



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WARSAME J.A. IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI 64 OF 2020**

**BETWEEN**

**JOHN MUGAMBI.....1ST APPELLANT/APPLICANT**

**MUGAMBI & COMPANY ADVOCATES...2ND APPELLANT/APPLICANT**

**AND**

**DR.KIAMA WANGAI .....RESPONDENT**

*(An application for leave to amend the Memorandum of Appeal lodged on 21st February 2020 pursuant to Rule 31, 44(1) of the Court of Appeal Rules, 2010 and Article 159 (2) (d) of the Constitution of Kenya)*

\*\*\*\*\*

**RULING OF THE COURT**

1. Before me is the notice of motion dated 19th November 2020 wherein the applicants seek leave to amend the memorandum of appeal lodged on 21st February 2020 in respect of **Civil Appeal No. 64 of 2020 at Nairobi**. The grounds in support of the application for leave to amend is to the effect;

- a). That, the memorandum of appeal as lodged lacks orders and/or prayers sought before this Court;**
- b). That, the orders and/or prayers sought in the appeal were inadvertently excluded through an honest mistake at the time the appeal was lodged;**
- c). That, the intended amendment is necessary to enable the Court determine all the issues raised in the appeal and pronounce itself with finality and on merit.**
- d). That, the intended amendment will not occasion any prejudice to the respondent.**

2. The applicants' upon noticing the anomaly in their memorandum of appeal dated 21st February 2020 presents to this Court the Notice of Motion under **Rule 31, 44(1)** of the Court of Appeal Rules, 2010 and **Article 159 (2)(d)** of the Constitution of Kenya, seeking leave to amend the memorandum of appeal to reflect orders setting aside the Ruling and Order of the trial court dated 19th July, 2018, remitting the Advocate-Client Bill of Costs dated 20th June 2016 for taxation before the Deputy Registrar and that cost do abide in the outcome of the appeal.

3. This Court is urged to invoke its discretionary powers under **Rule 31** which provides that on any appeal this Court's power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings to the superior court with such directions as may be appropriate, or to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs. The issue before me is whether to grant the orders sought. 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 ***Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] eKLR***).

4. My view therefore as was the view of this Court in ***George Gikubu Mbuthia v Consolidated Bank of Kenya Ltd & Another (2016)***

*eKLR*, that parties to a suit have the right to amend their pleadings at any stage of the proceedings before judgment and that courts should liberally allow such amendments. There are situations when the court will refuse to exercise its discretion to allow amendments. 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. The orders included to the memorandum of appeal reveal no basis to deny the application herein, therefore the Notice of Motion dated 19th November 2020 is allowed with costs to abide in the appeal.

**Dated and delivered at Nairobi this 19th day of February, 2021**

**M. WARSAME**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**