Mburu t/a JM Mburu & Co Advocates v County Government of Mombasa; Malombo t/a OM Robinson & Co Advocates (Interested Party) (Civil Appeal (Application) 73 of 2019) [2025] KECA 56 (KLR) (24 January 2025) (Ruling)

Neutral citation: [2025] KECA 56 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL (APPLICATION) 73 OF 2019

WK KORIR, JA

JANUARY 24, 2025

BETWEEN

JOHN MBAU MBURU T/A JM MBURU & CO ADVOCATES ..... APPLICANT

AND

COUNTY GOVERNMENT OF MOMBASA ..... RESPONDENT

AND

ROBINSON ONYANGO MALOMBO T/A OM ROBINSON & CO ADVOCATES ..... INTERESTED PARTY

(Being an application for leave to amend pleadings and entry of judgment on admission in respect of the Judgment of the High Court of Kenya at Mombasa (E.K. Ogola, J.) dated 20th December 2018 in HC Petition No. 4 of 2017)

RULING

1. The application herein was lodged vide a notice of motion dated 23rd August 2024 pursuant to rule 18 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, rule 44 of the Court of Appeal Rules and sections 3 (2), 3A (1) and 3B of the *Appellate Jurisdiction Act*.

2. To put this ruling in context, it is necessary to briefly state the history of the dispute between the parties as narrated by the applicant. The applicant, John Mbau Mburu is an advocate carrying on his legal trade in the name and style of J. M. Mburu & Company Advocates. He avers that the Municipal Council of Mombasa which is the predecessor of the respondent, the County Government of Mombasa, appointed him as the lead counsel in Mombasa Civil Appeal No. 283 of 2007, Kenya Ports Authority vs. The Municipal Council of Mombasa & the Attorney General, which was being handled on behalf of the respondent by the Interested Party, Robinson Onyango Malombo, trading as O. M. Robinson &

Co. Advocates. It was agreed that the applicant's professional fees would be paid through the Interested Party's law firm. Following this agreement, the applicant and the Interested Party reduced those terms to writing thereby assigning the applicant 50% of the professional fees payable. According to the applicant, the Interested Party tendered an interim fee note for Kshs 174,101,975, and the respondent split the sum equally between the applicant and the Interested Party. The sum due to the applicant was then lumped together with and paid in instalments alongside fees payable to the Interested Party in respect of services rendered to the respondent in other matters. Aggrieved by this, the applicant lodged a constitutional petition before the High Court at Mombasa. In a judgment delivered on 20th December 2018, Ogola, J. dismissed the applicant's petition holding that a claim for unsettled legal fees was not a matter to be pursued through a constitutional petition, prompting the applicant to lodge the appeal within which this application has been brought.

3. Through the current motion, the applicant seek orders as follows:

> " 1. The applicant be granted leave to amend the petition in HC Petition No. 4 of 2019 (John Mbau Mburu t/a J.M. Mburu & Company -vs- County Government of Mombasa, & Robinson Onyango Malombo t/a O. M. Robinson & Company, advocates), which petition constitutes the foundation of this appeal, in the manner indicated in the draft amended petition filed herewith.
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> 2. The sum of Kshs. 102 million has been confirmed and admitted as owing to the applicant rightfully and exclusively by not only the defunct municipal council of Mombasa and the respondent, but also by various transitional bodies which were charged with the responsibility of identification, verification and validation of assets and liabilities which were inherited by all county governments from the defunct local authorities on the onset of devolution. The same are as follows:
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> a. The Transitional Authority (TA);
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> b. The Intergovernmental Relation Technical Committee (IGRTC);
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> c. The Intergovernmental Budget and Economic Committee (IBEC).
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> 3. This Honourable Court confirmed the debt through its ruling dated 21st October 2022.
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> 4. An order for payment of the said admitted sum plus costs to the applicant and/or judgment for the same in favour of the applicant plus costs and interest as set out in the amended petition."

4. In a lengthy affidavit, the applicant has elaborated on the grounds in support of the application. From the outset, I must point out that the applicant has also made averments on other issues that, in my view, are irrelevant to the present application. I will therefore confine myself to what is germane to the prayers sought in the application.

5. In regard to the prayer to amend the petition filed before the High Court, the applicant states that the intended amendment seeks to add the prefix "special damages" to prayer (i) (a) of the petition, arguing that the omission of those words arose from an inadvertence. He also states that he seeks to amend

the petition by deleting prayers (i) (b), (i) (c) and (i) (d), thereby dropping the prayers for general, exemplary and aggregated damages. He avers that neither the respondent nor the Interested Party will be prejudiced if the prayers sought are granted.

6. In respect to the prayer that judgment be entered on admission, it is the applicant's deposition that the Kshs. 102 Million he claims from the respondent arose as a result of legal services rendered to the respondent's predecessor, the Municipal Council of Mombasa. According to the applicant, the respondent took over the debt, which debt has been admitted and confirmed by the relevant authorities including this Court (Lesiit, J.A) in a ruling dated 21st October 2022. He therefore urges the Court to invoke Order 13 Rule 2 of the Civil Procedure Rules, 2010 and enter judgment on admission against the respondent for the sum of Kshs. 102 Million.

7. The respondent did not file a response to the application.

8. The Interested Party opposed the application through a replying affidavit sworn on 26th September 2024 by Robinson Onyango Malombo. The Interested Party avers that the application is incompetent and mischievous as the Court lacks jurisdiction to amend pleadings because that would amount to re-opening the proceedings before the High Court.

9. When this application came up for hearing on 21st November 2024, the applicant and the Interested Party had filed their respective submissions. Regarding representation, the applicant was present in person. Learned counsel, Ms. Julu represented the respondent, while learned counsel, Mr. Gomba was present for the Interested Party.

10. The submissions for the applicant were dated 8th November 2024. Regarding the jurisdiction of the Court, the applicant submitted that rule 18 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, as read with rule 44 of this Court's Rules and section 3(2) of the *Appellate Jurisdiction Act* granted the Court a wide latitude to allow applications for amendment of pleadings at any stage. The applicant also relied on sections 3A and 3B of the *Appellate Jurisdiction Act* in urging the Court to invoke the overriding objectives and enter judgment on admission against the respondent pursuant to the provisions of Order 13 Rule 2 of the Civil Procedure Rules, 2010. He proceeded to submit that the present application was unopposed and should be allowed. The applicant urged that the replying affidavit by the Interested Party did not dislodge the application as it did not respond to the substantive prayers sought therein. It was also the applicant's submission that the Court is not functus officio as the main appeal is yet to be heard and determined and the Court therefore has jurisdiction to entertain the application for amendment. The applicant relied on *John Gakuo & Another vs. County Government of Nairobi & Another, Civil Appeal No. 201 of 2016*, to urge that an application for leave to amend under rule 44 of this Court's Rules should be freely allowed.

11. Turning to the prayer for entry of judgment on admission, the applicant submitted that section 3(2) of the *Appellate Jurisdiction Act* empowered this Court to exercise the powers of the High Court and urged the Court to invoke Order 13 Rule 2 of the Civil Procedure Rules, 2010 and allow the prayer for judgment on admission. The applicant consequently prayed that the motion be allowed.

12. Although in her oral submissions Ms. Julu indicated that the respondent was aligned with the response and submissions by the Interested Party, she nevertheless submitted that the respondent was only opposed to the prayer for entry of judgment on admission and not the prayer for the amendment of the petition. In opposition to the application for entry of judgment on admission, counsel submitted that the petition was fully considered by the High Court and at no point did the respondent admit owing the applicant any money, and there was therefore no basis for granting the order. Counsel stressed that the only advocate-client relationship that existed was between the Interested Party and the respondent.

