



**Charo v Kenya Airways Authority (Civil Application 32 of 2021)
[2022] KECA 1316 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1316 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 32 OF 2021
GV ODUNGA, JA
DECEMBER 2, 2022**

BETWEEN

JAPHET NOTI CHARO APPLICANT

AND

KENYA AIRWAYS AUTHORITY RESPONDENT

(Application for leave to amend the memorandum of appeal in an Appeal from the decision of the Environment and Land Court (Mr Justice J. Olola) delivered on 14.3.2019 at Malindi in Malindi ELC Case No. 10 of 2008)

RULING

1. By a motion on notice dated October 26, 2021, the applicant herein, Japhet Noti Charo, seeks an order that he be granted leave to amend his memorandum of appeal and for an order that the costs of and incidental to this application abide the result of the said appeal. The grounds upon which the said application was brought was that through an inadvertent error, the respondent is described as an authority instead of a limited liability company and further that the appellant was also minded to add the ground that the plaintiff before the court below did not prove its case and to correct the typographical errors in the earlier memorandum of appeal.
2. The application was supported by an affidavit sworn by the applicant in which he deposed that he noticed that in the memorandum of appeal, the respondent (original plaintiff) was inadvertently misdescribed as an authority instead of a limited liability company. He therefore sought leave of court to amend the memorandum of appeal to replace the word 'authority' with 'limited' immediately after the words 'Kenya Airways'.
3. Apart from that, he sought that leave be granted to add one more ground to appeal that the plaintiff in the court below did not prove or make out a case against the defendant.



4. It was the applicant's view that the proposed amendments would help clarify and sharpen the record of appeal and correct the misdescription explained above. In his view, the said amendments would not prejudice the respondent in any way.
5. The said application was hinged on rule 44 (1) of the *Court of Appeal Rules* and in support of his submissions, the applicant relied on the case of *John Gakuo & Another versus County Government of Nairobi & another Civil Appeal (Application) No 201 of 2016*.
6. In opposing the application, the named respondent relied on a replying affidavit sworn by Laura Wandera the senior legal counsel at Kenya Airways PLC (formerly Kenya Airways Limited) (hereinafter referred to as 'the Company'), the plaintiff in Malindi ELC Case No 10 of 2008, Kenya Airways Limited vs Japhet Noti Charo Shutu. She averred that the company is not an authority established under any statute or order but is a public limited company registered as such under the *Companies Act*, Cap 486 (repealed). To the extent that the appeal is instituted against a non-existent entity, she averred, there is no valid appeal before this court capable of being considered or amended as sought in the application. In support of this position, the company relied on *Kenya Power & Lighting Company Limited Vs Benzene Holdings Limited t/a Wyco Paints [2016] eKLR* wherein the Court of Appeal relied on the case of Banque Internationale De Commerce, cited with approval by the Supreme Court in Fort Hall Bakery Supply Co vs Fredrick Muigai Wangoe (1959) EA 474.
7. The deponent disclosed that on March 14, 2019, the Environment and Land Court at Malindi delivered a judgment in favour of the company as against the applicant in which the court issued a declaration that the plaintiff/respondent was the registered owner of land parcel LR No 5XXXXX situate in Malindi District; an order of eviction against Japhet Noti Charo Shutu from the said parcel of land; an order for restoration of the said parcel of land to the plaintiff; and a permanent injunction against the defendant. The court also dismissed the defendant's counterclaim and awarded the costs, both of the suit and the counterclaim to the plaintiff.
8. It was averred that on May 7, 2021, more than two years after the delivery of the said judgement, the applicant filed an application for stay of execution of the judgment and decree and in response thereto, the company raised the issue of the competence of the appeal. More than 1 year after filing of the original memorandum of appeal on June 12, 2019, the applicant filed this application on October 26, 2021. The deponent deposed that it is trite that applications seeking amendments of pleadings ought to be brought within reasonable time. However, in the present circumstances, the application was filed after an inordinate, unexplained, and unjustifiable delay. To the deponent, the discretion to allow amendment of pleadings including a memorandum of appeal ought to be exercised circumspectly and in deserving cases. In this case, it was deposed that the present application is filed in bad faith to defeat the objection raised by the company in opposition to the application for stay of execution of the judgment and decree of the trial court. In this regard the company cited *Kenya Hotels Limited vs Oriental Commercial Bank Limited 120181 eKLR* in which the dicta in *Kanawal Sarjit Singh Dhim vs Keshavji Jivraj Shah [2010] eKLR* was cited.
9. Apart from that, it was deposed that the what the applicant intends to achieve by the proposed amendment in ground I(c) is the introduction of a totally new cause of action by introducing the issue of want of a board resolution. This ground, it was averred was not pleaded, evidence adduced, canvassed, and determined by the trial court. In the circumstances, the application is an afterthought and a calculated move by the applicant to litigate by instalments and ambush



the company by setting up entirely new and different grounds than the one it came to meet before this court.

