



REPUBLIC OF KENYA



KENYA LAW
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**Kagunda v Kariuki (Civil Application E174 of 2024)
[2024] KECA 840 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KECA 840 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E174 OF 2024**

P NYAMWEYA, JA

JULY 12, 2024

BETWEEN

JAMES NJOGU KAGUNDA APPLICANT

AND

PETER NJUGUNA KARIUKI RESPONDENT

*(An application for leave to amend the Notice of Appeal
dated 1st March 2022 in Thika ELC Appeal No. 38 of 2018)*

RULING

1. James Njogu Kagunda, the Applicant herein, has a lodged Notice of Motion application in this Court dated 8th April 2024, in which he seeks leave to amend the Notice of Appeal dated 1st March 2022 lodged in Thika ELC Appeal No. 38 of 2018 and transmitted to this Court. The application is supported by an affidavit sworn on even date by the Applicant. The brief facts giving rise to the application are as follows. After judgment was given in the Applicant's favour on 13th December 2018 in Thika CMCC No. 1008 of 2009 - *James Njogu Kagunda vs Peter Njuguna Kariuki against Peter Njuguna Kariuki*, the Respondent herein, the said Respondent lodged an appeal against the judgment in the Environment and Land Court at Thika (hereinafter "ELC"), being ELC Appeal No. 38 of 2018 - *Peter Njuguna Kariuki vs James Njogu Kagunda*. The said appeal was subsequently upheld in a judgment delivered on 8th April 2021 by Gacheru J.
2. The Applicant's advocate was not able to attend Court on 8th April 2021 when the said judgment was delivered electronically and the statutory period of lodging an appeal of 14 days consequently expired, which prompted the advocate to file an application dated 19th August 2021 for leave to file a Notice of Appeal out time. The Applicant deposed that the ELC (Eboso J.) extended the time for filing a Notice of Appeal in a ruling delivered on 24th February 2022, and the Applicant's advocates subsequently complied and lodged a Notice of Appeal within the given period. However, there was an error in the



Notice of Appeal, in that the advocate stated therein that he was appealing the ruling of Eboso J. dated 24th February 2022, instead of indicating that the appeal was against the judgment of Gacheru J.

3. The Applicant asserted that once the advocate realised his inadvertent mistake, he immediately filed an application dated 1st April 2022 in the ELC seeking to amend the said Notice of Appeal. A ruling was rendered by the ELC (Eboso J.) on 26th February 2024 in which it was held that the ELC did not have jurisdiction to entertain the application since the Notice of Appeal had already been transmitted to the Court of Appeal, and the Applicant's advocate was instructed to file an application in this Court which is the one with jurisdiction.
4. I heard the Applicant's application in chambers on 21st May 2024 by way of written submissions. The Applicant relied on submissions dated 16th May 2024 in which the foregoing averments were reiterated, and in which reliance was placed on the decision in *Central Kenya Limited vs Trust Bank Limited* (2002) 2 EA 365 that a party is allowed make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that amendment can be allowed without injustice to the other side.
5. The Respondent did not file any response to the application nor file any submissions thereon.
6. It is trite that the power reserved for the Court by Rule 46(2) of the [Court of Appeal Rules](#) of 2022 to amend any document is a discretionary power which must be exercised judiciously. The factors that the Court should consider in the exercise of its discretion were laid out in the case of [John Mugambi & Mugambi & Company Advocates vs Kiama Wangui](#) (2021) eKLR as follows:

“My view therefore as was the view of this Court in *George Gikubu Mbutia v Consolidated Bank of Kenya Ltd & Another* (2016) eKLR, 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. 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. The orders included to the memorandum of appeal reveal no basis to deny the application herein, therefore the Notice of Motion dated 19th November 2020 is allowed with costs to abide in the appeal.”

7. The averments by the Applicant that he complied with all the directions given by Eboso J. in the ruling extending time to appeal, including the surrender of the title to the property that is the subject of the intended appeal, were not disputed by the Respondent. There is therefore no demonstrated prejudice that will be suffered by the Respondent if this application is granted.
8. The application dated 8th April 2024 is accordingly granted on the terms that the Applicant is granted leave to amend the Notice of Appeal dated 1st March 2022, and to lodge the amended Notice of Appeal within 14 days from the date of delivery of this ruling. There shall be no order as to the costs of the said application.
9. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY, 2024

P. NYAMWEYA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

