



Broadband Access Limited & another v Koome & another (Suing as the Personal Representatives of the Estate of Samuel Macharia Kabiru - Deceased) & another (Civil Appeal 216 of 2020) [2023] KEHC 18786 (KLR) (Civ) (21 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18786 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 216 OF 2020

AN ONGERI, J

JUNE 21, 2023

BETWEEN

BROADBAND ACCESS LIMITED 1ST APPELLANT

ACCESS KENYA GROUP LIMITED 2ND APPELLANT

AND

TABITHA KENDI KOOME & CHARLES GITAU KABIRU (SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF SAMUEL MACHARIA KABIRU - DECEASED) 1ST RESPONDENT

ISINYA ROSES LIMITED 2ND RESPONDENT

RULING

1. The application coming up for consideration in this ruling is the one dated 24/4/2023 seeking leave to amend the memorandum of appeal.
2. The 2nd respondent did not oppose the said application.
3. The application is supported by the affidavit of Maureen Mutuma sworn on 24/4/2023 in which she deponed that the appellants filed the memorandum of appeal of 11th June 2020 detailing 10 grounds of appeal. That the intended amendment is necessary to enable the court determine all the issues with finality.
4. That the grounds sought to be included in the memorandum of appeal raise important issues which go to the jurisdiction of the magistrate court as the court lacked jurisdiction to hear a work injury claim. That the ends of justice will be met if the application herein is allowed



5. The respondent opposed the application vide a replying affidavit dated 17/5/2021. In it she averred that the cause of action giving rise to the suit and the appeal is an accident which occurred on 3rd October 2011 at the 2nd respondent's premises at Isinya involving Samuel Macharia Kabiru (deceased) while in the course of his employment.
6. That the issue of the Chief Magistrates Court's jurisdiction to hear and determine the matter was not raised or canvassed before the trial court and to the contrary the appellants admitted and submitted to the jurisdiction of the said court. That in light of the appellants admission of the trial court's jurisdiction and the practice directions given by the honorable Chief Justice and the President of the Supreme Court on the jurisdiction of the Chief Magistrates court the appellant application is misplaced.
7. The parties filed written submissions as follows; the appellant submitted that order 8 rule 5 (1) of the Civil Procedure Rules provides that:

“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.”
8. The appellant submitted that it is trite law that parties cannot grant jurisdiction to a court by consent and in support cited Jamal Salim v Yusuf Abdulabi Abdi & another Civil Appeal No. 103 of 2016 [2018] eKLR, where the Court of Appeal stated as follows:

“Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;

 1.
 2. The jurisdiction either exists or does not ab initio
3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.”
9. It was argued that the issue of jurisdiction can be raised even on appeal which is what they are seeking to do. That further judgement was delivered by the Magistrate's court on May 21, 2020 and don't apply in this matter. That in any case arguments on jurisdiction can be addressed in the main appeal with both parties submitting on the issue.
10. The appellant submitted that no prejudice will be suffered by the 1st respondent if the orders sought are granted, as she will have ample time to respond to all the grounds of appeal in her submission when the appeal is fixed for hearing.
11. The sole issue for determination is whether the appellant should be granted leave to amend the memorandum of appeal.



12. The legal provision governing the amendment of pleadings is order 8 rule 5(1) of the Civil Procedure Rules which 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.”

13. It is in the interest of justice that all issues be set before the court for determination of the same with finality.

14. The respondents will not be prejudiced by the said amendment since they will have an opportunity to respond to the issues raised in the draft amended memorandum of appeal.

15. The courts have a discretion to allow amendment of pleadings at any stage.

16. I allow the application dated 24/4/2023 and direct that the amended memorandum of appeal be served upon the respondents within 14 days of this date.

17. In order to expedite this appeal, each party is granted 14 days to file written submissions starting with the appellant.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 21ST DAY OF JUNE, 2023.

A. N. ONGERI

JUDGE

In the presence of:

.....for the Appellant

.....for the 1st Respondent

.....for the 2nd Respondent

