



**National Land Commission v Runji & 4 others (Civil Appeal
24 of 2020) [2021] KECA 134 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 134 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 24 OF 2020
SG KAIRU, JA
NOVEMBER 5, 2021**

BETWEEN

NATIONAL LAND COMMISSION APPLICANT

AND

THERESIA RUNJI 1ST RESPONDENT

MARIETA GITONGA CHEGE 2ND RESPONDENT

NAOMI KIIO 3RD RESPONDENT

SAMMY MACHARIA KARA 4TH RESPONDENT

MIRITINI FREE PORT LIMITED 5TH RESPONDENT

(An application to amend the notice of appeal dated 22nd November, 2019 and filed on 25th November, 2019 arising from the judgment and decree of the High Court of Kenya at Mombasa (Ogola, J.) dated 12th November 2019 in Constitutional Petition No. 17 of 2018)

RULING

1. In its application, presented under Article 159(2)(d)(e) of the *Constitution*, Section 3, 3A and 3B of the *Appellate Jurisdiction Act* and Rules 16, 42, 43 and 44 of the *Court of Appeal Rules*, the applicant, The National Land Commission, seeks leave to amend its notice of appeal dated 22nd November 2019 and filed in court on 25th November 2019. The object of the proposed amendment is to correct the title of the judicial officer who delivered the impugned judgment of 12th November 2019. While the judgment was given by the Hon. Mr. Justice E.K. Ogola the notice of appeal makes reference to Lady Justice E.K. Ogola.
2. Learned counsel Mr. Oluga holding brief for Mr. Mbuthia for the applicant and appearing for the 5th respondent, who is supporting the application, submitted that the reference to Lady Justice E.K.



Ogola in the notice of appeal as opposed to the Hon. Mr. Justice E.K. Ogola was inadvertent and an excusable mistake; that the amendment will not occasion any prejudice to any party; that the Court has inherent jurisdiction under Article 159(2)(d)(e) of the Constitution, Section 3, 3A and 3B of the *Appellate Jurisdiction Act* to allow the amendments as was the case in *Attorney General vs. Coalition for Reform and Democracy & 7 others [2015] eKLR* where the Court allowed an amendment to a notice of appeal to indicate the correct court. That in the case of *William Ngare & 4 others vs. Public Trustee & 10 others [2012] eKLR*, the Court was clear that a notice of appeal is amenable to amendment.

3. Learned counsel for the 1st and 3rd respondents Mr. Gikandi together with Mr. Mwanzia learned counsel for the 4th respondent were joined by Mr. Gichanga who holds a power of attorney for the 2nd respondent in strenuously opposing the application. It was submitted that the subject matter of the application, not being an application for extension of time under Rule 4 of the Court of Appeal Rules, is a matter for the full Court and is beyond the jurisdiction of a single judge; that a notice of appeal, being a primary document, is not amendable as held by the Court in *Abdala Otieno Kitengo vs. Republic [2002] eKLR*, which, according to counsel, remains good law.
4. It was submitted further that the notice of appeal sought to be amended has other defects that will not be cured by allowing the instant application; that the appeal filed is incompetent as it was filed outside the period of 60 days permitted under Rule 82 of the Court of Appeal Rules; that the provisions of Article 159(2)(d)(e) of the Constitution and Section 3, 3A and 3B of the Appellate Jurisdiction Act are not a cure for all manner of mistakes and the Court needs to guard against those provisions becoming “an unruly horse” as that would lead to chaos in the administration of justice.
5. I have considered the application, the affidavits, the submissions, and the authorities cited by counsel. During the hearing of the application before me, I enquired from counsel who confirmed that there is no contest that the judgment delivered by the High Court on 12th November 2019, the subject of appeal, was delivered by the Hon. Mr. Justice E.K. Ogola. There can be no doubt therefore that the reference in the notice of appeal to Lady Justice E.K. Ogola is a blunder. A careless mistake. As Madan, JA stated in *Belinda Murai & 9 other vs. Amos Wainaina [1979] eKLR*:

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”
6. I am satisfied that justice in the present case is best served by allowing the amendment. It has not been demonstrated what prejudice will be suffered by the respondents if the amendment is allowed. I do not understand the rationale for the argument, which has support in the case of *Abdala Otieno Kitengo vs. Republic*, (above) that a notice of appeal is not amenable to amendment. That decision was made prior to the dictate in Article 159 of the Constitution that substantive justice must reign over technicalities. Moreover, as demonstrated in subsequent decisions in *S.K. Macharia and another vs. Standard Chartered Bank Limited [2012] eKLR* and *Attorney General and another vs. Coalition for Reform and Democracy and 6 others [2015] eKLR*, the thinking of the Court is that a notice of appeal is indeed amenable to amendment.
7. As for the jurisdiction to entertain the application for amendment by a single judge, Rule 53 of the Court of Appeal Rules permits it.



8. In conclusion, I allow the application in terms of prayers 1 and 2 of the application dated 15th June 2020. The applicant has 10 days from the date of delivery of this ruling to file and serve an amended version of notice of appeal to correct the title of the Judge whose judgment is challenged.

Costs of the application shall be in the appeal.

DATED AND DELIVERED AT MOMBASA THIS 5TH DAY OF NOVEMBER, 2021.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

