



REPUBLIC OF KENYA



KENYA LAW
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**Bandari Investment Co. Limited v Service & 22 others (Civil Application
E034 of 2021) [2021] KECA 233 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 233 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E034 OF 2021
JW LESSIT, JA
DECEMBER 3, 2021**

BETWEEN

BANDARI INVESTMENT CO. LIMITED APPLICANT

AND

NATIONAL POLICE SERVICE 1ST RESPONDENT
REGIONAL CORDINATOR COAST 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT
COUNTY GOVERNMENT OF MOMBASA 4TH RESPONDENT
ORIOLE INVESTMENT LIMITED 5TH RESPONDENT
MARTIN CHIPONDA 6TH RESPONDENT
HASHIM LOMA MAKAZI 7TH RESPONDENT
OMAR JUMA SALIM CHIVASI 8TH RESPONDENT
MOHAMED MAKAZI 9TH RESPONDENT
CAROLINE ACHIENG 10TH RESPONDENT
MAMA DAMARIS 11TH RESPONDENT
SHIDA CHIRO 12TH RESPONDENT
SALIM JUMA 13TH RESPONDENT
RASHID JUMA 14TH RESPONDENT
M. KASHINDO 15TH RESPONDENT
COLLINS ODINGO 16TH RESPONDENT
LEWIS GOGO 17TH RESPONDENT



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| SHAFI CHITOSI | 18 TH RESPONDENT |
| RUTH KATANA | 19 TH RESPONDENT |
| DALU CHIGAMBA MUNGA | 20 TH RESPONDENT |
| EPHRAIM KITSAO BAYA | 21 ST RESPONDENT |
| NAHODHA JOHN | 22 ND RESPONDENT |
| KAZUNGU KATANA | 23 RD RESPONDENT |

(An application for leave to amend Notice of Appeal in an intended appeal and extension of time to file the Amended Notice of Appeal from the Judgement of High Court of Kenya at Mombasa (Sila Munyao, J.) dated 28th January, 2021 in ELC Constitutional Petition No. 15 of 2017)

RULING

- The Notice of Motion application before me is the one dated 30th April 2021, coming up for hearing on 19th October 2021. It has been brought pursuant to rules 4, 41, and 44 of the [Court of Appeal Rules, 2010](#). The applicant seeks the following orders:
 - That the Honourable Court be pleased to grant leave to the appellant to amend the Notice of Appeal.
 - That the Honourable Court be pleased to extend time limited by the rules of the court to file and serve the Amended Notice of Appeal.
 - That the costs of this application be in the cause.
- The Application is based on the ground the Notice of Appeal is erroneous in that it refers to a judgement delivered on 21st January, 2021 instead of 28th January, 2021, and urges that the error was inadvertently made and it is in the interest of justice that it be rectified by leave being granted for the amendment of the Notice of Appeal. The applicant urges that the mistake is a mere technicality that can be cured, and the Respondents will not suffer prejudice or inconvenience if the orders sought are granted.
- The applicant relied on the case of [Attorney General & Another v Coalition for Reform & Democracy & 7 others \(2015\) eKLR](#) and that of [John Mugambi & Mugambi & Company Advocates v Kiama Wangui \(2021\) eKLR](#) for the proposition that amendments should be liberally allowed unless the respondents will suffer prejudice.
- The 6th, 20th, 21st and 23rd respondents (herein after the four respondents) opposed the application on the grounds they had accrued rights to strike out the impugned Notice of Appeal. They urged that they moved the court on 7th April, 2021 in a motion seeking an order to strike out the notice of appeal on grounds of late service on the respondents and reference to a non-existent judgement. It was submitted that these omissions under the old constitutional dispensation would have been fatal to the appellant's intended appeal, as a notice of appeal, being a primary document was not amenable to amendment.
- The four respondents submitted that authorities abound that the oxygen rule and Article 159 of the Constitution are not a cure for all sloppy omissions and errors in conduct of litigation. That where, like here, a right to challenge the legality or propriety of the notice of appeal has accrued to the respondent,



upon filing their motion on 7th April, 2021, the court is enjoined to administer even justice to prevent the defeating of the respondents' accrued right.

