



**Osoro v Madzayo (Civil Appeal (Application) E008 of 2023)
[2023] KECA 868 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KECA 868 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL (APPLICATION) E008 OF 2023**

JW LESSIT, JA

JULY 7, 2023

BETWEEN

JOHN NYAGAKA OSORO APPLICANT

AND

JILANI MONGO MADZAYO RESPONDENT

(Being an appeal against the judgment and decree of the Environment and Land Court at Malindi by Olola, J. delivered on 15th September 2021 in ELC No. 85 of 2017)

RULING

1. John Nyagaka Osoro, the applicant, by way of a Notice of Motion dated April 17, 2023, brought pursuant to Rule 46 of the Court of the Court of Appeal Rules, 2022 seeks:
 - i. Leave of Court be granted to amend memorandum of appeal to include the names of the officials of Mtwapa Jumba Self Help Group, a party already served with a notice of appeal as a second respondent in this appeal.
 - ii. The amended memorandum of appeal is admitted as part of a supplementary record of appeal.
 - iii. The costs of the application are in the appeal.
2. The grounds on the face of the application and reiterated in a supporting affidavit sworn by the applicant on April 17, 2023, are that judgment in the case was delivered by J Olola, J in Malindi on September 15, 2021 and a notice of appeal lodged on September 28, 2021. That the record of appeal dated February 21, 2023 was filed and served upon all parties within the recommended statutory timeframes. That the applicant inadvertently omitted the name of the Mtwapa Self Help Group that were served with the notice of appeal.



3. The respondent filed an affidavit dated May 20, 2023 in opposition to the appellant's notice of motion. He contends that the intended 2nd respondent are not a necessary party in the appeal.
4. The application was heard through the virtual platform on the April 17, 2023. Present at the hearing was learned counsel Mr SM Kimani for the appellant/applicant, and learned counsel Mr Shujaa for the respondent.
5. Mr Kimani relied on his written submissions filed on the June 5, 2023 which he highlighted briefly. He submitted that the document intended to be amended was the memorandum of appeal, not the notice of appeal. He urged that once a party who can be affected by the appeal is served with notice of appeal, they become nominal respondents to whom rights accrue under Rule 86 of the Rule. He urged that the respondent had a right to challenge the joinder by moving the Court under Rule 86 of the Rules, which he failed to do.
6. That, Jilani Mongo Madzayo, the respondent herein, who was the plaintiff in the trial court did not include the officials of Mtwapa Jumba Self Help Group as defendants. That the officials reportedly allocated land to both the appellant and the respondent. That their input in the appeal through their records would have gone a long way into determining whose equity had priority. The applicant submitted that Mtwapa Jumba Self Help Group allocated land to both the appellant and the respondent and could therefore not be speculated that the outcome of the appeal will not have a direct bearing on the party which admittedly allocated the land which is the subject of the litigation during trial.
7. The applicant relied on the case of *Eastern Bakery v Caterino (1958) EA 461 (CA)* for the proposition that the grant of leave to amend any document is an exercise of discretion and should be freely allowed if they are made without injustice to the other side. He relied on *Anjumani v Ali (1999) 1 EA 1* and *LZ Engineering vs Trade Bank Limited (2000) 1 EA 143* and urged that this case is bad law and that this Court should depart from the rigidity that leaned towards refusing leave to amend primary documents. That the 2nd respondent's presence in the case was in the interest of justice in determining the subject appeal.
8. Counsel urged that the appellant served his notice of appeal on the officials of the proposed respondent and inadvertently omitted the names of the officials and the self-help group in the memorandum of appeal. That the omission was inadvertent as counsel who issued the notice of appeal delegated to a junior counsel the responsibility to prepare the record of appeal during his absence from office. That the names of the current officials of the self-help group were not immediately available.
9. Mr Shujaa highlighted his submissions that were filed on the June 6, 2023. He urged that the instant appeal is against the judgment and decree made in ELC in Case No 85 of 2017 and that the incidental reliefs granted in the judgment and decree thereto were against the appellant only. It was further averred that the judgment and decree appealed against does not affect the intended 2nd respondent and likewise the outcome of the appeal will not affect the said 2nd respondent. That the claim in the primary suit was for the recovery of vacant possession of the suit property as well as permanent injunction plus costs of the suit as against the appellant.
10. The respondent contends that in the appellant's statement of defence filed in the primary suit, the appellant had described the intended 2nd respondent as an amorphous body devoid of legal capacity to sue or be sued. That if the 2nd respondent lacked capacity to sue or be sued in the primary suit as pleaded then they lacked capacity in the appeal as well.



