



Kibera & another v Wainaina & 2 others; Wainaina & another (Interested Parties) (Civil Appeal (Application) 429 of 2019) [2022] KECA 143 (KLR) (18 February 2022) (Ruling)

Neutral citation: [2022] KECA 143 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 429 OF 2019
HM OKWENGU, JA
FEBRUARY 18, 2022**

BETWEEN

PETER NJONJO KIBERA 1ST APPELLANT

AGNES WAIRIMU NJONJO 2ND APPELLANT

AND

STANLEY WAINAINA 1ST RESPONDENT

JACKLINE MWAI 2ND RESPONDENT

CITY COUNCIL OF NAIROBI 3RD RESPONDENT

AND

STANLEY WAINAINA INTERESTED PARTY

CITY COUNCIL OF NAIROBI INTERESTED PARTY

(An application to seek leave to amend the memorandum of appeal dated 2nd September, 2019 and replace the notice of appeal dated 1st July, 2019 with notice of appeal dated 26th October, 2020 brought under Rule 44 of the Court of Appeal Rules and all other enabling provisions of the law in Civil Appeal No. 429 of 2019)

RULING

1. By a notice of motion dated 27th October, 2020, the applicants who are stated as Peter Njonjo Kibera and Agnes Wairimu Njonjo, seek leave to amend the memorandum of appeal dated 2nd September, 2019 and an order to replace the notice of appeal dated 1st July, 2019 with a notice of appeal dated 26th June, 2019 drawn by Muchoki Kang'ata Njenga & Co. Advocates and filed before the superior court on 27th June, 2019.



2. The application is supported by an affidavit sworn by Njuguna Gathacha who depones that he is the applicant and that he is conversant with the case, having represented the appellants during the hearing before the superior court. I take it that he is the advocate for the appellants/applicants. He explains that following the judgment that was delivered in ELC No. 384 of 2020 on 20th June, 2019, the applicants filed two notices of appeal dated 26th June, 2019 and 1st July, 2019 respectively, in which they expressed their intention to appeal the entire judgment.
3. The applicants urge the Court that the notice of appeal dated 1st July, 2019 be expunged from the record, and replaced with the notice of appeal dated 26th June, 2019. The applicants also wish to amend the memorandum of appeal dated 2nd September, 2019, to add 3 grounds that they inadvertently omitted.
4. The 3 grounds are:
 - i. That the learned Judge of the superior court erred in law and fact in making a finding on an issue which had not been pleaded and which issue had not been placed before the learned Judge for determination by any of the parties.
 - ii. That the learned judge of the superior court erred in law and fact by failing to acknowledge that the trial court and the respondents were bound by the pleadings.
 - ii. That the learned judge of the superior court erred in law and fact by failing to ascertain that the respondents' case suffered from latches and hence was incurably defective.
5. The applicants maintain that the amendment is necessary for the determination of the real issues in controversy, and that the respondent will not suffer any prejudice or injustice if the application is allowed.
6. In support of the motion, the applicants have filed written submissions in which they cite *Mungai Njoroge & Anor vs Kiarie Njoroge & Anor* [2019] eKLR; *Central Kenya Limited vs Trust Bank Limited* [2002] 2EA, 365; *Kenya Hotels Limited vs Oriental Commercial Bank Limited* [2018] eKLR, and *John Gakuo & Anor vs County Government of Nairobi & Anor* [2018] eKLR, for the proposition: that a party may be allowed to make amendments necessary for determining the real question in controversy, or to avoid a multiplicity of suits; that the power reserved for the Court under Rule 44(1) of the *Court of Appeal Rules* to amend any documents is a discretionary power that must be exercised judiciously; and that a memorandum of appeal is amenable to amendment.
7. This matter was listed before me on 8th December, 2021 under Rules 53 and 54 of the Court of Appeal Rules, for hearing as a single Judge. Parties had been duly served with hearing notices indicating that the hearing will proceed by way of written submissions and each was given opportunity to file written submissions. Whereas the applicants filed written submissions, none was received from the respondents, nor have the respondents filed any relying affidavit. This means that the application stands unopposed.
8. Upon considering the motion and the authorities cited, I find that the orders sought in terms of amendment of the memorandum of appeal and striking out the notice of appeal dated 1st July, 2019 to replace it with the one dated 26th June, 2019 which is already on record, are necessary in order to facilitate the determination of the real question in controversy between the parties in the appeal. I am also satisfied that the respondents, who in any case have not opposed the motion, will not suffer any prejudice.

Accordingly, I allow the motion and grant the orders as sought.



DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

