



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

EMP v FNN (Civil Application E035 of 2022) [2022] KECA 981 (KLR) (29 July 2022) (Ruling)

Neutral citation: [2022] KECA 981 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E035 OF 2022
P NYAMWEYA, JA
JULY 29, 2022

BETWEEN

EMP APPLICANT

AND

FNN RESPONDENT

*(An application for leave to amend the application
in Mombasa Civil Application No. 55 of 2020)*

RULING

1. On 6th August 2020, EMP, the Appellant herein, filed Mombasa Civil Application No 55 of 2020 : EMP vs FNM, seeking extension of time to file a Memorandum of Appeal and Record of Appeal out of time, against the judgment delivered by the High Court on 6th May 2020 in Divorce Cause No. 1 of 2015. The Appellant has now moved this Court by the instant application, being a Notice of Motion application dated 27th May 2022, seeking leave to amend Mombasa Civil Application No 55 of 2020. The amendment that is proposed thereto, as indicated in an attached draft of the amended Notice of Motion, is to replace the phrases “memorandum of appeal and record of appeal” in the said application with that of “Notice of Appeal”, and to introduce new ground. The effect is that that Mombasa Civil Application No 55 of 2020 would now seek extension of time to file a Notice of Appeal.
2. The application is supported by an affidavit sworn on 27th May 2022 by the Appellant, who averred that her previous advocates on record were not present when the impugned judgment was delivered virtually on 5th May 2020 because of internet connectivity challenges, and were not aware of the judgment until 25th May 2020 when they communicated the same to the Appellant. Consequently, that she, on 27th May 2020, instructed the said advocates to file the appeal against it, who then filed a Notice of Appeal on 28th May 2020 but the same was out of time. Subsequently, that the advocates filed Mombasa Civil Application No. 55 of 2020 for extension of time, but did not include a prayer for the extension of time for the Notice of Appeal, which was due to an error and inadvertence, and



was highly regretted. The Appellant averred that the delay in filing the Notice of Appeal was only 11 days from 5th May 2020, was not unreasonable neither was it inordinate, and was explained.

3. Further, that it is necessary to amend Mombasa Civil Application No. 55 of 2020 to include the extension of time for the Notice of Appeal as the said application has been fixed for hearing, and the intended Appeal concerned matrimonial properties which the Appellant stands to be permanently deprived of, and is therefore weighty, meritorious and with high chances of success. Lastly, that the Appellant's constitutional right of appeal was at stake and would be lost unless the application was allowed, and her former advocate's errors and mistake should not be visited upon her. Additionally, that the Respondent would not be prejudiced with the proposed amendment, and any inconvenience could be catered for by costs.
4. FNN, the Respondent herein, filed a lengthy replying affidavit sworn on 8th June 2022 in opposition to the application. He deponed therein that the application failed to meet the conditions required for its success, and in particular that the application is made in bad faith for reasons that: judgment was delivered upon notification and the Applicant's advocate logged in and out of the Court session; there was no evidence was tendered to the Court to show that the Appellant's previous firm of advocates applied for a copy of the judgment upon its delivery; Mombasa Civil Application No. 55 of 2020 which the Appellant seeks to amend was filed on 6th August 2020 long after the Respondent had filed an application to strike out the Notice of Appeal on 29th June 2020 in Miscellaneous Civil Application No 49 of 2020, where both parties have filed written submissions and is pending hearing before this Court; that there had been a delay in filing this present application as the Appellant's advocates were aware of the error in the Notice of Appeal arising from the aforementioned application by the Respondent for its striking out; the Respondent had not been served with a letter requesting for typed proceedings and judgment by the Applicant's advocates therefore there was no intention to prosecute any appeal; the application was misleading as to the issue of representation as all along the firm of M/s Mutisya and Associates Advocates had represented the Applicant, and the representation of the Applicant by three different firms of advocates filing different applications before different Courts which the Respondent detailed, is an abuse of the Court process.
5. Additionally, that the application sought to introduce a new factor in the case as the Respondent had submitted that there was no competent appeal in his response to Mombasa Civil Application No 55 of 2020 and the application for amendment was meant to defeat his response. Further, if the amendment was allowed, it would change the application into one of a substantially different character as the original application presupposed a competent appeal before the Court, while the current amendment sought to introduce a new document that is the Notice of Appeal which initiates an appeal. Lastly, that the application would cause the Respondent great injustice which would be prejudicial, as execution of the judgment was complete and the Appellant had been evicted from the matrimonial properties, and the Respondent made reference to attempts by the Appellant to access his house, and complaints he had made in this regard. Therefore, that the Appellant had not come to Court with clean hands and did not deserve the exercise of this Court's discretion. In addition, that no amount of costs would compensate the injustices to be cause to the Respondent as there was no arguable appeal and the application was meant to deny him the enjoyment of the fruits of his judgment.
6. This Court held a virtual hearing of the Appellant's application for amendment on 6th July 2022, and learned counsel Mr. S M. Mutisya, appeared for the Appellant, while learned counsel Ms. Pauline Osino appeared for the Respondent. Mr. Mutisya relied on his written submissions dated 6th June 2022, reiterated the averments made in the application. Ms. Osino in highlighting her submissions cited the holding in Rubina Ahmed & 3 Others vs Guardian Bank Ltd (Sued in its capacity as a



