



**Lekakeny v Ketere & another (Civil Appeal (Application)
E104 of 2023) [2024] KECA 128 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 128 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) E104 OF 2023
JM NGUGI, JA
FEBRUARY 9, 2024**

BETWEEN

EMMANUEL LEKAKENY APPLICANT

AND

MENKOKO NONKIPA KETERE 1ST RESPONDENT

OLEIMPASO SAITOTI PETER NKOLOPE 2ND RESPONDENT

*(Being an Application for leave to amend the Notice of Appeal and Record
of Appeal from the Judgment of the Environment and Land Court at
Kilgoris, (Washe, J.) dated 21st February, 2023 in ELCA Case No. 15 of 2021)*

RULING

1. The application before the Court is dated August 18, 2023. It is expressed to be brought under rules 4, 41 and 44 of the *Court of Appeal Rules*. Rules 41 (on applications for leave to appeal in civil matters) and 44 (on forms of applications to the Court) are inapplicable. In any event, the applicant seeks the following prayers quoted verbatim from the application:
 1. “That the Honourable Court allows the Appellant to amend the Notice of Appeal dated and filed on March 7, 2023 to amend/rectify the date of the Judgment indicated on the Notice of Appeal which is 6th March, 2023 to agree with the date in the Judgment which is February 21, 2023.
 2. That the Honourable Court allow the Appellant to amend the Notice of Appeal dated 7th March, 2023 to indicate the correct Advocate on record R v Mukoya & Co. Advocates unlike what is indicated in the Notice of Appeal Kasamani & Associates Advocates.



3. That upon prayer 1 and 2 of this Application to amend/rectify the Notice of Appeal being allowed, the Record of Appeal pursuant to the Notice of Appeal be deemed duly filed accordingly.
4. That the costs of this application be provided for.”
2. The application is supported by the affidavit of Emmanuel Lekakeny Kayo, the applicant, sworn on August 18, 2023.
3. The argument made for the application is straightforward: the applicant says that the Notice of Appeal was timeously filed on March 7, 2023 but that it contained two typographical errors which he wishes to correct:
 - a. The first error is of the date of delivery of the impugned judgment: while the judgment was, in fact, delivered on 21st February, 2023, the Notice of Appeal erroneously names that date as 6th March, 2023.
 - b. The second error is, quite astoundingly, that of the name of the firm representing the applicant: while the correct firm on record is R v Mukoya & Co. Advocates, the firm indicated on the face of the Notice of Appeal is “Kassamani & Associates Advocates.”
4. The applicant, in both his supporting affidavit and written submissions submits that these are typographical errors committed by his advocates which should be excused. The errors, the applicant submits, were made in good faith and their correction would not prejudice the respondents. In any event, the applicant submits, the errors being of a technical nature, and the subject matter being land, the Court should use its discretion in the interests of justice to ensure that the appeal is heard on its merits.
5. The application is opposed by the 2nd respondent. She filed an affidavit deponed on September 26, 2023 in opposition. The affidavit gives a rather detailed background and history about the dispute from its genesis at the Magistrate’s Court in Kilgoris. The main points taken in opposition to the application are amplified in the 2nd respondent’s written submissions dated October 5, 2023.
6. The 2nd respondent was enjoined, upon her application, as an interested party to the case at the Kilgoris ELC. By that time, the case was on appeal from a decision by the Kilgoris Magistrates’ Court. The original suit at the subordinate court was instituted by the applicant against the 1st respondent. The subject matter of the suit was the land known as LR No. Trans Mara/Olomismis/769. Judgment was entered in favour of the 1st respondent. Dissatisfied with that decision, the applicant appealed to the ELC.
7. It is at the ELC whence the 2nd respondent learnt about the existence of the suit and applied to be enjoined. She eventually succeeded at the ELC having persuaded the court that she was, in fact, the bona fide owner of the suit property. The applicant was, again, dissatisfied with that judgment, which was delivered on February 21, 2023. That judgment is the subject of the pending appeal.
8. The 2nd appellant is convinced that the applicant is not entitled to the orders he seeks for two related reasons. First, she believes that the application has been brought in bad faith. Second, the 2nd appellant believes that the Court should not exercise its discretion on behalf of the applicant because it would prejudice her. This is because, she argues, her vested interests or accrued rights in having the substantive appeal struck out have already accrued.
9. The 2nd respondent filed an application dated May 30, 2023 to have the appeal filed by the applicant struck out on two grounds:



