



**Questworks Limited v Treboruamak Real Estate Investment Management Company Limited
(Civil Application E242 of 2024) [2025] KECA 263 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KECA 263 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E242 OF 2024
LA ACHODE, JA
FEBRUARY 21, 2025**

BETWEEN

QUESTWORKS LIMITED APPLICANT

AND

**TREBORUAMAK REAL ESTATE INVESTMENT MANAGEMENT COMPANY
LIMITED RESPONDENT**

*(Appeal against the judgment and Decree of the High Court at Nairobi
(Mongare J) dated 19th February 2024 in HCA No. E001 of 2020)*

RULING

1. Questworks Limited the Applicant, filed an application dated 22nd October 2024 under Rules 44 and 46 of the Court of Appeal Rules 2010 for orders that, this Court be pleased to grant leave to the Applicant to amend the Memorandum of Appeal, in terms of the Draft Memorandum of Appeal annexed to the application. Treboruamak Real Estate Investment Management Company Limited is the respondent.
2. The application is premised on the grounds on its face and the supporting affidavit of even date sworn by Kiingati Ndiragu Advocate on its behalf.
3. The grounds of the application are that the Applicant lodged a Memorandum of Appeal dated 27th March 2024 on 3rd April 2024 together with the Record of Appeal. The Applicant wishes to amend the Memorandum of Appeal to seek appropriate orders from this Court in accordance with the Amended Memorandum of Appeal annexed. That the amendments are necessary for the proper determination of the issues and will enable the Court to effectively determine the issues in controversy. Further, that the Respondent will not suffer any prejudice if the order sought is allowed.
4. In rebuttal, Robert Kamau Njuguna a director of the Respondent, swore a replying affidavit on 23rd January 2025 on behalf of the Respondent. He deposed that the application is misconceived and does



not meet the threshold set in Rule 44 of this Court's Rules due to unexplained delay in filing the instant application.

5. The Respondent averred that the Applicant initially moved this Court in CA Civil Application No. E094 of 2024, seeking stay orders pending the hearing and determination of the instant appeal. The application was struck out on 3rd May 2024 as the prayers sought to have the judgment of the Chief Magistrate's court set aside instead of that of the High Court. Further, that despite the Court pronouncing the incompetence of the Memorandum of Appeal in May 2024, the Applicant did not file an application to amend it.
6. The Respondent deposed that this Court issued instructions on the disposal of the main appeal on 18th September 2024, directing the Applicant to file and serve its submissions in the appeal within 30 days, which expired on 19th October 2024. It instead filed the instant application on 22nd October 2024 with no explanation for the delay of over five months.
7. It was further deposed that the Applicant has not sought an order to set aside the directions of the Court issued on 18th September 2024 in respect of the prosecution of the main appeal. As such, the directions remain binding. That the Applicant is guilty of laches and is not entitled to the orders sought as its application is overtaken by events.
8. M/s Kiingati Ndirangu & Associates Advocates filed written submissions dated 22nd January 2025 on behalf of the Applicant and echoed the averments in the application and affidavit.
9. M/s Muthoga & Omari Advocates filed submissions dated 27th January 2025 on behalf of the Respondents and equally reiterated their replying affidavit relying on this Court's decision in *Mbuthi v Karanja* (Civil Application E347 OF 2023) [2023] KECA 1261 KLR, where it was held that:

“It is trite also that applications seeking amendments of pleadings ought to be brought within a reasonable time. In *Kyalo v Bayusuf Brothers Ltd* Civil Appeal No. 38 of 1983, it was held that applications for amendment of pleadings should only be allowed if they are brought within a reasonable time because to allow a late amendment would amount to an abuse of the court process”.

10. I have considered the application, the affidavits in support and in reply and the rival submissions. The applicable law that governs the present application is rule 46 of the Court of Appeal Rules 2022, which provides as follows:

- “(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—
- a. if practicable, lodged with the Registrar and served on the respondent before the hearing of the application; or
 - 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.

11. The rule clothes this Court with the mandate to exercise the discretion to grant leave for amendment. However, like any powers reserved for the exercise of discretion by the Court, it must be exercised



judiciously as was held in this Court's decision in *John Mugambi & Mugambi & Company Advocates v Kiama Wangai* [2021] KECA 952 (KLR) thus:

It is trite that the power reserved for the Court by rule 44(1)[in what is now rule 46] 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 than arbitrarily, on humour, or fancy. (See *Kanawal Sarjit Singh Dhim v 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 *Kenya Hotels Limited v Oriental Commercial Bank Limited* [2018] eKLR).

12. Additionally, this Court in *Lekakeny v Ketere & another* [2024] KECA 128 (KLR), guided by *John Mugambi & Mugambi* (supra) held that:

In the *John Mugambi* Case, while pointing out that the judicial policy is to liberally allow amendments, the Court stated some of the factors the Court considers in deciding whether to allow an amendment. They include whether the application has been brought in good faith which is, in part, determined by the timing of the application and the conduct of the applicant; whether there has been an undue delay in bringing the application; whether the amendment will cause injustice or prejudice to the respondent; whether it will unfairly redefine the dispute; and whether the amendment would be futile or superfluous.

13. In the present case it cannot be denied that the application for amendment is coming late in the day. The Applicant was aware of the incompetence of the Memorandum of Appeal when its application for stay was struck out on 3rd May 2024. On 18th September 2024 this Court gave the parties directions on how to dispose of the Applicant's main appeal, which had an incompetent Memorandum of Appeal. At this juncture, the Applicant had not yet filed the application to amend the Memorandum. It subsequently sought this order in the instant application, more than a month later.

14. I, therefore, find that this application is not brought in good faith, having been filed after the directions to dispose of the matter were given by this Court. Further, there has been undue delay that has not been explained in filing this application, since this Court adverted to the incompetence of the Memorandum of the Appeal way back in May 2024. It is also my view that allowing the application will be detrimental to the Respondent who has already complied with the directions of the Court.

In the premise, the application dated October 22, 2024 has no merit and is therefore dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original Signed

DEPUTY REGISTRAR