10. While appreciating that under rule 44(1) of the Court of Appeal Rules, 2010, this court has the discretion to allow amendment of pleadings including a memorandum of appeal, it was averred that this court will not exercise its discretion in cases where the applicant is introducing a new or inconsistent cause of action; where the respondent has vested interests or accrued legal rights which will be adversely affected by the amendment; or where the respondent will suffer prejudice or injustice which cannot be properly compensated in costs.
11. In his oral address before the court, Mr Ouma, learned counsel for the company took issue with the applicant's supplementary affidavit on the ground that no leave was sought to file and admit it in court. The said affidavit, it was submitted, sought to introduce the proceedings before the trial court. While referring to the statement of defence dated May 15, 2008 and filed on May 16, 2008, it was submitted that the defence made no mention of want of board resolution to institute the proceedings and therefore the applicant could not seek to introduce the same in the amended memorandum of appeal. To support this position, the company relied on *George Gikubu Mbutia vs Consolidated Bank o Kenya Ltd & Another [2016]eKLR* as cited in *Uchumi Supermarkets Ltd & Another vs Sidhi Investments Ltd [2018] eKLR*.
12. The company asserted that allowing of the present application shall occasion it grave injustice which cannot be compensated in costs as the company has been locked out of enjoying the fruits of its litigation for more than 3 years since judgment was entered in its favour. In the circumstances, it was contended that the application is purely meant to derail the company from enjoying the fruits of its litigation.
13. It was the company's position that the applicant has not invoked any legislative basis in his application thus the granting of the orders sought would entail the sanctioning of an inherently defective application. It was averred that the proposed amendment is not necessary as it will not assist this court in determining the real question in controversy which is whether the trial judge was judicious in finding that the plaintiff is the registered owner of all that parcel of the suit land.
14. It was the company's position that it has been severely prejudiced by the present application and the appeal as a whole as it is unfairly forced to defend an appeal in which it has not been properly sued.
15. The respondent therefore took the position that the applicant failed to establish sufficient basis for the exercise of this court's discretion in his favour and in the circumstances of this case, the application is inimical to the rules of natural justice and the overriding objective in articles 48 and 159(2)(a) and (b) of the *Constitution* of Kenya, 2010, is both mischievous and an abuse of the court process and ought to be dismissed with costs to the company.
16. In his response to the challenge on the filing of the supplementary affidavit without leave of court, Mr Otara, learned counsel for the applicant submitted that on May 4, 2022, leave was granted to file any relevant documents was granted. According to counsel, the issue of the board resolution was before the superior court hence not a new issue hence no prejudice has been shown by the company. In any case, it was submitted, the issue of a board resolution is a point of law even before the common law and the court cannot close its eyes thereon the issue. According to counsel, the application cannot prejudice the respondent. It was submitted that the effect of the amendment will not change the cause of action as the applicant seeks to correct the name of the respondent from 'Kenya Airways Authority' to 'Kenya Airways Limited.'