13. On his part, Mr. Gomba for the Interested Party through the submissions dated 30th September 2024, reiterated the Interested Party's objection to the motion stressing that this Court lacks jurisdiction to entertain it. Further, that the trial court is functus officio. Counsel referred to the decisions in Owners of Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] eKLR and Menginya Salim Murgani vs. Kenya Revenue Authority [2014] eKLR for the submission that a court without jurisdiction cannot legitimately entertain proceedings and that the prohibition applies to a court that is functus officio. Consequently, counsel urged the Court to dismiss the application with costs.

14. Whereas the applicant has cited rule 44 of this Court's Rules, which provides for the "form of applications to Court" as the enabling provision for his application, I suspect that he intended to approach the Court pursuant to rule 46 of the Court of Appeal Rules, 2022 which provides that:

> " 46. Applications for leave to amend
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> 1. Whenever a formal application is made to the Court for leave to amend a document, the amendment for which leave is sought shall be set out in writing and—
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> a. if practicable, lodged with the Registrar and served on the respondent before the hearing of the application; or
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> b. if it is not practicable to lodge the document with the Registrar, handed to the Court and to the respondent at the time of the hearing.
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> 2. Where the Court gives leave for the amendment of a document, whether on a formal or an informal application, the amendment shall be made or an amended version of the document be lodged within such time as the Court when giving leave may specify and if no time is so specified, then within forty-eight hours of the giving of leave and on failure to comply with the requirements of this subrule, the leave so given shall determine."

15. It is without doubt that under rule 46, the Court has power to amend documents. In Lilian Wanja Muthoni Mbogo t/a Sahara Consultants & 5 Others vs. Assets Recovery Agency [2022] KECA 48 (KLR), the Court expounded on the power to amend documents as follows:

> "...the power to amend a document under Rule 44 of the Court Rules is discretionary. This means that the Court must exercise the power of amendment judiciously by granting leave to amend only where it is in the interest of justice based on the circumstances before the Court. In particular, the Court has to take into account the nature and extent of the amendment, and whether it will assist in the just determination of the real questions in dispute between the parties. On his part the applicants must demonstrate that the application is brought in good faith and also place before the Court facts that would justify the court acting in its favour."

16. Similarly, in Kenya Hotels Limited vs. Oriental Commercial Bank Limited [2018] KECA 692 (KLR), the Court held that:

> " It is trite that the power reserved for the Court by rule 44

(1) of the Court of Appeal Rules to amend any document is a discretionary power. Like all judicial discretion however, it must be exercised judiciously and upon reason, rather arbitrarily, on humour, or fancy. (See Kanawal Sarjit Singh Dhim vs. Keshavji Jivraj Shah [2010] eKLR). A memorandum of appeal, such as the one that the applicant seeks to amend is a document that is rightly amenable to amendment. (See Uhuru Highway Development Ltd vs. Central Bank of Kenya [2002] 1 EA 314). Whether or not to allow an amendment will also depend on the nature and extent of the amendment. If the applicant is merely introducing a ground of appeal that is properly founded on the evidence that was adduced and canvassed before the trial court, which it is alleged the trial Judge ignored or misapplied, the Court will more readily allow the amendment. Different considerations will however apply if the applicant is seeking to introduce a totally new ground of appeal that was not pleaded, evidence adduced, canvassed and determined by the trial court. Thus for example, in exercising its discretion in the former type of case involving an amendment that did not entail introduction of an entirely new point, the Court, in Kanawal Sarjit Singh Dhim vs. Keshavji Jivraj Shah (supra) took into account a number of considerations such as that the dispute involved a prime and valuable property in Nairobi, the judgment the subject of appeal had been obtained ex parte; the need to afford the applicant an opportunity to ventilate all the issues that he wished to raise on appeal; the fact that the intended amendment was not irrelevant to the appeal; and that the respondent stood to suffer no prejudice as he had the opportunity to oppose the appeal. And in Nathan Muhatia Pala t/a Muhatia Pala Auctioneers & Another vs. Joseph Nyaga Karingi [2013] eKLR, the Court also took into account the duty imposed by sections 3A and 3B of the *Appellate Jurisdiction Act* to ensure that justice is dispensed in consonance with the overriding objective so as to realize just, expeditious, proportionate and affordable resolution of disputes.

