



**Lilian Wanja Muthoni Mbogo t/a Sahara Consultants & 5 others v Assets Recovery Agency  
(Civil Appeal (Application) E221 of 2020) [2022] KECA 48 (KLR) (4 February 2022) (Ruling)**

Neutral citation: [2022] KECA 48 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E221 OF 2020  
HM OKWENGU, JA  
FEBRUARY 4, 2022**

**BETWEEN**

**LILIAN WANJA MUTHONI MBOGO T/A SAHARA CONSULTANTS .... 1<sup>ST</sup>  
APPLICANT**

**LIDI HOLDINGS LIMITED ..... 2<sup>ND</sup> APPLICANT**

**LIDI ESTATE LIMITED ..... 3<sup>RD</sup> APPLICANT**

**STEPHANIE MARIGU MBOGO ..... 4<sup>TH</sup> APPLICANT**

**SHEELA WANGARI MBOGO ..... 5<sup>TH</sup> APPLICANT**

**SHALOM MALAIKA KAMWETI ..... 6<sup>TH</sup> APPLICANT**

**AND**

**ASSETS RECOVERY AGENCY ..... RESPONDENT**

*(An application under Section 3A & 3B of the Appellate Jurisdiction Act, and Rule 44 of the Court of Appeal Rules for leave to amend the memorandum of appeal)*

**RULING**

1. The applicants who are the appellants in Civil Appeal No. E221 of 2020 filed a memorandum of appeal on 21st July, 2020 through their advocates who were then on record. They have now changed advocates and have filed a notice of motion dated 21st April, 2021 seeking leave of this Court to file an amended memorandum of appeal. Through grounds stated on the motion and an affidavit sworn by Justus Omolo an advocate in the firm of Sigano and Omolo LLP Advocates, currently representing the applicants, it is explained that based on new instructions given by the applicants to the advocates it is necessary that additional grounds of appeal be brought. The additional grounds are reflected in the draft amended Memorandum of Appeal that they have annexed to their motion. The applicants



- maintain that the intended amendments are material to the proper and substantial determination of the dispute between the parties.
2. A perusal of the draft amended memorandum of appeal reveals that in the new grounds intended to be introduced, the applicants seek inter alia to: challenge the finding of the learned Judge that Section 82 and 90 of the *Proceeds of Crime and Anti Money Laundering Act* (herein POCAMLA) empowered the respondent to institute and continue proceedings against the applicants as it did; question the propriety of the proceedings and orders issued against 5th and 6th applicants who were minors; challenge the issuance of the order of forfeiture of all funds in the appellant's accounts without the learned Judge satisfying herself that they were all proceeds of crime as defined by section 2 of POCAMLA; and fault the application of the legitimacy of source of funds test applicable in criminal proceedings under the Anti- Corruption and Economic Crime Act, which is not intended for civil forfeiture proceedings.
  3. The applicants have filed written submissions in which they urged the Court to exercise its discretion in their favour and grant them leave to amend the memorandum of appeal, as the additional grounds raise issues of law which go into jurisdiction, and if the application is allowed the Court will be able to address and resolve the real issues in controversy between the parties.
  4. In support of the submissions the applicants have cited several authorities including *Uhuru Highway Development Ltd vs Central Bank of Kenya [2002] 1 EA 324*, a Court of Appeal decision (Omolo JA), for the proposition that a memorandum of appeal is not a primary document and subject to the interest of justice is always amenable to amendment, Also cited are two decisions of this Court, *John Gakuo & another vs County Government of Nairobi & another* 2017 eKLR; and *Josiah Ochieng & 2 others trading as Aquiline Agencies vs First National Bank of Chicago [1995] eKLR* in support of the proposition that the purpose of amending a memorandum of appeal is to facilitate the just determination of the real controversy between the parties, and therefore should be allowed provided the application is made in good faith and no injustice will be suffered by the other party.
  5. The respondent opposes the application through a replying affidavit sworn by one of its investigators SSGT Fredrick Musyoki wherein he contends that the proposed amendments are an afterthought since they were not raised before the High Court; that the suit before the High Court was brought under POCAMLA, hence the test applicable are the standard in that Act; that the proceedings were in the nature of Civil forfeiture and not criminal confiscation and as such sections 61 and 65 of POCAMLA that deal with criminal confiscation do not apply; that the applicant has failed to comply with the directions of this Court to file submissions in 30 days, but has instead filed this application, which should be dismissed.
  6. The respondent has also filed written submissions in which it argues that the proposed amendment challenging the powers of the respondent are baseless; that the issue of the competence of the suit against the 5th and 6th respondent was never raised in the High Court and thus the proposed amendments in this regard are an afterthought. The respondent relied on *Uhuru Highway Development Ltd vs Central Bank of Kenya (supra)*, submitting that the applicants were trying to introduce a totally new ground of appeal which was not pleaded or determined by the trial court and the application for amendment should therefore not be allowed. Surprisingly the respondent concludes its submissions by urging that the application dated 12th April, 2021 has merit and should therefore be allowed as prayed. This is surprising because in the body of the submissions the respondent has actually referred to the applicant's motion as dated 12th April, 2021 and has as stated above opposed the motion.