17. In a rejoinder, Mr Ouma submitted that the alleged leave was granted and lapsed on May 14, 2022.
18. I have considered the motion, the affidavits both in support of and in opposition to the motion, the submissions made and the authorities cited.
19. The first issue for determination is whether the supplementary affidavit filed by the applicant is properly on record and what ought action should the court in respect thereof. From the record, on May 4, 2022, Nyamweya, JA granted leave to the applicant to file and serve a further affidavit within 14 days. The supplementary affidavit, according to Mr Otara was filed on November 7, 2022 which was clearly way outside the period granted by the court. Accordingly, Mr Otara's justification that the same was properly on record is, with due respect, without merit. That being the position, the next issue is what the court ought to do with the said document. While I appreciate that the document is irregularly on record, I did not hear Mr Ouma to contend that his client has been prejudiced thereby. To the contrary, Mr Ouma was able to competently articulate his client's case. While the courts frown upon the failure by parties to comply with directions, depending on the magnitude of non-compliance and the prejudice cause thereby, the principle which guides the court in the administration of justice when adjudicating on any dispute is that, where possible, disputes should be heard on their own merit and errors should not necessarily deter a litigant from the pursuits of his right. Therefore, it has been held by this court that the court is obliged to look at the documents on record even though filed out of time unless for a reason other than mere lateness, it considers it undesirable to do so. See [*Trust Bank Limited vs Amalo Company Limited Civil Appeal No 215 of 2000 \[2002\] 2 KLR 627 \[2003\] 1 EA 350*](#) and [*Central Bank of Kenya vs Uhuru Highway Development Ltd & Others Civil Appeal No 75 of 1998*](#).
20. Accordingly, without encouraging non-compliance with the directions of the court, I am not prepared in this case, where the parties were able to put forward their respective cases without hindrance, to ignore the said supplementary affidavit.
21. The matter before me is substantially an application seeking to amend the memorandum of appeal. That the court has wide discretion in such matters is not in doubt. In law, the principles that guide courts when considering an application for amendment of pleadings are clear and these are that amendments to pleadings sought before hearing, should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs. See [*Eastern Bakery vs Castelino \(1958\) EA 461*](#). It must now be noted that the introduction of sections 3A and 3B of the [*Appellate Jurisdiction Act*](#) are in favour of facilitating the just, expeditious, proportionate and affordable resolution of matters governed by the act and in handling matters before it, the court ensures the just determination of the proceedings; the efficient use of the available judicial and administrative resources; the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties; and the use of available technology. However, the decision whether or not to allow amendment being an exercise of judicial discretion, like all other judicial discretions, must be exercised upon reason and not on any whims of the court nor capriciously. See [*Musamarini Limited & 6 Others vs ADM Limited & 5 Others \[2011\] eKLR*](#).
22. In this case, the suit before the High Court was instituted by Kenya Airways PLC, formerly Kenya Airways Limited. The applicant's case is that the employment of the word 'Authority' instead of 'PLC' was as a result of inadvertence. This is not a case where a non-existent party



has been sued or has sued but one where an existing party to the proceedings before the High Court is mis-described as regards its legal status. To my mind the parties in this case know in whose favour the decision sought to be appealed against was granted and therefore none of the parties can be said to have been misled by the misdescription as regards the respondent's name and status.

23. In *Tidesley v Harper*, 10 ch D 396, Bramwell LJ said:-

' My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.'

24. In *Mwakio vs Kenya Commercial Bank Ltd [1987] eKLR*, it was held that the above dictum, typifies the normal judicial approach if a court is prayed to grant leave to amend. On the facts of that case, the court opined that there was no basis for saying that in seeking to amend, the applicant was acting mala fide. Similarly, in this case, I find that the misdescription of the respondents cannot, in the circumstances of this case, be said to have been mala fides. It was a bona fide inadvertence and since it is not contended that the misdescription was meant to mislead or overreach, it is an excusable mistake or error.

25. Bearing that statement of principle in mind and taking into consideration all the other factors of this case, I find that this is a proper case to exercise my discretion in the applicant's favour as regards the amendment of the name of the respondent and the additional grounds 1(a) and 1(b) of the proposed Amended memorandum of appeal since the said grounds necessarily arise from the proceedings before the court appealed from.

26. However, as regards the introduction of ground 1(c), it is contended that the issue of the failure to obtain a board resolution was neither pleaded nor canvassed before the trial court. In my view, the issue, whereas the requirement of a board resolution may well be a legal requirement, where the issue is whether or not it was obtained, that is a factual issue that, to base a decision thereon, must be pleaded. Accordingly, the issue cannot be raised for the first time on appeal and hence cannot be introduced by an amendment to the memorandum of appeal. To do so would clearly cause any injury to the respondent. A party who attempts to introduce such an issue by way of an amendment to the memorandum of appeal may well be acting mala fides since such action would amount to an ambush on the respondent at the stage where the respondent would not be in a position to adduce evidence to show that there was in fact such a resolution.

27. I have carefully gone through the proceedings before the High Court and particularly the issues that were identified by the parties to the suit. I am unable to find that the issue of the board resolution was one of the issues either expressly or impliedly placed before the court for determination.

28. Accordingly, while I grant leave to the applicant to amend the memorandum of appeal as regards the name of the respondent to read 'Kenya Airways Limited' instead of 'Kenya Airways Authority' as well as the addition of grounds (a) and 1(b) thereof, I however, disallow the application as regards ground 1(c) thereof. Let the amended memorandum of appeal be filed and served within 14 days. The costs of this application are awarded to the respondent.

29. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 2ND DAY OF DECEMBER, 2022.



GV ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