Where the applicant seeks to introduce an entirely new point, there are well known strictures that seek to ensure firstly, that an appellate court does not, in disguise, metamorphose into a trial court and make first-instance determinations without the benefit of the input of the court from which the appeal arises."

17. It is necessary to point out that the cited authorities are in respect to the amendment of a memorandum of appeal, which is a document filed for the first time in this Court and is not among the documents that are filed before the court appealed from. However, in the application before me, the applicant seeks to amend the petition which was the foundation of the judgment which he is challenging before the Court. Unfortunately, neither the applicant nor the respondent who are the core parties to the application made any illuminating submission on the question as to whether pleadings filed before a trial court can be amended in an appellate court. Instead, counsel for the respondent conceded to the applicant's prayer for amendment. Nonetheless, I do not think that the jurisdiction under rule 46 extends to amendment of pleadings filed in the trial court. It should not be forgotten that in discharging its appellate mandate, this Court will not entertain any matter founded on issues which are raised for the first time before it unless they are issues of jurisdiction or illegality - see Thuweiba Maka & 3 others vs. Aisha Juma & Another [2016] eKLR. One would ask what appeal the Court will be handling if this application were to be allowed. In my view, allowing this request for amendment will turn this Court into a trial court. That would mean the record will contain new pleadings which were not available to the trial court for consideration and which never formed part of the judgment being appealed against.

To this end, I am persuaded by Lord Birkenhead, LC in North Staffordshire Railway Co vs. Edge (1920) AC 254, as quoted in Thuweiba Maka & 3 Others vs. Aisha Juma & Another (supra) that:

> "The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument, it is the invariable practice of appellate tribunals to require that the Judges in the Courts below shall be read. The efficiency and the authority of a Court of Appeal, are increased and strengthened by the opinions of the learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decision which may be of the highest importance without having received any assistance at all from the Judges in the courts below."

18. The proposed amendment by the applicant seeks to alter the nature of the dispute between the parties from a petition for general, exemplary and aggravated damages to a claim for special damages. Even though the applicant terms the proposed amendment inconsequential, in law, it is indeed consequential and far-reaching. It is trite that special damages are specifically pleaded and proved. Additionally, as conceded by the applicant, this amendment aims at aligning the petition to the evidence on record which, in his view, proved that he was owed Kshs.102 Million. Therefore, exercising the powers to amend the petition in the manner proposed by the applicant, will go against the fundamental requirement that parties should abide by their pleadings. I am also not aware of, and neither has any of the parties pointed to me, a provision in the rules of the Court or the *Appellate Jurisdiction Act* that would permit the Court to allow the amendment of the pleadings that formed the basis of the proceedings before the trial court. In my view, rule 18 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which the applicant relies on in support of his application allows amendment of pleadings by the trial Judge when a matter is pending before the High Court. In my view, the provision cannot be used by this Court to amend the trial court's pleadings. Were the application for amendment to be allowed, it would amount to the Court relinquishing its appellate jurisdiction and taking over the role of the trial court. There is no constitutional or statutory basis for such a move. Consequently, the application for the amendment of the petition that was filed before the High Court is found to be without merit and is hereby dismissed.

19. The second prayer by the applicant is for the entry of judgment on admission. This prayer, too, must fail for three reasons. Firstly, this prayer was hinged on the success of the prayer for amendment of the petition, which I have rejected, thereby rendering this prayer moot. Secondly, the applicant has not pointed to any rule of the Court that would support such an application. Thirdly, making such an order as prayed by the applicant would have the effect of settling the appeal and that will amount to usurping the powers exercisable and reserved for the full Court and not a single Judge.

20. In the end, the notice of motion dated 23rd August 2024 lacks merit and is hereby dismissed with costs to the respondent and the Interested Party.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY, 2025.

W. KORIR

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

Deputy Registrar