5 of the Civil Procedure Rules provide as follows:
  - 3 Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the
    - (1) 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 sub rule (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.
    - (3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
    - (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the



capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment. Rule 3 shall have effect in relation to an originating summons, a petition and an originating notice of motion as it has effect in relation to a plaint.

5. For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

(2) This rule shall not have effect in relation to a judgment or order.

9. The principles that guide the court in considering an application for amendment of pleadings were set out by the Court of Appeal in *Central Kenya Limited v Trust Bank limited* (2000)2 E.A 365 as follows: -

“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

10. *Bullen and Leake & Jacob's Precedents of Pleading*, 12th Edition, provides as follows concerning amendment of pleadings: -

“...power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action...”

11. The legal provision for amendment is as follows; Order 8 Rule 5(1) of the *CPR* provides as follows;

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

12. Order 8, rule 4 provides for Amendment of originating process.

“4. Rule 3 shall have effect in relation to an originating summons, a petition and an originating notice of motion as it has effect in relation to a plaint”.



13. The court’s approach in dealing with amendments has always been that an application for amendment should be allowed unless the application to amend is *mala fides* or it will prejudice the other party or cause an injustice to the other party which cannot be compensated by costs. The court has a discretion to grant or refuse the amendment which must be exercised judicially. The court is inclined to grant the amendment where it is made in good faith and no prejudice will be caused to the other party.
14. The Court will exercise its discretion to allow for amendment where the amendment allows for a better articulation or presentation of the issues in dispute but declined to do so where the effect of the amendment is to obscure the issues, prejudice the other party or prevent a full inquiry. Within those limits the court has a wide discretion. The primary principle appears to be that an amendment will be allowed in order to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done. The court has the greatest latitude in granting amendments, and it is very necessary that it should have as the object of the court is to do justice between the parties.
15. The traditional approach in relation to applications for amendment of pleadings was summarized in *Cobbold v Greenwich LBC* [1999] EWCA Civ 2074 as follows: -

“[a]mendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient management of justice is not significantly harmed.”
16. There has been no plea or demonstration that either the respondent or the subject will suffer any injustice or prejudice if the sought amendment is allowed. In my estimation, the amendment sought will enable this court to hear and determine all the real and substantive issues between the parties in the dispute.
17. Consequently, I allow the application dated 28<sup>th</sup> February 2024 and make the following orders-
  - a. The Petitioner is granted leave to amend her Petition as per the attached draft.
  - b. The annexed further amended originating summons be deemed duly filed on payment of requisite court fees.
  - c. The Respondents are granted corresponding leave to amend, file and serve his amended Reply within 14 days from the date hereof.
  - d. The Petitioner shall pay costs of the Application to both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 21<sup>ST</sup> DAY OF JUNE, 2024.**

**P M NYAUNDI**

**JUDGE**

**In the presence of:**

Fardosa Court Assistant