- i. That the Notice of Appeal was served on the 2nd respondent late and outside the statutory timelines; and
 - ii. That the appeal and the record of appeal was incompetent for having been filed by a stranger.
10. The two grounds upon which the 2nd appellant has applied for the striking out of the appeal are self-explanatory. The first one is based on the allegation that while the Notice of Appeal was timeously filed on March 7, 2023, it was not served on the 2nd respondent until May 10, 2023. This, the 2nd respondent points out, was outside the statutory timeline of seven days.
11. On the second ground upon which the 2nd respondent has sought the dismissal of the appeal on account of the fact that the Notice of Appeal was filed by a law firm which did not represent the applicant at the ELC. Yet, that law firm, Kassamani & Associates, is the one that filed the Notice of Appeal; and without the leave of the Court.
12. Both these grounds for striking out, if proved to a three-judge bench, are sufficient grounds to strike out the appeal. The 2nd respondent submits that the present application has been filed in bad faith specifically to defeat their application to strike out the appeal. The 2nd respondent relies on this Court's decision in *John Mugambi & Mugambi & Company Advocates v Kiama Wangai* [2021] eKLR for the proposition that a party should not be allowed to amend any court document if the effect of the amendment would be prejudice vested interests or legal rights which have already accrued. The 2nd respondent argues that she has already accrued a vested interest in having the appeal struck out ex debito justitiae on account of the two grounds explained above, and that, therefore, the Court should not exercise its discretion to allow the prayers sought.
13. The singular question presented in the appeal is whether the Court should exercise its discretion to permit the applicant should be permitted to amend its Notice of Appeal filed in Court on March 7, 2023.
14. The governing rule is rule 46 of the *Court of Appeal Rules*. It states that:

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 to lodge the document 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...
15. It is true that the Court has wide discretion in considering an application to amend any document filed in this Court. Consequently, the Court ordinarily grants leave to amend freely given when justice so requires. However, as the Court remarked in the John Mugambi Case, like all powers reserved for the exercise of the discretion by the Court, it must be exercised judiciously. In that case, the Court stated:

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.
16. 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.

17. While reiterating these factors, the *John Mugambi Case* held that where the effect of the amendment would be to prejudice or adversely affects the rights or vested interests of the opposing side which have already accrued, the amendment should be disallowed. The Court held that:

....[P]arties to a suit have the right to amend their pleadings at any stage of the proceedings before judgment and that courts should liberally allow such amendments. There are situations when the court will refuse to exercise its discretion to allow amendments. Such cases 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.

18. In the present case, the applicants were aware of the existence of the application dated 30th May, 2023 by the 2nd respondent pending in Court. The 2nd respondent deposed in her replying affidavit that she has served the application on the applicant. The applicant has not denied service. The 2nd respondent's application is still pending before the Court.
19. It is fairly obvious that the present application is carefully framed to both directly and indirectly defeat the 2nd respondent's application. It does so directly by seeking to "amend" the name of the law firm that filed the Notice of Appeal as a "typographical error" hence defeating the substantive second ground for the request to strike out the appeal. It also does so indirectly by in its third prayer which prays that the Notice and Record of Appeal both be deemed to be duly filed.
20. Allowing the prayers sought by the applicant in this case would have the impact of obliquely defeating (or at the very least seriously undermining) the 2nd respondent's application dated May 30, 2023 which is pending before the Court. That latter application must be heard by a three-judge bench of the Court. It is, therefore, plainly obvious that the effect of granting the leave to amend in this case would cause obvious prejudice and unfairness on the 2nd respondent.
21. The amendments the applicant seeks are not innocuous alterations to a document to correct typographical errors as the applicant touts them which, ordinarily, would, be freely allowed. By bringing the present application, without as much as disclosing that the 2nd respondent's application is pending, the applicant was seeking to steal a match on the 2nd respondent. The Court's discretion cannot be deployed for such purposes. The correct course is for the applicant to defend the 2nd respondent's pending application. Only if his appeal survives that threat to its existence would it lie for the applicant to bring such an application whether formally or informally.
22. The upshot is that the application dated 18th August, 2023 cannot be granted. It is for dismissing; and I hereby do so with costs to the 2nd respondent since the 1st respondent did not file any response or participate in the proceedings.
23. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF FEBRUARY, 2024.

JOEL NGUGI

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JUDGE OF APPEAL



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

Signed

DEPUTY REGISTRAR

