



REPUBLIC OF KENYA



KENYA LAW
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Kamau v Radido & 6 others (Being Sued as the Officials of the Kenya Magistrates and Judges Association); Federation of Women Lawyers (FIDA Kenya) (Interested Party) (Civil Application E255 of 2024) [2025] KECA 788 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KECA 788 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E255 OF 2024
LA ACHODE, JA
MAY 9, 2025**

BETWEEN

HON. LADY JUSTICE NANCY JACQUELINE NJUHI KAMAU APPLICANT

AND

HON. MR. JUSTICE STEPHEN OKIYO RADIDO 1ST RESPONDENT

HON. MR. JUSTICE EDWARD MURIITHI 2ND RESPONDENT

HON. TOM MARK OLANDO 3RD RESPONDENT

HON. RHODA YATOR 4TH RESPONDENT

HON. DAFFA HASSAN OMAR 5TH RESPONDENT

HON. KIONGO KIONGO 6TH RESPONDENT

MR. DANIEL SEPU 7TH RESPONDENT

**BEING SUED AS THE OFFICIALS OF THE KENYA MAGISTRATES AND
JUDGES ASSOCIATION**

AND

FEDERATION OF WOMEN LAWYERS (FIDA KENYA) ... INTERESTED PARTY

(Being an application for an order of injunction under Rule 5(2)(b) of the Court of Appeal Rules 2010, pending the hearing and determination of an intended appeal from the judgment of the High Court at Nairobi (Mwita J) delivered on 23rd May, 2024 in Constitutional Petition No. E226 of 224)



RULING

1. By a Notice of Motion dated 24th May, 2024, Nancy Jacqueline Kamau, the applicant herein moved the Court under Rule 5 (2) (b), 42 and 47 of the Court of Appeal Rules, 2010 (the proper citation should be Court of Appeal Rules 2022). She sought in the main, an order for injunction staying the election for the position of the representative of the High court judges in the Judicial Service Commission, scheduled to be held on 25th May, 2024, pending the inter-party hearing of the application and the intended appeal.
2. The main ground of the application was that in a judgment delivered on 24th May, 2024, in the applicant's Constitutional Petition dated 2nd May, 2024, the High court upheld the decision of the respondent to bar the applicant from vying for the position of representative of High court judges, established under Article 171(2)(d) of *the Constitution*. The applicant stated that the sole ground upon which she was barred is that she is a woman, and therefore, the decision amounts to direct and obvious negative discrimination.
3. By a letter dated 25th May, 2024, addressed to the Deputy Registrar of the Court of Appeal, the applicant stated that subsequent to issuance of directions for the hearing of the application, a gazette notice was published on 27th May, 2024, indicating that the successful candidate in the impugned election had been gazetted and had taken office.
4. The applicant was of the view that in the circumstances, the prayers sought in the application dated 24th May, 2024 had been overtaken by events and it would be futile to proceed with the application. She requested that the application be marked as withdrawn in accordance with rule 54 of the Court of Appeal Rules, to save judicial time. Further, that the application had not been served and therefore, the issue of costs did not arise.
5. In the meantime, while awaiting directions regarding her request to withdraw the application, the position of the representative of High court judges fell vacant again following the unfortunate demise of Hon. Justice David Majanja on 10th July, 2024. The effect of the development was that the respondent was by law, required to hold fresh elections to fill the vacancy.
6. The applicant filed and serve her record of appeal on 16th July, 2024 and subsequently filed this notice of motion dated 21st August, 2024 under rules 44 (1) and 46(1), seeking leave to amend the Notice of Motion dated 24th May, 2024 in terms of draft amended Notice of Motion. This is the application that is before me for determination today.
7. In the supporting affidavit of even date sworn by the applicant, and the submissions filed on her behalf by the firm of Iseme, Kamau & Maema Advocates, the applicant averred that the respondent was in the process of organizing fresh elections to be held on 6th September, 2024, using the same rules and process used in the impugned elections of 25th May, 2025.
8. The applicant therefore sought to amend the Notice of Motion dated 24th May, 2024 to delete the date of 25th May, 2024 since that elections had already passed, and substitute it with the date of 6th September, 2024, for the upcoming fresh elections. She submitted that the grounds of the application would remain the same, and the issues set out as to the validity and constitutionality of the election rules that govern the respondent would also remain the same.



