



**Wapang'ana v Equity Bank Limited & another (Civil Appeal
107 of 2016) [2022] KECA 814 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KECA 814 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 107 OF 2016
PO KIAGE, K M'INOTI & M NGUGI, JJA
MAY 27, 2022**

BETWEEN

**ERICK KIMINGICHI WAPANG'ANA T/A MAGHARIBI
LIMITED APPLICANT**

AND

**EQUITY BANK LIMITED 1ST RESPONDENT
ANTIQUA AUCTION AGENCIES 2ND RESPONDENT**

*(An application for leave to amend the memorandum of appeal
arising from the ruling of the High Court of Kenya at Bungoma
(Mukunya, J.) dated 27th September 2016 in HCCC NO. 91 OF 2011)*

RULING

1. By the motion dated 26th June, 2019 and brought under Rule 44 of the Rules of this Court, the applicant seeks in the main, leave to amend the memorandum of appeal dated 28th November, 2016 and lodged in this Court on 5th December, 2016. The appeal is against the decision of the High Court declining to review and set aside its orders dismissing the applicant's suit for want of prosecution, and disallowing the prayer for reinstatement of injunctive orders which had expired and not renewed.
2. The motion is founded on grounds appearing on its face including that; the applicant filed the appeal in person without assistance of counsel thus omitting germane issues; the grounds are of fundamental and decisive character as they inter alia relate to jurisdictional questions; the application is made without undue delay as the appeal is yet to be listed for hearing.
3. The application is supported by the affidavit of the applicant sworn on 26th June, 2019 narrating the eight (8) grounds of appeal that the applicant seeks to introduce. In essence the applicant seeks to replace the entire memorandum of appeal with a new one.



4. In written submissions dated 16th September 2021 and lodged by the law firm of Wambua Kigamwa & Company Advocates for the applicant, it is proffered that the learned judge had no jurisdiction to deal with the matter since he was a judge of the Environment and Land Court, yet the suit involved a commercial dispute over the realization of security by a chargee. Counsel emphasizes the role of the Environment and Land Court as being one of dealing with matters connected to the use of land only, citing the case of *Co-operative Bank of Kenya Limited vs Patrick Njuguna & 5 others* [2017] eKLR. While conceding that the issue of jurisdiction was never raised at the trial court, counsel deposes that the same can still be raised at first instance at the appellate court, invoking *Floriculture International Limited -vs- Central Kenya Limited & 3 others* [1995] eKLR.
5. Counsel further contends that service of the notice of dismissal of the matter under Order 17 rule 2(1) of the *Civil Procedure Rules*, 2010 was not effected upon the appellant's advocate as required by Order 48 rule 2 of the same rules. Consequently, submits counsel, where an order is made without service upon the affected person(s), the court has the inherent jurisdiction to set aside its own order. The case of *Ali Bin Khamis -vs- Salim Bin Khamis Kirobe & others* [1956] 1 EA 195 was relied on for this assertion. On the question of delay in prosecuting the suit, counsel faults the learned Judge for failing to appreciate the explanation given by the applicant that the delay was occasioned by his advocate, which mistake should have been excused.
6. In opposing the application, the law firm of Wetangula Adan & Makokha filed written submissions dated 20th September, 2021 contending that since it was the applicant who moved the Environment and Land Court, he could not again turn around and claim that the said court had no jurisdiction. Counsel further vilifies the applicant for applying for review of the decision declaring the injunctive orders as lapsed when this Court had already heard an appeal on the matter and dismissed it. According to counsel, the applicant failed to give a plausible reason for its failure to move the court for four (4) years, hence the trial court was right in dismissing the suit for want of prosecution. Further, that the appeal is incompetent and calculated to delay its statutory power of sale. Counsel urges this Court to dismiss the application with costs.
7. We have carefully considered the application and the submissions by learned counsel. Ideally, pursuant to Rule 53 of the Court of Appeal Rules, this application should have been heard by a single judge. However, a single judge acts for the Court and we believe no prejudice will be occasioned to either party by a full Court hearing and determining the matter. In any event, in accord with the proviso to Rule 53 (1), applications heard by a single judge can be heard by a full Court.
8. The power donated by Rule 44 of this Court's Rules is discretionary, to be exercised judiciously. The principles that we must consider in the exercise of the same were thus stated in *Patriotic Guards Limited -vs- James Kipchirchir Sambu* [2018] eKLR;

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”
9. Ordinarily, a court is enjoined to allow amendment of pleadings any time before judgment. (See *George Gikubu Mbutia -vs- Consolidated Bank of Kenya Ltd & another* [2016] eKLR). However, where



circumstances do demand the Court may decline to exercise its discretion to allow such amendments as elaborated in *John Mugambi & Mugambi & Company Advocates -vs- Kiama Wangai* [2021] eKLR:

“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”.

10. The applicant proposes to amend the memorandum of appeal in its entirety. In particular, he introduces a new ground, to wit, that the learned Judge had no jurisdiction to handle the matter. While we note the applicant’s submission that he filed the appeal in person without the benefit of counsel hence omitting some germane issues, we particularly take cognizance that the suit at the trial court was at the instance of the applicant, and with no jurisdiction issue arising. It therefore puzzles us why the applicant would raise the jurisdiction issue at all. This is a clear abuse of the court process. Moreover, it is evident that the proposed change is material and substantial with the effect that the respondent is likely to be prejudiced.
11. In the result, we find the application devoid of merit and dismiss it with costs.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF MAY, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

