



REPUBLIC OF KENYA



**Co-operative Bank of Kenya Limited v Ojwang (Civil Appeal (Application)  
278 of 2019) [2023] KECA 1308 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1308 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL (APPLICATION) 278 OF 2019  
M NGUGI, JA  
OCTOBER 27, 2023**

**BETWEEN**

**CO-OPERATIVE BANK OF KENYA LIMITED ..... APPLICANT**

**AND**

**ORWA JAMES OJWANG ..... RESPONDENT**

*(Application for leave to amend the Memorandum of Appeal dated 1st December, 2019 and filed on 3rd December, 2019 in Kisumu Court of Appeal No.278 of 2019, from the judgment and Decree of the Employment and Labour Relations Court at Kisumu (N. Nderi J.) delivered on 24th January, 2019 in Kisumu ELRC 43 of 2016)*

**RULING**

1. The applicant has filed the application dated 20<sup>th</sup> February, 2023 under Rule 46 of the Court of Appeal Rules, 2022. In the said application, the applicant seeks the following orders, which I set out verbatim:
  1. That the Application herein be certified as urgent and be heard expeditiously and ex parte in the first instance owing to the urgency hereof.
  2. That Applicant herein be granted leave to amend its Notice of Motion dated 1<sup>st</sup> December 2019 and lodged at the Court of Appeal Registry on the 3<sup>rd</sup> of December 2019 in terms of the draft Amended Memorandum of Appeal.
  3. That the costs of this Application be provided for.
2. The application is based on the grounds set out on the face of it and is supported by an affidavit sworn on 20<sup>th</sup> February, 2023 by Florence Njuguna, the applicant's Legal Officer.
3. Ms. Njuguna deposes that the impugned judgment against it and in favour of the respondent was entered in respect of the respondent's Memorandum of Claim dated 15<sup>th</sup> February, 2016. That



in the said judgment, the respondent was awarded: Ksh 497,199 in lieu of three months' notice; relevant certificates of all statutory contribution and pension scheme to the claimant as at the date of termination; interest at court rates from the date of filing suit till payment in full; and half the costs of the suit. Ms. Njuguna avers that the intended amendments are argumentative (sic) and necessary to enable this Court determine all issues before it with finality and shall therefore be in the wider interest of justice, allowing the Court to determine whether the respondent's summary dismissal was warranted and justified under the law. The applicant further avers that it has an arguable appeal with high chances of success and the respondent shall not suffer prejudice, if the application, which has been filed without inordinate delay, is allowed.

4. Annexed to the application is a Draft Amended Memorandum of Appeal containing an additional 5 grounds of appeal. In these new grounds, the applicant faults the learned judge for failing to consider the fundamental ground raised for summary dismissal, being willfully neglecting to perform work which the respondent had a duty to perform; ignoring the provisions of section 44(4) of the *Employment Act*, 2007; failing to consider the applicant's counterclaim; awarding the respondent costs without considering the fact that the respondent had outstanding arrears of loans taken from the applicant, and awarding the respondent 3 month's pay in lieu of Notice.
5. In submissions dated 21<sup>st</sup> March 2023 in support of its application, the applicant contends that the power reserved by this Court to amend any document is discretionary and such discretion must be exercised judiciously. It submits that the new grounds that it seeks to introduce are truly founded on the pleadings filed and evidence adduced before the trial court, and that the respondent shall not suffer any prejudice, and shall have an opportunity to oppose the appeal.
6. The respondent has opposed the application by way of submissions dated 17<sup>th</sup> March, 2023. It is his submission that the applicant seeks to amend a Notice of Motion dated 1<sup>st</sup> December 2019 and lodged in court on 3<sup>rd</sup> December 2019, a pleading that is non-existent as there is no motion dated 1<sup>st</sup> December 2019 or lodged in court on 3<sup>rd</sup> December 2019. The respondent submits therefore that the present motion is misconceived and an abuse of court process. He relies on the case of *Raila Amolo Odinga & another vs IEBC* (2017) eKLR.  
  
He further submits that the present motion has been filed 4 years from the time the Memorandum of Appeal was filed, without any explanation for the delay being given. The respondent prays that the motion be dismissed for lack of merit.
7. I have before me an application seeking to amend, as the respondent submits, a non-existent Notice of Motion, there being no motion before this Court dated 1<sup>st</sup> December 2019. I believe what the applicant seeks to do is amend its memorandum of appeal. It, however, has not placed prayers in that respect before this Court. From the rest of the pleadings and submissions, one can make an educated guess with regard to what the applicant seeks. The question, however, is whether the Court should be left in a situation where it has to decipher a party's wishes from the rest of the document, rather than the specific prayers sought. The application is a prime example of extremely negligent drafting on the part of counsel, which I believe the Court should not condone.
8. I will, accordingly, strike out the application as incompetent, but with no order as to costs.

**DATED AND DELIVERED AT KISUMU THIS 27<sup>TH</sup> DAY OF OCTOBER, 2023**

**MUMBI NGUGI**

.....

**JUDGE OF APPEAL**



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

*Signed*

**DEPUTY REGISTRAR**

