



REPUBLIC OF KENYA



KENYA LAW
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**Thiongo v Mbuthia (Civil Appeal E224 of 2021)
[2024] KEHC 7543 (KLR) (7 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7543 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E224 OF 2021
DO CHEPKWONY, J
JUNE 7, 2024**

BETWEEN

JOHN KIMANI THIONGO APPELLANT

AND

JANE WAMBUI MBUTHIA RESPONDENT

RULING

1. What is before this court for determination is the Notice of Motion Application dated 10th July, 2023 seeking the following orders:-
 - a. Spent.
 - b. Spent.
 - c. That this Honourable Court be pleased to grant leave to the Appellant to amend the Memorandum of Appeal.
 - d. That costs of this Application be provided for.
2. The Application is based on the grounds set out on an Supporting Affidavit of John Kimani Thiongo sworn on 10th July, 2023, wherein he has averred and the following grounds:-
 - a. That one Stephen Thiongo Macharia - deceased had purchased the entire share of George Kuria Macharia deceased in Githunguri/Githiga/459.
 - b. That the said share formed part of the Estate of Stephen Thiongo Macharia, the Deceased.
 - c. That the entire of Estate of Stephen Thiongo Macharia has been the subject of Succession Cause No. 1025 of 2007 which has now been finalised.
 - d. That there is no Estate of George Kuria Macharia left for the court to adjudicate on.



- e. That it will be prudent that this fact be brought out in the Memorandum of Appeal.
 - f. That no prejudice will be suffered by the Respondent if leave is granted to amend the Memorandum of Appeal.
 - g. That it will be prudent that all other proceedings be stayed pending the amendment of the Appeal.
3. The Respondent filed Grounds of Objection dated 28th July, 2023 stating that:-
- a. The application is bad in law, misconceived and unmerited.
 - b. The grounds upon which the application rely on to amend the memorandum of appeal namely irregular inclusion of the estate property, in his father estate, in disregard of deceased's registration is not a sound ground to warrant amendment of Grounds of Appeal.
 - c. That the Appellant is not entitled to adduce further evidence during an appeal without satisfying the legal criteria for adduction of further evidence.
 - d. There is no new material evidence worth of consideration in the intended appeal.
 - e. The application is frivolous, abusive of the court process and only meant to occasion delay and final hearing and determination of the pending application for stay and appeal on merits.
 - f. The Application is an affront to the expedient administration of justice and should be dismissed.

Determination

4. Having carefully read through and analysed the application alongside the grounds upon which the same is premised and the grounds raised in objecting the same, the court finds the issue for determination being whether the Applicant can be granted leave to amend his Memorandum of Appeal.
5. The law on amendment of pleadings is provided for under Order 8 Rule 3 of the [Civil Procedure Rules](#) alongside any other enabling provision of the law. It provides as follows:-

“[Order 8, rule 3.] Amendment of pleading with leave.

- 1. Subject to *Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6* and the 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 subrule (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.
6. The issue of amendment of pleadings was discussed in the case of *George Gikubu Mbutia v Consolidated Bank of Kenya Ltd & Another* [2016] eKLR where the Court of Appeal expressed itself 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 interests or accrued legal rights will be adversely affected; where prejudice or injustice which cannot be properly compensated in costs is occasioned to the other.”

7. Having read through the record of proceedings in the instant case, this Court finds that the Appellant has not provided or attached a draft amended Memorandum of Appeal with the proposed amendments highlighted or underlined or struck out for the court to determine whether or not it intends to introduce a new cause of action so that it can be determined whether the issues raised will be prejudicial to the Respondent or not.
8. For this reason, this Court is unable to make a determination on whether or not to allow the amendment without knowing what the intended amendments are. In the circumstances, this Court is hereby compelled to dismiss the application dated 10th Jul, 2023 with costs to the Respondent.

It is so ordered.

RULING DELIVERED, DATED AND SIGNED THIS 7TH DAY OF JUNE, 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:

Appellant in person – present

Mr. Kinuthia counsel for Respondent

Court Assistant - Martin

