



REPUBLIC OF KENYA



KENYA LAW
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**Chege v Ngibuini (Civil Appeal (Application) E452 of 2024)
[2024] KECA 1666 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1666 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E452 OF 2024
M NGUGI, JA
NOVEMBER 22, 2024**

BETWEEN

OLIVER NDUNGU CHEGE APPLICANT

AND

HUMPHREY MWANIKI NGIBUINI RESPONDENT

(Being an application for leave to amend the Memorandum and Record of Appeal in an appeal from the decision of the ELC at Machakos (A. Nyukuri J.) in ELC No. 383 of 2011)

RULING

1. In the application dated 25th July 2024, the applicant seeks leave to amend his memorandum and record of appeal to include parties erroneously omitted; and that the draft memorandum of appeal be deemed duly filed upon leave being granted.
2. The application, which is supported by an affidavit sworn by Earle Ngani, the applicant's advocate, on 25th July 2024, is brought under rule 46 of this Court's Rules. It is based on the grounds set out on the face of the application. The applicant avers that being dissatisfied with the judgment delivered by Annet Nyukuri J. on 29th April 2024 in Machakos ELC Appeal 383 of 2011, he lodged a notice of appeal on 9th May 2024 and served it upon the parties who were before the superior court; that a memorandum of appeal and record of appeal were filed on 10th June 2024 and served upon the said parties; and a notice of motion dated 28th June 2024, certificate of urgency dated 19th July and the directions of this Court were all served upon the respondents named before the superior court.
3. He states, however, that although served, through an error, these parties were not named in the appeal and all other documents. The applicant avers that the omission was due to human error and the parties who had been omitted will not be prejudiced as they had all been served with the court documents.



4. The respondent opposes the application through an affidavit sworn by his advocate, Caxstone P. Kigata, on 7th October 2024. While deposing to various matters relating to the joinder and non-joinder of parties to the claims and counter-claims before the trial court, the respondent avers that the applicant has omitted, additionally, one Joseph Kasyoki Mutuku (suing as the legal representative of the estate of Dominic Mutuku Kasyoki (deceased)). He avers that the draft memorandum of appeal is, for the above reason, defective and incompetent.
5. The respondent has also filed submissions dated 7th October 2024. He reiterates the averments in Mr. Kigata's affidavit and avers that while the applicant wishes to rectify the anomaly in his memorandum and record of appeal, he has failed to include all the parties who ought to be respondents in the appeal. He submits that the application for amendment should be struck out as the memorandum of appeal is defective and incompetent.
6. I have considered the application and the respondent's submissions, there being no submissions by the applicant on record. Under rule 46(1) of this Court's Rules, this Court has discretion to allow amendment of documents filed before it. With regard to whether or not to allow an amendment, M'Inoti JA, in his decision in *Kenya Hotels Limited v Oriental Commercial Bank Limited* (Civil Appeal 252 of 2009) [2018] KECA 692 (KLR) (Civ) (23 February 2018) (Ruling) stated as follows:

“Whether or not to allow an amendment will also depend on the nature and extent of the introducing a ground of appeal that is properly founded on the evidence that was adduced and canvassed before the trial court, which it is alleged the trial judge ignored or misapplied, the Court will more readily allow the amendment. Different considerations will however apply if the applicant is seeking to introduce a totally new ground of appeal that was not pleaded, evidence adduced, canvassed and determined by the trial court.

... the overriding concern to avoid prejudicing a party who is made to meet an entirely different case late in the day at the appeal stage, without the opportunity of adducing evidence that may be necessary to counter or dispel the new point.”
7. In the matter before me, the applicant seeks to amend the memorandum and record of appeal to include parties who were named before the superior court, were served with the documents filed in this Court, but were not named as parties in the pleadings. The respondent, while noting that he would not ordinarily oppose an application for amendment of pleadings, nonetheless does so on the basis that the applicant has left out yet another party who was a party before the trial court in the proposed amendments.
8. It seems to me that the respondent's objection is not a sufficient basis for denying the leave to amend that the applicant seeks. Ultimately, the overriding objective of courts is to do justice. The applicant seeks to amend his memorandum and record of appeal to include parties, who ought to be parties before this Court, whom he had inadvertently left out.
9. If, as the respondent submits, there is another party whom the applicant omitted in preparing his memorandum and record of appeal, the remedy is to allow him to amend the pleadings and include all the relevant parties. The respondent has not indicated what prejudice he may suffer as a result of such amendment, and I see none.
10. I accordingly find the application dated 25th July 2024 to be merited, and it is hereby allowed. The applicant is granted leave, within 30 days from the date hereof, to amend the memorandum of appeal and record of appeal to include all the parties involved in the suit in the trial court.



DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER, 2024 MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