11. It was contended that the persons named as the secretary and treasurer of the intended 2nd respondent testified as witnesses for the appellant during trial in the primary suit and further that the appellant had the opportunity to join the said group or officials in the primary suit either as plaintiffs or defendants but chose not to. Hence, the respondent's stand was that the appellant's application to join the said amorphous body or its officials in this appeal is therefore an afterthought.
12. The respondent submitted that it is trite that the power of the court to add a party to proceedings is discretionary and can be exercised at any stage of the proceedings including at the appellate state. However, the applicant must show that the party to be joined has a personal interest or stake in the matter in question. That interest must be clearly defined and proximate enough to the matter in question and not merely peripheral and that the intended party would suffer prejudice in case of non-joinder.
13. It was submitted that it must also be borne in mind that no suit can be defeated by reason only of non-joinder of a party and that this Court may well proceed to determine the appeal as far as the rights and interest of the appellant and the respondent are concerned.
14. Further, that the appellant must show that the intended party's presence would enable the Court resolve all the matters in dispute and that the joinder of the intended party will not vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings. For the above propositions, the respondent's counsel relied on the following decisions: *Appollos Kennedy Mwangi vs Margaret Wanjiku Chege & 2 Others, Civil Appeal (Application) No 116 of 2015* and *Attorney General vs Kenya Bureau of Standards & Another, Civil Appeal (Application) No 132 of 2017*.
15. Mr Shujaa urged that the application for joinder should be dismissed with costs as the threshold to grant the same had not been met.
16. I have carefully considered the application before me, the arguments by the counsel to the parties and the cases cited. The principles that guide the Court when in applications of this nature are settled. In the case of *R vs AG & Another (2004) eKLR*, this Court stated that amendments to pleadings sought before the hearing should freely be allowed if they can be made without injustice to the other side and if there is no injustice if the other party can be compensated by costs.
17. *Halsbury's Laws of England, 4th Ed Vol 36(1)* at paragraph 76, sets out the purpose of amendment as, inter alia;

' The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side.'
18. In *Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] eKLR*, this Court observed that;

' It is trite that the power reserved for the Court by rule 44(1) [now 46(1) of the 2022 Rules] 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).'

19. In the *Kenya Hotels Ltd* case, (*supra*), this Court went on to hold;

' 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.'

20. The applicant's counsel has asked the Court to invoke Rule 46 of the Rules and grant the leave sought. However, in seeking the orders under the same head, the applicant does not explain why the parties were not enjoined in the earliest opportunity during trial. As noted by this Court in *JMK v MWM & another* [2015] eKLR,

' Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or suo motu, to order the name of a person who ought to have been joined or whose presence before the court is necessary, to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party.'

21. The Court further noted that;

' Commenting on this provision, the learned authors of Sarkar's Code of Civil Procedure (11th Ed Reprint, 2011, Vol 1 P 887), state that:

' The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.'

22. The amendment sought has the effect of adding a party to the appeal. The issue is whether the party intended to be enjoined is a necessary party to the appeal. Further, whether they will help the Court effectually and completely adjudicate on the appeal. The respondent has contested the facts urged by the applicant's counsel and has raised a pertinent issue. Counsel for the respondent has urged that, the officials of the party intended to be enjoined were called by the applicant as witnesses in support of his case. He urged the Court to note that at the trial before the superior court is where he should have elected whether they should be witnesses or parties. That as the applicant opted to make them witnesses the application is an afterthought.

23. The power to grant leave to amend is discretionary. I have considered the issues raised by the respondent. The applicant has not explained why they intend to enjoin the same parties he used as witnesses as respondents in this appeal. If they were necessary in the case, they fulfilled their role when they testified as witnesses. It does not fit well to the appeal to have them enjoined as respondent. The fact they were witnesses for the appellant, it does not look neat to have the same party who called them



in his support enjoining them as respondents. I think it will cause a measure of embarrassment to the enjoined parties, and will cause prejudice to the respondent. It will change the nature of the case. The record will be confusing, having to refer to parties that were witnesses as respondents.

24. In *Central Kenya Ltd V Trust Bank & 4 Others, CA NO 222 OF 1998*, the guiding principle in amendment of pleadings and joinder of parties was considered as follows:

' All amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.'

25. It is my conviction that this application lacks in merit and should be dismissed with costs, which I hereby do.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY 2023.

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

