



**Wagah v Mwai (Environment and Land Appeal E017 of 2023)
[2024] KEELC 3398 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3398 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E017 OF 2023**

AY KOROSS, J

APRIL 25, 2024

BETWEEN

DR. MARGARET AKINYI WAGAH APPELLANT

AND

JOHN ANDIWO MWAI RESPONDENT

RULING

1. The notice of motion dated 29/06/2023 that is the subject of this ruling is filed by the appellant and in it, this court is moved under several provisions of law and the appellant has sought several reliefs from this court. Some of the reliefs are spent and the residual reliefs are: -
 - a. That orders do issue granting the appellant leave to amend her memorandum of appeal dated 22/05/2023.
 - b. That orders be issued against the court administrator-Bondo Law Courts for him to avail certified copies of proceedings within 14 days hereof and issue a certificate of delay.
 - c. Costs of the motion abide the outcome of the appeal.
2. The motion is predicated on grounds thereon and it is supported by an affidavit sworn on the same date by the appellant Dr. Margaret Akinyi Wagah.
3. Some of the grounds thereon are replicated in the supporting affidavit and some of them supported prayers that are already spent. These spent grounds will be disregarded.
4. In summary, the appellant avers the lower court has dismissed her suit in favour of the respondent and she is prejudiced. She further avers that because of the certain changes in the lower court proceedings, she should be granted leave to amend her appeal.



5. The court notes that on record, there is a supplementary affidavit deposed on 17/10/2023 by the appellant's counsel on record Mr. Erick T. Kokul. However, having scrutinized the record, leave was never issued for such an affidavit to be filed and on that basis, this affidavit is hereby expunged from the record.
6. The motion is unopposed and is canvassed by oral submissions of Mr. Osiemo who appeared before this court 28/11/2023 and he urged it to allow the reliefs as sought in the motion.
7. Having considered the motion, affidavit and annexures thereto, three issues emerge for this court's consideration: -
 - a. Whether the appellant should be granted leave to amend her memorandum of appeal.
 - b. Whether this court should direct the court administrator Bondo Law courts to issue certified copies of proceedings within 14 days hereof and issue a certificate of delay.
 - c. What about costs.
 - a. Whether the appellant should be granted leave to amend her memorandum of appeal.
8. My invitation to intervene on behalf of the appellant is invoked by Order 42 Rule 3 of the Civil Procedure Rules which provides as follows:
 - “(1) The appellant may amend his memorandum of appeal without leave at any time before the court gives directions under rule 13.
 - (2) After the time limited by subrule (1) the court may, on application, permit the appellant to amend his memorandum of appeal.”
9. On jurisprudence, I hereby adopt the position of the Court of Appeal in the case of John Mugambi & Mugambi & Company Advocates v Kiama Wangai [2021] eKLR which had an opportunity to interrogate the principles that guide a court in granting leave to amend a memorandum of appeal as follows: -

“My view therefore as was the view of this Court in George Gikubu Mbutia 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.”
8. A scrutiny of Order 42 Rule 3 of the Civil Procedure Rules shows that when considering a motion to amend an appeal, this court exercises a discretionary power which is judicious, upon reason and not whimsically or arbitrary.
8. Thus, looking at the record and the appellant's averments, it is not lost to this court that at the time the appellant was filing the memorandum of appeal, she was aggrieved against the ruling rendered by the learned trial magistrate on 27/04/2023.



8. However, I have noted that contrary to the provisions of Order 8 Rule 7 of the Civil Procedure Rules, the draft memorandum of appeal does not highlight as is required, the grounds the appellant is abandoning and the ones she is introducing.
8. It is noted the memorandum of appeal and its draft amendment demonstrates the decision the appellant is keen to have overturned is that of dismissing her application dated 17/04/2023.
8. In my view, it appears there was an oversight on the part of the appellant as she is not introducing a new issue or a new cause of action. The draft memorandum of appeal is amenable to amendment and I have no basis to deny this relief.
 - b. Whether this court should direct the court administrator Bondo Law courts to issue certified copies of proceedings within 14 days hereof and issue a certificate of delay
8. Order 42 Rule 13 (3) of the Civil Procedure Rules states: -

“The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.”
8. It appears the appellant is not privy that in accordance with Order 42 Rule 13 (3) of the Civil Procedure Rules, an appellate court can on its own volition call for the lower court record. For the benefit of the appellant, this court has already made a formal request to the lower court. Therefore, this prayer is misplaced.
8. Now, turning to the issue of certificate of delay, in my considered view, this is an administrative issue whereby the appellant can by a formal letter, apply for such a certificate. See the orbiter of the Court of Appeal decision of Gregory Kiema Kyuma v Marietta Syokau Kiema [1988] eKLR.
8. The appellant has not demonstrated that she made such an application and the lower court declined to heed her request. Ultimately, I find and hold that this relief is not properly before this court. It is trite law costs abide the outcome of the event and the costs of this motion shall abide the outcome of the main appeal.
8. In the end, for the foregoing reasons and findings, I hereby issue the following disposal orders: -
 - a. That the appellant be and is hereby granted leave to amend her memorandum of appeal in terms of the draft amended memorandum of appeal annexed to the motion and it must strictly be highlighted in accordance with the provisions of Order 8 Rule 7 of the *Civil Procedure Rules*.
 - b. That the amended memorandum of appeal be filed and served upon the respondents within 14 days of this ruling.
 - c. Mention before the deputy registry to confirm remittance of lower court record, filing of record of appeal and further directions on 29/05/2024.
 - d. That the costs of this motion will be costs in the appeal.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 25TH DAY OF APRIL 2024.



HON. A. Y. KOROSS

JUDGE

25/4/2024

Ruling delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Mr. Munguti for the appellant.

N/A for respondent

Court assistant: Ishmael Orwa