7. Rule 44 of the *Court Rules* that deal with applications for leave to amend documents states as follows:
- “(1) Whenever a formal application is made to the Court for leave to amend any document, the amendment for which leave is sought shall be set out in writing and, if practicable, lodged with the Registrar and served on the respondent before the hearing of the application or, if that is not practicable, handed to the Court and to the respondent at the time of the hearing.
2. Where the Court gives leave for the amendment of any document, whether on a formal or an informal application, the amendment shall be made or an amended version of the document be lodged within such time as the Court when giving leave may specify and if no time is so specified then within forty-eight hours of the giving of leave and on failure to comply with the requirements of this sub-rule, the leave so given shall determine.”
8. As stated by this Court in *Kenya Hotels Limited vs Oriental Commercial Bank Limited*(supra) which was cited by the respondent, the power to amend a document under Rule 44 of the Court Rules is discretionary. This means that the Court must exercise the power of amendment judiciously by granting leave to amend only where it is in the interest of justice based on the circumstances before the Court. In particular, the Court has to take into account the nature and extent of the amendment, and whether it will assist in the just determination of the real questions in dispute between the parties. On his part the applicants must demonstrate that the application is brought in good faith and also place before the Court facts that would justify the court acting in its favour.
9. The main issue for consideration in this application is therefore, whether the above parameters have been satisfied such as to justify the exercise of the Court’s discretion in granting leave for the amendment of the memorandum of appeal as requested.
10. Having carefully perused the application, the contending affidavit and the cited authorities, I find that the new issues intended to be raised in the amended memorandum are all issues of law anchored on the findings that were made by the learned Judge in the judgment subject of the appeal. They basically question the legality of the findings and in some instance the jurisdiction of the learned Judge to grant the orders. As has been said many times before jurisdiction is everything and a court cannot acquire jurisdiction by consent of the parties or judicial craft, and if I may add ‘judicial omission.’ Therefore, though the issue regarding jurisdiction was not raised in the High Court, it is an issue that can be raised at any time and one that needs to be interrogated by this Court.
11. It would be premature at this stage to go into the merit of any of the grounds raised. It suffices that the issues raised are not frivolous. In my view addressing these issues during the hearing of the appeal would help the Court in determining the real controversy between the parties. Moreover, there is no evidence of any bad faith on the part of the applicants, to the contrary it is apparent that the change of advocates has helped them look at things differently and has contributed to this move. I also take note that the respondent will not suffer any prejudice as the appeal is still in its initial stages.
12. For the above stated reasons I am satisfied that this is an appropriate case to grant leave for the applicants to amend their memorandum of appeal. Accordingly, I grant prayer 2 of the applicants’ notice of motion dated 21st April, 2021 and order that the amended memorandum of appeal be filed within 14 days from today. In the circumstances of this case it is only appropriate that costs of the motion are awarded to the respondent in any event. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF FEBRUARY, 2022.**



**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

