



**Keino (Suing as the Legal Representative of Norman Kiptum Keino (Deceased)) v Kemei
(Civil Appeal (Application) E029 of 2024) [2024] KECA 941 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 941 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL (APPLICATION) E029 OF 2024**

WK KORIR, JA

JULY 26, 2024

BETWEEN

NELLY JEMELI KEINO APPLICANT

**SUING AS THE LEGAL REPRESENTATIVE OF NORMAN KIPTUM KEINO
(DECEASED)**

AND

GRACE CHEPKEMBOI KEMEI RESPONDENT

(Being an application for amendment of a Notice of Appeal and extension of time to file and serve the amended notice of appeal against the judgment and decree of the High Court at Kapsabet (J.R. Karanja, J) issued and dated 14th May 2023 in HCCA No. E008 OF 2023)

RULING

1. The case of the applicant, Nelly Jemeli Keino (Suing as the Legal Representative of Norman Kiptum Keino (Deceased)), as gleaned from the papers she has filed before this Court is that in a judgment delivered on 14th May 2023 at Kapsabet High Court, J.R. Karanja J. dismissed her request for the revocation of the grant issued in respect of the estate of the late Samuel Gimnyigei Gimnyige. It is her averment that she has since lodged a notice of appeal against the impugned judgment. It is also the applicant's averment that when the matter was being heard in the High Court, Nandi/Ndulele/386 being a property in the estate of the deceased was registered in the name of the respondent, Grace Chepkemboi Kemei. However, a search conducted on 19th February 2024 disclosed that the respondent had subdivided the property into Nandi/Ndulele/1615 and Nandi/Ndulele/1616, with the former being registered in the name of one Ernest Kibet Sawe. She is therefore seeking leave through her notice of motion dated 30th May 2024 filed pursuant to rules 4, 46 and 79 of the Court of Appeal Rules 2022 to amend the notice of appeal to include Ernest Kibet Sawe as a respondent. She also prays that if the leave to amend the notice of appeal is allowed, time be enlarged for serving that notice.



2. The application was not responded to and neither did the respondent participate in the application despite being served with case management directions.
3. When the application was placed before me for hearing on 19th July 2024, the firm of Wambua Kigamwa Advocates had filed submissions dated 10th July 2024 on behalf of the applicant. In those submissions, counsel referred to the case of *Kensilver Express Ltd & 137 others v. Commissioner Insurance & 4 others* [2014] eKLR to urge that despite the applicant being the defaulting party, the prayers sought should be granted to enable regularization of the notice of appeal. Counsel submitted that the failure to include Ernest Kibet Sawe in the notice of appeal was an inadvertent error on the part of counsel and is thus excusable. Counsel also argued that the intended appeal was not frivolous and that it is in the interest of justice that the leave sought be granted. Counsel asserted that the mistake was discovered during the process of preparing an application for stay of execution of the judgment pending the hearing of the appeal. Further, that the present application has been filed without undue delay. Counsel referred to the case of *Philip Chemwolo & Another v. Augustine Kubende* [1986] eKLR in support of the submission that the inadvertent mistake is excusable and the application should therefore be allowed.
4. This application is brought under rules 4, 46 and 79 of the *Court of Appeal Rules, 2022* which are reproduced as follows:

“ 4. Extension of time

The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.

....

46. Applications for leave to amend

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.
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 sub-rule, the leave so given shall determine.

....



79. Service of notice of appeal on persons affected

- (1) An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal: Provided that the Court may, on application which may be made ex parte, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court.”

5. Another relevant provision is rule 55(1) which permits applications such as the one before me to be heard by a single judge. I am therefore satisfied that my discretionary jurisdiction has properly been invoked by the applicant. However, I am conscious that this discretionary power ought to be exercised judiciously.

6. Addressing an application for the amendment of a notice of appeal, the Court in *Kensilver Express Limited & 137 others v. Commissioner Insurance & 4 others* (*supra*) held that:

“Parties sought to be introduced by the leave to amend the notice of appeal sought participated in the High Court proceedings or were alternatively affected by the High Court proceedings. Such parties would have been invited to participate in the appeal process simply firstly by being cited in the heading Notice of appeal served as parties to the intended appeal, and secondly by being served with the Notice of appeal. Where they have not been so cited in the heading of the Notice of appeal, or where there is a procedural lapse like in the circumstances displayed herein, where they have neither been cited in the heading of the Notice of appeal lodged nor served with the said notice, the cure to this procedural lapse is not for the applicant to first seek leave of Court to join them to the proceedings before seeking the relief to amend and serve the Notice of appeal on them. The procedure employed by the applicants herein of firstly seeking leave to amend, followed by leave to serve them out of time is the correct procedure. Leave to join them first would have been necessary had the application in No. 305 of 2013 been filed in file No. 39 of 2009.” [Emphasis mine]

7. In *George Gikubu Mbutia v. Consolidated Bank of Kenya Ltd & Another* [2016] eKLR, the factors to guide the Court in considering whether to allow amendment of pleadings were identified as follows:

“It accepted too as a general proposition that parties 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. However, he also noted 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 other party; and where the applicant is guilty of inordinate delay. The court cited a number of authorities as the foundation of those principles, among them *Motokov v. Auto Garage Ltd & Others* [1971] EA 353; *Barclays Bank DCO v. Shamsudin* [1973] EA 451 and *Central Kenya Ltd v. Trust Bank Ltd & 5 Others*, CA. No. 222 of 1998.” [Emphasis mine]

8. I am persuaded and guided by the cited decisions. In this case, Ernest Kibet Sawe was not a party before the High Court. He, however, has since acquired proprietary rights over a portion of the property which is the subject of the applicant’s appeal and those rights may be adversely affected by the outcome



of the pending appeal. I have also considered the annexed memorandum of appeal and I am satisfied that the applicant is not introducing a new cause of action but is basically challenging the judgment of the High Court. Although the application may seem inordinate as it has been brought approximately one year from the time of the filing of the notice of appeal, the applicant has explained that she only became aware of the registration of Ernest Kibet Sawe as the proprietor of a sub-division of the suit property when she conducted a search with a view of applying to stay the execution of the impugned judgment. In the absence of a contrary view, I find this averment to be a sufficient explanation for the delay. Additionally, there is no apparent prejudice that will be suffered by the respondent if the application is allowed.

9. Accordingly, the application dated 30th May 2024 is allowed in the following terms:
- i. The applicant is granted leave to amend his Notice of Appeal within 7 days from the date of delivery of this ruling.
 - ii. The time for all the other activities consequent to the filing of a notice of appeal shall be as per the rules of the Court.
 - iii. The costs of this application shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JULY, 2024

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

