



Kenya United Steel Company (2006) Limited v Ahmed & another (Civil Appeal (Application) E141 of 2022) [2024] KECA 1734 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KECA 1734 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E141 OF 2022
SG KAIRU, JA
DECEMBER 6, 2024**

BETWEEN

KENYA UNITED STEEL COMPANY (2006) LIMITED APPELLANT

AND

AHMED MOHAMMED AHMED 1ST RESPONDENT

AHMED MOHIDDIN 2ND RESPONDENT

(Being an application for leave to amend the Memorandum of Appeal from the Judgment of the Environment and Land Court of Kenya at Mombasa (Omollo, J.) dated 31st October, 2017 in ELC Cause No. 470 of 2011)

RULING

1. In its application dated 15th January 2024 and made under Rules 44 and 46 of the Court of Appeal Rules, Kenya United Steel Company (2006) Limited, the applicant/appellant, seeks leave to amend its Memorandum of Appeal in this matter.
2. The application is based on the grounds that the proposed amendments are necessary for the Court to determine the real questions in dispute in the matter with finality and that no prejudice or injustice will be occasioned to the respondents.
3. The appeal arises from a judgment delivered on 31st October 2017 in which the Environment and Land Court (ELC) (A. Omollo, J) at Mombasa nullified a Wakf deed on the grounds that it did not comply with the requirements of Section 4(1) of Wakf's Commissioners Act.
4. I heard the application on 4th October 2024 when the parties were represented by learned counsel. Miss. Julu appeared for the applicant. Mr. Khatib appeared for the 1st respondent. Mr. Tindi appeared for proposed interested parties.



5. I have considered the application, the affidavits and the submissions. To allow or to decline leave to amend a document involves the exercise of judicial discretion. In the case of *Kenya Hotels Limited vs. Oriental Commercial Bank Limited* [2018] eKLR, the Court stated 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. Keshavji Jivraj 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 *Uhuru Highway Development Ltd v. Central Bank of Kenya* [2002] 1 EA 314).” And further that:

“Whether or not to allow an amendment will also depend on the nature and extent of the amendment. If the applicant is merely 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.”

6. With those principles in mind, the background in brief is that in his suit before the ELC, the 1st respondent, Ahmed Mohamed Ahmed, sought: a declaration that the Wakf created over the property known as Plot. No. 884 (original 780/1) of Section VI M.N is null and void as it offends the rule against perpetuity for failing to provide for charity; an order to vest that property in the name of the deceased settlor Asila Bint Mwijabu; and an order to nullify all subsequent transactions over that property.
7. After conducting a hearing, the learned trial judge in her judgment the subject of the appeal framed three issues, namely whether the 1st respondent had locus standi to institute the suit; whether the suit was time barred; and whether the Wakf is null and void and therefore should be dissolved. Having considered the rival arguments, the Judge answered the first two issues in the negative, and the third one in the affirmative.
8. In its Memorandum of Appeal dated 16th December 2022 through its then advocates Walker Kontos Advocates, the applicant raised four grounds of appeal, namely, that the judge was wrong in holding that the suit was not time barred under the *Limitation of Actions Act*; in failing to appreciate that third parties, who were not privy to the suit, were affected by the judgment; failing to hold that the 1st respondent lacked capacity to institute the suit; failing to consider and appreciate the consequences of the registration of the Wakf under the Registration of Titles Act.
9. The applicant changed its advocates through a Notice of Change of Advocates dated 5th December 2023 by its current advocates Balala & Obed Advocates who then brought the present application. The amendments proposed as captured in the draft amended Memorandum of Appeal include complaints that the learned Judge: misapprehended the provisions of Section 4(1) of the Wakf's Commissioners Act; misunderstood the provisions of the Wakf Deed; erred in holding that the 1st respondent had locus standi; in nullifying all subsequent transaction.
10. In my view, the proposed amendments do not, introduce grounds outside of the matters canvassed and determined by the trial. If anything, they provide clarity in the appellants' grievances regarding the impugned judgment which should assist the parties and the Court in effectually determining the appeal.



11. As for the delay in making the application which the 1st respondent's counsel raised, I note that whereas the suit before the trial court was instituted in 2011, judgment was delivered in October 2017. The present appeal was filed in 2022, and this application was filed shortly after the applicant changed its advocates. Furthermore, there is no demonstrable prejudice that will be occasioned to the parties by allowing the amendments.
12. In the result, I allow the application. The applicant shall file and serve the amended Memorandum of Appeal (in the form of a supplementary record of appeal) within 14 days from the date of delivery of this ruling.
13. Costs of the application shall abide by the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

