



REPUBLIC OF KENYA



**KENYA LAW**  
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**Jobling v Firearms Licensing Board (Civil Application E69 of 2022)  
[2022] KECA 1170 (KLR) (28 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1170 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E69 OF 2022  
JM MATIVO, JA  
OCTOBER 28, 2022**

**BETWEEN**

**STEPHEN VINCENT JOBLING ..... APPLICANT**

**AND**

**FIREARMS LICENSING BOARD ..... RESPONDENT**

*(Being an application for extension of time to file and serve written submissions and application for leave to amend the Memorandum of Appeal filed in Civil Appeal No. E037 of 2021 which was an appeal against the judgment made by the High Court at Nairobi (Korir J) dated 19th December 2020 in Nairobi High Court Miscellaneous Application Number 202 of 2019) in HCC MISC. APP. No. 202 of 2019)*

**RULING**

1. Vide the application dated March 9, 2022, the appellant/applicant prays for:- (a) extension of time to file his submissions; (b) leave to amend his memorandum of appeal; (c) alternatively, the memorandum of appeal dated March 9, 2022 annexed to the application deemed to be properly on record; (d) the costs of the application be in the cause.
2. The grounds in support of the application are that the key ground of his appeal which is the doctrine of exhaustion has not been properly brought out, hence the need for the amendment; that the application has been filed timeously and that it is in the interests of justice that the application be allowed.
3. The above grounds are explicated in his supporting affidavit dated March 9, 2022 annexed thereto. The salient points are that on February 7, 2022, the court directed parties to file submissions within 30 days, but his advocate advised that there was need to amend the memorandum of appeal; that the appeal raises weighty issues of public importance; and that a mistake of an advocate should not be visited on the party.



4. On record are two affidavits of service dated March 15, 2022 and April 9, 2022 showing the honorable Attorney General was served. However, they never filed a reply to the application or submissions. Also, the hearing notice was served upon both parties by the court by way of e-mail.
5. Counsel for the applicant cited *Kanawal Sarjit Singh Dhim v Keshavjivraj Shah* [2010] e KLR which held that “the power reserved for the court by rule 44(1) of the *Court of Appeal Rules* (now Rule 46) 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 humor, or fancy.” He submitted that a memorandum of appeal is a pleading like any other pleading and the rules that apply to amendment of pleadings also apply to a Memorandum of Appeal. To buttress his argument, he relied on *John Gakuo & another v Count Government of Nairobi & another* [2017] e KLR. He also relied on *Kenya Hotels Limited v Oriental Commercial Bank Limited* [2018] which held *inter-alia* that “a memorandum of appeal, is a document that is rightly amenable to amendment.” Additionally, counsel relied on *Uburu Highway Development Ltd v Central Bank of Kenya* [2002] 1 EA 314 which held that “a Memorandum of Appeal, subject to the interests of justice, is always amenable to amendment.” Lastly, counsel cited *Eastern Bakery v Castelino* [1958] EA 461 in which Sir Kenneth O’connor P stated as follows: -

“...It will be sufficient, for the purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.... The court will not refuse leave to allow an amendment simply because it introduces a new case.... But there is no power to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject matter of the suit... The court will refuse leave to amend where the amendment would change the action into one of a substantially different character; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g. by depriving him of a defence of limitation accrued since the issue of the writ.”

6. The primary object of allowing amendment is “to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done. The foregoing should be contrasted with the court’s inclination to disallow the amendment if it is not made in good faith or it is done with the sole purpose of prejudicing the defendant or in cases where obvious injustice to the other party would result if the amendment is allowed.
7. Amendments of pleadings are provided for under rule 46 (1) of the *Court of Appeal Rules, 2022* which provides: -

46. Applications for leave to amend

1. Whenever a formal application is made to the court for leave to amend a document, the amendment for which leave is sought shall be set out in writing and—
  - a. if practicable, lodged with the Registrar and served on the respondent before the hearing of the application; or
  - b. if it is not practicable to lodge the document with the registrar, handed to the court and to the respondent at the time of the hearing.
2. Where the court gives leave for the amendment of a 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. The court's approach in dealing with amendments has always been that an application for amendment should be allowed unless the application to amend is mala fides or it will prejudice the other party. The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fides or unless such amendment would cause an injustice to the other side which cannot be compensated by costs or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed. The court has a discretion to grant or refuse the amendment which must be exercised judicially. The court is inclined to grant the amendment where it is made in good faith and no prejudice will be caused to the other party.
9. The decision whether to grant or refuse an application to amend a pleading rest in the discretion of the court. The attainment of justice between the parties is not to be obstructed by a too rigid consideration. The object of pleadings is to define the issues: and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion. The primary principle appears to be that an amendment will be allowed in order to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done. The court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the court is to do justice between the parties.
10. The traditional approach in relation to applications for amendment of pleadings was summarized in *Cobbold v Greenwich LBC* {1999} EWCA Civ 2074 as follows: -

“[a]mendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient management of justice is not significantly harmed.”
11. In *Abdul Karim Khan v Mohamed Roshan* [1965] EA.289 (C.A) the court laid down the principle that the courts will not permit an amendment that is inconsistent with original pleading and entirely alters the nature of the defence or plaint. In *Ochieng and others v First National Bank of Chicago* Civil Appeal Number 147 of 1991 the Court of Appeal set out the principles under which courts may grant leave to amend the pleadings as follows: -
  - a. the power of the court to allow amendments is intended to determine the true substantive merits of the case;
  - b. the amendments should be timeously applied for;
  - c. power to amend can be exercised by the court at any stage of the proceedings;
  - d. that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;
  - e. the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.
12. The main issue for consideration in this application is therefore, whether the instant application falls within the parameters set out in the above cited decisions to justify the exercise of this court's discretion



in granting leave for the amendment of the Memorandum of Appeal as requested. I am satisfied that the intended amendment meets the requisite considerations. As for the prayer to for extension of time to file submissions, I find and hold that the said prayer is merited. Accordingly, I allow the applicant's application dated March 9, 2022 and order as follows: -

- a. That the applicant be and is hereby granted leave to file an amended memorandum of appeal in terms of the draft memorandum of appeal annexed to the application and extension of time to file submissions.
- b. That the amended memorandum of appeal and the submissions shall be filed and served within 14 days from the date of this order.
- c. Costs in the cause.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER, 2022.**

.....

**J. MATIVO**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