- successor in title to First National Finance Bank) [2019] eKLR. that an amendment would not be allowed if it would change the character of the matter.
7. Further, that an applicant should not be allowed to reframe the case, and reiterated that a Notice of Appeal initiates an appeal and the amendment sought would reframe the entire appeal. Additionally, that the Appellant was pleading to matters of fact in the proposed amendment that should be in an affidavit. Lastly, the counsel urged that the doctrine of laches was applicable since the conduct of the Applicant showed that she had sufficient representation and adequate notice, and made reference to Rule 82 (1) of the Court of Appeal Rules, 2010 to submitted that the Respondent was not served with a letter requesting for proceedings within the set timelines. In conclusion, it was urged that the application was brought in bad faith as demonstrated in the Respondent's replying affidavit, and would prejudice the Respondent.
 8. In reply, Mr. Mutisya contended that the Respondent's counsel was arguing the amended application, and would have an opportunity to do so if the instant application was allowed. Therefore, that no reason had been advanced by the Respondent to deny leave for amendment, and there was no demonstration of the substantive prejudice that would be suffered by the Respondent that could not be compensated by costs. Further that the "spirit" of *the Constitution* was to have the Appellant's appeal heard on merit, and. Mr. Mutisya proposed that the amended application for extension of time to file the Notice of Appeal could be heard together with the Respondent's application to strike out the Notice of Appeal.
 9. The issue that presents for determination is whether this Court should grant the Appellant leave to amend Mombasa Civil Application No. 55 of 2020. The principles that guide an application for amendment were ably stated in *John Gakuo & Another vs County Government of Nairobi & Another* [2017] eKLR (Karanja JA) and in *Rubina Ahmed & 3 others v Guardian Bank Ltd (Sued in its capacity as a successor in Title to First National Finance Bank Ltd)* [2019] eKLR (Waki, Gatembu & Odek JJ.A) In this regard, I am guided by the emphasis in the said decisions that the purpose of an amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and 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.
 10. The general applicable principle therefore, is that amendments should be allowed liberally, if they can be made without injustice to the other side which cannot be compensated by costs. However, before exercising this jurisdiction, the court needs to be satisfied firstly, that the application is made in good faith. In the present application, the Respondent has contended that the application is made in bad faith, principally arising from the fact that he has filed an application on 29th June 2020 in Miscellaneous Civil Application No 49 of 2020 seeking to strike out the Notice of Appeal for the same reasons sought to be cured by the proposed amendments. The Respondent also alleges that the Appellant is culpable of material delay, having been aware of the defects in the Notice of Appeal from over two years ago, when the application to strike it out was made.
 11. It is not in dispute in this regard that the Appellant's previous advocates did on 4th June 2020 lodge a Notice of Appeal dated 28th May 2020 out of time. While leave can be granted amend a pleading to repair an omission due to negligence or error in filing a notice of appeal in time, this is subject to the amendment not causing an injustice or prejudice to the other side as noted hereinabove. In my view, the arguments the Respondents raises as regards the motive of the Appellant in seeking the proposed amendments are valid, as firstly, the Appellant does not contest that there was an existing application to strike out the Notice of Appeal for the reasons that are the subject of the proposed amendments, and the bringing of the instant application at a time when, as demonstrated by the Respondent, the application for striking out of the Notice of Appeal is for all intents and purposes ready for hearing,



points to an attempt to steal a march on the Respondent. This in my view, is a prejudice that is not quantifiable and capable of being addressed by cost.

12. Secondly, while the Court will not refuse leave simply because the proposed amendments introduce a new case or new ground of defence, the Court needs to be satisfied that the amendment will not change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action. The Respondent has emphasised that Mombasa Civil Application No 55 of 2020 was predicated on there being a competent appeal in existence, yet the proposed amendments seek to cure the defect of there being no competent appeal in place. I am of the view that in the circumstances of this application, where the competency of the Appellant's appeal is the subject of another pending application by the Respondent, such an amendment would substantially change the character of the respective parties' cases. In addition, as noted by the Respondent's counsel, the proposed amendments introduce averments of facts in the pleadings, which ought to be in an affidavit, and lastly, the Appellant is not precluded from filing a separate application for extension of time to file the Notice of Appeal.
13. Arising from these reasons I am constrained to decline the leave sought in the Appellant's application dated 27th May 2022, which application is hereby dismissed with costs to the Respondent.
14. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 29TH DAY OF JULY 2022.

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed

DEPUTY REGISTRAR

