



**Mbuthi v Karanja (Civil Application E347 of 2023)
[2023] KECA 1261 (KLR) (13 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1261 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E347 OF 2023
PM GACHOKA, JA
OCTOBER 13, 2023**

BETWEEN

EUNICE MUTHONI MBUTHI APPLICANT

AND

JAMES KINUTHIA KARANJA RESPONDENT

*(An application for leave to amend the Memorandum of Appeal
dated 31st March 2022 pursuant to Rule 44(1) of the Court of Appeal
Rules, 2022 and Article 159(2)(d) of the Constitution of Kenya)*

RULING

1. Before me is the notice of motion dated 19th July 2023 wherein the applicant seeks leave to amend the memorandum of appeal dated 31st March 2022 in respect of Nairobi Civil Appeal No. E218 of 2022. The grounds in support of the application which are elucidated further in the supporting affidavit sworn by Paul Maingi Musyimi are to the effect:
 - a. The Memorandum of Appeal as filed is bereft of a fundamental ground regarding the jurisdiction of the superior Court in pronouncing itself on an issue statutorily reserved for the Land and Environment Court under the *Environment and Land Court Act* (2011) and Article 162 (2)(b) of *the Constitution*.
 - b. The Applicant changed advocates on 27th June 2023 and her erstwhile Advocates omitted and/or overlooked the said fundamental ground on jurisdiction.
 - c. The said omission will deny the Honourable court the opportunity to pronounce itself on the unpleaded issue, thereby prejudicing the Applicant.
 - d. The Applicant has already filed a record of Appeal in Nairobi Civil Appeal No. E218 of 2022 and which Appeal the Deputy Registrar has issued directions on its disposal.



- e. The Amendment is necessary in the interests of Justice as it will assist the Honourable Court settle all the issues in respect to the Appeal.
- f. The Respondent will not be prejudiced in any way since they are yet to file submissions to the Appeal.
2. The applicants have filed submissions dated 2nd October 2023. Their position is that the appellant appointed new advocates, that is Maingi Musyimi & Associates Advocates on 27th June 2023 after the memorandum of appeal had been filed (31st March 2022) and that upon appointment, noted the omission of fundamental ground of appeal and thus moved the Court for leave to amend the appeal. They add that the amendment is necessary as it shall bring to the fore a principal ground of appeal, that is whether the trial court in its determination exceeded its' jurisdiction as provided by statute and that no prejudice will be occasioned to the respondents should the Court grant leave.
3. The Respondent has not filed a replying affidavit or submissions, yet the Court notes that they were served with a hearing notice of the instant application on 26th September 2023.
4. I have considered the application, the supporting affidavit, the documents, and the applicant's submissions. The issue before me is whether I should allow the application so as to enable the applicants to introduce the proposed new ground of appeal. The power the applicants wish me to exercise in their favour is discretionary. As such, there are guidelines upon which I should exercise such judicial discretion. In [*Kenya Hotels Limited v Oriental Commercial Bank Limited*](#) [2018] eKLR, it was observed 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 Iivraj Shab*](#) [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).”
5. The ground of appeal the applicants seek to introduce is to the effect that the Judge erred in fact and law by determining ownership of the suit property and the rights of the disputants thereof without the requisite jurisdiction under Article 162(2)(b) of [*the Constitution*](#). The generality of that ground of appeal is apparent or cannot be ignored. In the [*Kenya Hotels Ltd*](#) case (*supra*), the Court went on to observe:
- “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. It is trite also that applications seeking amendments of pleadings ought to be brought within a reasonable time. In [*Kyalo v Bayusuf Brothers Ltd*](#) Civil Appeal No. 38 of 1983, it was held that applications for amendment of pleadings should only be allowed if they are brought within a



reasonable time because to allow a late amendment would amount to an abuse of the court process. Halsbury's Laws of England, 4th Ed. Vol. 36(1) at paragraph 76, is applicable as it provides 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...”

7. I note that the record of appeal was filed on 31st March 2022 and the application for leave was filed on 19th July 2023 after the new advocates came on record on 27th June 2023. Clearly, there is no delay in the filing of the application.
8. My view, therefore, as was the view of this Court in George Gikubu Mbutia vs. Consolidated Bank of Kenya Ltd & Another (2016) eKLR, is 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.
9. I note that the amendment seeks to introduce a ground on jurisdiction. It has been said time and again that jurisdiction is everything and it is an issue that even a court can raise suo moto. Therefore, I do not see any prejudice will be caused to the respondent. Accordingly, the Notice of Motion dated 19th July 2023 is allowed with costs to abide in the appeal. The applicant is given 14 days to file and serve the amended memorandum of appeal.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF OCTOBER, 2023.

M. GACHOKA CIARB, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