9. The respondent filed submissions dated 15th August, 2024 through the firm of Ongoya & Wambola Advocates setting out the history of this matter. The respondent submitted that through letters dated 5th August 2024 and 7th August, 2024, the applicant introduced new circumstances which allegedly necessitated the allocation of an urgent hearing date for this application. These stated as follows:
- “(i) The Judicial Service Commission through the letter dated 31st July, 2024 has formerly communicated about a vacancy of the position of a member of the JSC which is supposed to be a member of the respondent.
 - ii. That as a result of the vacancy, the respondent would be expected to conduct elections and swear in the elected individual by 21st August, 2024.
 - iii. That due to the similarity in the nature of elections, that were conducted on 25th May, 2024, and those expected to be concluded by 6th September, 2024, the application for stay dated 24th May, 2025 before this court needs to be urgently heard and determined.”
10. The respondents’ position was that the applicant mischievously sneaked in the foregoing facts which are misleading, and are not in any way applicable in this case for reasons that the application dated 24th May, 2024 sought to stay the elections initially scheduled for 25th May, 2024 and not the intended upcoming elections scheduled to be conducted by 6th September, 2024. Also, that the application dated 24th May, 2024 arises from the judgment and/or order of the High court in Nai Constitutional Petition No. E226 of 2024 delivered on 23rd May, 2024, in which the issue of the intended upcoming elections to be conducted on 21st August, 2024 never arose.
11. The respondent submits that although the issue of the initial request for withdrawal of the application was not dispensed with, they were not opposed to it. They emphasized that the application for stay dated 24th May, 2024 had been overtaken by events, on account of the applicant’s earlier concession through her communication to the Court in the letter dated 29th May, 2024. Further, that the elections of 25th May, 2024 sought to be stayed have long been concluded, a fact that is in the public domain.
12. Upon considering the grounds of the application, the affidavit in support, the rival submissions and the applicable law, the sole issue that emerges for determination is whether discretion should be exercised to permit the applicant to amend the Notice of Motion dated 24th May, 2024.
13. The discretionary mandate to amend documents in a suit is donated by rule 46 of the Court of Appeal Rules, 2022 in the following terms:
- “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”
14. The discretion in considering an application to amend any document filed in court is wide and courts ordinarily freely grant leave to amend where justice so dictates. There are however principles that guide the court in exercising this discretion, and like all powers reserved for the exercise of discretion by the court, it must be exercised judiciously and not capriciously.



15. In the case of John Mugambi and Mugambi & Company Advocates vs Kiama Wangai [2021] eKLR, this Court stated that :

“... 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.”

The court went further to state that:

“... parties to a suit have the right to amend their pleadings at any state of the proceedings before judgment, and that courts should liberally allow such amendments.”

16. There are situations when the court will decline to exercise its discretion to allow amendments. Such situations 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 respondent.

17. Having examined the amendments prayed for by the applicant, I note that they are not inconsequential, such as, correction of typographical errors in the application. Two reasons of importance however, make this application a non-starter.

18. The first reason is that the application dated 24th May, 2024 arises from the judgment and order of the High court in Nairobi Constitutional Petition No. E226 of 2024, delivered on 24th May, 2024. The petition was specific to the elections of 25th May 2024. The intended upcoming elections scheduled 21st August, 2024 were not an issue for determination before the court in that petition.

19. The second reason is that the elections sought to be stayed, whether be it the original elections of 25th May 2024, or the subsequent ones of 6th September 2024, they have all since been concluded. The successful candidate in the subsequent elections was gazetted and already took office.

Consequently the application dated 24th May, 2024 cannot be granted and must suffer the fate of dismissal. The respondent having filed submission in this application is awarded the costs.

Orders accordingly

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2025

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

