



**Sea Angel Service Station Ltd v Abdul (Civil Application
E126 of 2021) [2024] KECA 158 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KECA 158 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E126 OF 2021
AK MURGOR, JA
FEBRUARY 23, 2024**

BETWEEN

SEA ANGEL SERVICE STATION LTD APPELLANT

AND

YUSUF ABDUL RESPONDENT

(An application to amend the Memorandum of Appeal filed in the appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (P.J.O. Otieno, J.) delivered on 3rd May 2017 in Mombasa HCCC No. 108 of 2013)

RULING

1. By a Notice of motion dated 5th January 2024 brought pursuant to rules 31 and 41(1) of the [Court of Appeal Rules](#), 2010 and Article 159 2(d) of the [Constitution](#), the applicant, Sea Angel Service Station Ltd (the appellant in the appeal) seeks:
 - (i) leave to amend the Memorandum of appeal in terms of the proposed amended Memorandum of appeal;
 - (ii) that the annexed proposed amended Memorandum of appeal be deemed as duly filed and served upon the payment of the requisite court fees; and
 - (iii) that the costs of the application do abide by the results of the appeal.
2. The motion is brought on grounds set out on its face and an affidavit in support sworn by Gulamhussein Farkuddin Gulamhussein, a director of the applicant, in which he contends that it is necessary to amend the Memorandum of appeal to reflect the true and correct position of the subject matter of the applicant's appeal; that the amendments sought are intended to assist the Court to holistically determine the issues raised and will not in any way prejudice the respondent, and that the respondent will also be at liberty to amend any response if need be.



3. The draft amended Memorandum of appeal was annexed to the application. The grounds of appeal are the same and the only amendment is the prayer that:

“The costs of the appeal and those of the superior and subordinate court be borne by the Respondent.”

4. The appellant filed written submissions which the learned counsel for the applicant, Mr. Atancha highlighted during the virtual hearing of the application. Counsel submitted that the applicant’s application had satisfied the requirements necessary for the grant of orders to amend as the Memorandum of appeal as lodged lacked the orders sought; that the orders to be sought were inadvertently excluded through an honest mistake at the time the appeal was lodged; that, the intended amendment is necessary to enable the Court determine all the issues raised in the appeal and pronounce itself with finality and on merit.

5. There was no appearance by the respondent though served with the hearing notice.

6. As a brief background, by way of an amended plaint, the applicant filed a suit against the respondent before the Magistrates’ court in which it claimed the sum of Kshs. 281,604 in respect of Petroleum products supplied to the respondent at his request between the 26th May 1998 and 11th June 1998. In answer to that claim, by an amended statement of defence, the respondent denied the existence of any such agreement and further asserted that the applicant’s claim was statute barred.

7. The trial magistrate upon considering the dispute, allowed the claim and entered judgment in favour of the applicant against the respondent. Aggrieved, the respondent filed an appeal to the High Court which allowed the appeal set aside the judgement of the trial court, and proceeded to dismiss the applicant’s suit, hence the appeal.

8. The applicant placed reliance on rule 44, (now rule 46 in the current [rules of this Court’s](#), 2022), which provides that:

“(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”.

9. In the case of [Kenya Hotels Limited v Oriental Commercial Bank Limited](#) [2018] eKLR, it was observed 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 than arbitrarily, on humour, or fancy. (See *Kanawal Sarjit Singh Dhim v. Keshavjijivraj 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 *Uburu Highway Development Ltd v. Central Bank of Kenya* [2002] 1 EA 314).”



10. In the case of *Lilian Wanja Muthoni Mbogo t/a Sahara Consultants & 5 others v Assets Recovery Agency* (Civil Appeal (Application) E221 of 2020) [2022] KECA 48 (KLR) (Okwengu J.A) This Court held that:

“.... 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.”

11. Hence, it goes without saying that the power reserved for the Court by rule 44 (1) to amend any document is a discretionary power. It is a discretion that must be exercised judiciously, rather than arbitrarily, and should be based on sound reasons. It should also be borne in mind that applications under rule 44 (1) should to be brought within a reasonable time. In the case of *Kyalo v Bayusuf Brothers Ltd*, Civil Appeal No. 38 of 1983, it was held that applications seeking amendment of pleadings should only be allowed if they are brought within a reasonable time.

12. The main issue for consideration is, whether the instant application falls within the parameters set out in the above cited decisions to justify the exercise of this Court’s discretion in granting leave to amend the Memorandum of appeal to include a prayer for costs of the lower courts. If the amendment sought, which I note has been brought within reasonable time, will better enable the applicant ventilate its appeal before this Court, I consider it worthwhile to grant the application as prayed.

13. In sum the Notice of motion dated 5th January 2024 is merited and is allowed, and I make the following orders:

- i. Leave is hereby granted to amend the Memorandum of appeal in terms of the amended Memorandum of appeal annexed to the motion;
- ii. The annexed amended Memorandum of appeal be and is hereby deemed as duly filed and served upon the payment of the requisite court fees; and
- iii. the costs of the application to abide by the appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR

