



REPUBLIC OF KENYA



KENYA LAW
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**Okeno & 2 others v Yhap (Application 27 of 2020)
[2022] KECA 515 (KLR) (6 May 2022) (Ruling)**

Neutral citation: [2022] KECA 515 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
APPLICATION 27 OF 2020**

JW LESSIT, JA

MAY 6, 2022

BETWEEN

ERICK OKENO 1ST APPLICANT

JUDITH ZEMBI OKENO 2ND APPLICANT

TONY OKENO 3RD APPLICANT

AND

JAMES OVID SHUGARS YHAP RESPONDENT

*(Being an appeal against the whole of the judgment arising from
the judgment of the High Court at Mombasa delivered by Lady
Justice Thande, J. on the 9th October, 2020 in HCCC No. 2 of 2014)*

RULING

1. The Applicants have approached this court by way of Motion dated 14th September 2021, brought pursuant to Sections 42, 44 (1) and 47 of the *Court of Appeal Rules*, Sections 3A and 3B of the *Appellate Jurisdiction Act*. They seek in the main leave to amend the Grounds of Appeal and the Memorandum of Appeal dated 9th December 2020 and to file further Supplementary Record of Appeal. They also seek costs of the application be granted.
2. The application is premised upon the affidavit of Gerald Andego Magani, the counsel for the Applicants and grounds on the face of the Motion. In brief, Mr. Magani deposes that he took the conduct of the matter on behalf of the Appellants. That upon perusing the Memorandum of Appeal he found it necessary to amend the Grounds of Appeal and file a Supplementary Record of Appeal, for the just and expeditious disposal of the appeal. He has annexed a copy of the Intended amendment to the Memorandum of Appeal in his affidavit in support of the application. He deposes that the amendment shall not prejudice any party to the proceedings.



3. When this application was called out for virtual hearing on the 9th February 2022, Mr. A. G. Magani learned counsel for the Applicants was present and ready to prosecute his application. The firm of Odhiambo S.E. & Co. Advocates, learned counsel for the Respondent was not present despite service upon the firm of the hearing notice on 19th January 2022 and 2nd February 2022.
4. Mr. Magani in his brief submissions relied on his filed written submissions and the list of authorities. Counsel urged that he took over the matter from the previous advocate on record (Oduol Advocate) who had already filed the Memorandum of Appeal. He urged that what is sought in the amendment is to include certain important matters that were left out from the Memorandum as demonstrated in the annexed draft Memorandum of Appeal.
5. Briefly, the facts giving rise to this application are that James Ovid Shugars Yhap, the respondent herein filed a plaint in the High Court in Civil Suit No.2 of 2014 seeking;
 - a. A declaration that he is the owner of the suit properties and entitled to household and personal belongings in the house situate on Title No. CR 51563 (the suit property),
 - b. An order for injunction restraining the appellants from occupying the suit property, an order of injunction compelling the appellants to hand over to the respondent all motor vehicles, moveable property and documents belonging to the respondent.
 - c. Damages for trespass
 - d. Refund of Kshs. 40,180 and compensation in the sum of Kshs. 2,000/- per day and utility bills from 3rd April 2014 until the appellants give vacant possession of the house on Plot 5813.
6. The respondent's claim was that he and one Rosemary Okeno (deceased) were married under Luo customary law in 2000, and lived together as husband and wife in both Kenya and in the United Kingdom. Together, they purchased several properties including the suit property. On 28th March 2014 the deceased died at their home in the suit property while the Respondent was away in London. The Respondent's case was that he travelled back to Kenya, but the Appellants who had taken over and occupied the suit property, denied him access to the matrimonial home, title documents to the suit property and the vehicles at the suit property. They also excluded the Respondent from the funeral arrangements and burial of the deceased who was buried on 11th April 2014, thereby aggravating his grief for the loss of his wife.
7. The Appellants in their defence denied the Respondent's assertions and claimed that in 2000 the deceased was married to one Charles Ayodele. They contended that the properties listed, including the suit property were solely purchased by the deceased; that the Respondent conned the deceased, who was at the time suffering from cancer, into allowing him to hold 40% of the suit property; that the Respondent had no interest in the motor vehicles or moveable property as all were solely owned by the deceased. The Appellants raised a preliminary point that the Respondent had no legal standing to institute the suit not having taken out the requisite grant of representation.
8. Upon considering both rival arguments, the High Court singled out the questions for its determination being; whether the Respondent had the locus standi to institute the suit; whether there was a marriage between the Respondent and the deceased; and, whether the Respondent was entitled to the orders sought. In arriving at its findings, the High Court observed that as the registered owner of the suit property, the Respondent had a right and necessary standing to file the suit against the appellants; that the deceased and the Respondent were in a relationship and did live together in the UK and in Kenya as there was evidence that her marriage to Charles Ayodele was dissolved in 2004. As such, the Appellants had no right to interfere with the Respondent's ownership, possession and



peaceful enjoyment of the suit property. The court however limited itself to the orders relating to the suit property and deemed those falling outside the same for succession proceedings relating to the estate of the deceased.

9. In the end the High Court ordered the Appellants to hand over vacant possession of Plot No. 5813 to the Respondent and that the Appellants were liable in damages to the Respondent for trespass in the amount of Kshs. 1,200,000/- together with interest from the date of the judgement until payment in full. Aggrieved by those findings, the Appellants have preferred this appeal on 19 grounds. I will get back to them later on in this ruling.
10. I have considered this application, the affidavit in support and the submissions of Mr. Magani for the Applicant. There was no response from the Respondent. The application is therefore unopposed. The grounds in support of the application, and reiterated in the Applicants' written submissions and a supporting affidavit sworn by counsel for the applicants Gerald Andego Magani are that: the Memorandum of Appeal is amenable to amendment; that no new or inconsistent cause of action has been introduced by the amendments, and no prejudice will be occasioned to the Respondent, in the event the orders sought are granted. The Appellants relied on the cases of *Uhuru Highway Development Limited v. Central Bank of Kenya (2002) 1EA 314* and *George Gikubu Mbutia v. Consolidated Bank of Kenya Ltd & Another(2014) eKLR* to support its arguments.
11. The principles that inform applications of this nature were espoused in the case of *R v AG & Another (2004) eKLR* where this Court stated that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and there is no injustice if the other party can be compensated by costs.
12. *Halsbury's Laws of England, 4th Ed. Vol. 36(1) at paragraph 76*, is applicable as it provides *inter alia*;
 - i. "...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..."
13. In *Kenya Hotels Limited v Oriental Commercial Bank Limited[2018] eKLR*, it was observed that;
 - i. "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 Jivraj Shah [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*)."
14. In the *Kenya Hotels Ltd* case (supra), the court went on to observe;
 - i. "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.”

15. 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.
16. The amendments sought to be made to the Memorandum of Appeal are:
 - i. Paragraph 1, 2, 3 are minor amendments in the nature of clarity which do not introduce anything new;
 - ii. Paragraph 4 is amended to make it clear that the Learned Judge erred in Law and fact by arriving at a decision that the defendants were inter-meddlers of the estate of the deceased yet they had obtained letters of administration;
 - iii. Paragraph 5, 8, 9, 13 are crossed, thus doing away with them;
 - iv. Paragraph 6 is amended to change the pleaded ground that the learned Judge erred for finding the Defendants trespassers, to read the Judge erred for arriving at a decision that the Defendants actions amounted to trespass when they had legal standing to be on the property;
 - iv. Paragraph 7 and 10 were not amended;
 - iv. Paragraph 11 is amended to specify in whose favour damages complained of were ordered;
 - iv. Paragraph 12 is amended to add the words irrational, unreasonable and unjustified as being the Judge’s order to release the property to the Plaintiff (Respondent) while it was co-owned with the deceased;
 - iv. Paragraph 14 is amended to specify that the Judge failed to properly evaluate and or analyze the case;
 - iv. Paragraph 15 Paragraph adds fact the Plaintiff and Deceased co-owned the property at the ratio of 40-60 respectively;
 - iv. Paragraph 16 is amended to specify that the reason why the learned Judge erred on the issue of survivorship was for failing to find it inapplicable;
 - xi. Paragraph 17 specifies that the learned Judge took into account irrelevant considerations;
 - xi. Paragraph 18 adds that the learned Judge exuded bias against the Defendants (Appellants);
 - xi. Paragraph 19 is a new paragraph to the effect that the Learned Judge failed to consider and evaluate the law relating to ownership of real property in Kenya thus arriving at a wrong decision.
17. As shown above, the guiding principles when considering an application to amend any document is to be satisfied that the document proposed to be amended is amenable to amendment. In that regard, a memorandum of appeal is a document amenable to amendment, just like any other pleading. I am satisfied that the application is in that respect properly before the court.
18. The other principle is that the power to allow amendment of any document provided under Rule 44(1) of the Court of Appeal Rules, is a discretionary power and, like all judicial discretion must be exercised judiciously and upon reason. Whether to allow an amendment will also depend on the nature and



extent of the amendment. The nature of the amendments sought, as demonstrated in the summary I have given herein above, in respect of paragraphs 4, 11, 12, 14, and 17 are intended to bring clarity and particularity to the matters pleaded. I am satisfied that for the new grounds introduced in paragraphs 6, 16, 18 and 19, the same are properly founded on the pleadings of the parties and the evidence that was adduced and canvassed before the trial court, which it is alleged the trial judge ignored or misapplied. For those not amended, and those crossed/taken out, they do not affect anything in my view.

19. I also considered whether the application was brought within a reasonable time. The appeal was filed on 9th December, 2020 and the application to amend filed on 14th September, 2021. Also filed simultaneously with the application for leave to amend and file Further Record of Appeal, was a Notice of change of advocates for the Applicants/Appellants, from Oduol & Co. Advocates to Mr. Magani advocate, dated the same day. I find that the current advocate for the Applicants acted with speed to bring this application, the moment counsel was seized of the appeal.
20. Having considered this application, I find that no new or inconsistent cause of action has been introduced, and that no prejudice or injustice will be occasioned to the Respondent if the application is allowed. The application was brought in good time, in all the circumstances of the case. I therefore find merit in the application dated 14th September, 2021.
21. In the result, leave to amend the Grounds of Appeal and the Memorandum of Appeal dated 9th December 2020 is granted to the Applicants as per the annexed Draft Memorandum of Appeal. Leave is also granted to the Applicants to file Further Supplementary Record of Appeal. Both documents be filed and served within 21 days from the date of this ruling.
22. The Respondent did not file any responses. I order that costs of this application be in the cause.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF MAY 2022.

LESIT, JA

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