6. They relied on the case of *Mitchell v Cheyo & others (2011) 1 EA 293* and submitted that the ratio in that decision is that once a respondent files an objection or an application to strike out a defective notice or record of appeal, an application to amend the defective document(s) or extend time for service of such amended document would be in contravention of the sub-judice rule. For the protection of public confidence and integrity of legal proceedings and to avoid prejudice to such proceedings, the second application which seeks to remedy the omissions pointed out in the first application must not be heard, and ought either to be stayed, to await the determination of the first application, or be struck out for being incompetent.
7. The respondents distinguished the authorities cited by the applicant in its submissions by contending that first, they are both single judge decisions, secondly that it is unclear if any of the parties thereto sought a reference and with what results and thirdly, that there was no mention of the sub-judice rule because the applicants therein realised their mistake and moved the court before the respective respondents, or any of them, moved the court to strike out the notice or memorandum of appeal hence there was no vested interests or accrued rights in both applications.
8. Finally, they submitted that if the object of the intended appeal is to set aside the dismissal order in the Constitutional Petition No. 15 of 2017, and reinstatement of the petition for hearing, then the present application is an abuse of the court process as the applicant would, if successful have two suits before the Mombasa ELC court in which it pursues the same remedy; i.e., Constitutional Petition No. 15 of 2017 and ELC suit No. 16 of 2021.
9. I have considered the rival arguments of the parties and the cited cases, together with the filed written submissions. The Issues for Determination are whether the applicant should be granted leave to amend the Notice of Appeal and serve the same out of time after some of the Respondents filed an application to strike out the Notice of Appeal based on the mistakes the applicant wants to correct in this application.
10. Rules 16 (1) and 44 of the Court of Appeal Rules, 2010 provides for form of amendments and applications for leave to amend and provides thus:
 16. Form of amendments
 1. Where any person obtains leave to amend any document, the document itself may be amended or, if it is more convenient, an amended version of the document may be lodged.
 44. Applications for leave to amend
 1. Whenever a formal application is made to the Court for leave to amend any document, the amendment for which leave is sought shall be set out in writing and, if practicable, lodged with the Registrar and served on the respondent before the hearing of the application or, if that is not practicable, handed to the Court and to the respondent at the time of the hearing.
11. The applicant filed his application 7 days after the one by the respondent seeking to strike out the notice.
12. Whether or not to grant the application under consideration is a discretionary power which should none the less be exercised judicially, on a balance of convenience after considering the prejudice likely to



be to be occasioned to the respondents by allowing the application, or the applicant, if the application is declined. A denial of the application will result in the applicant not having an opportunity to prosecute their appeal. On the other hand, allowing the application will result in the respondent foregoing their application to strike out the notice of appeal.

13. The Court of Appeal Rules cited herein above gives this court power to entertain and grant leave to amend any document. The amendment sought to be made is an error on the date of the judgment sought to be appealed from, by stating that the judgment was delivered on the 21st January, 2021 instead of 28th January, 2021.
14. The case the applicant relied on of Attorney General & Another v Coalition for Reform & Democracy & 7 others (2015) eKLR is in all fours with the facts of this case. In that case the honourable the Attorney General of the Republic of Kenya drew his Notice of Appeal following the Ruling and Order of the honourable Mr. Justice Odunga on the 2nd January 2015 with which he was dissatisfied. He however styled it as intended to be an appeal to the Supreme Court, and the date of the ruling instead of indicating the correct date as 2nd January 2015, the same was shown as 2nd January 2014.

The single judge of this court held:

“It is therefore my considered view that the leave sought would serve the sole purpose of allowing access to the appellate judicial process and no prejudice or inconvenience would be occasioned to any party. The errors committed by the applicant cannot impede this court’s discharge of substantive justice. Accordingly, I grant orders in terms of prayers 1, 2 and 3 of the motion under consideration. I order that costs do abide the intended appeal”.

15. The applicant further relied on the case of John Mugambi & Mugambi & Company Advocates v Kiama Wangui (2021) eKLR where it was stated as follows:

“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.”

16. The respondents have urged that the above cited cases are by a single judge of this court. They are nevertheless persuasive. They have restated the law on applications of this nature. The position is that the respondent needed to show that they stand to suffer prejudice which cannot be compensated in costs. The respondents urged that they stand to lose an accrued right of having the appeal being struck out, and entertaining the application is flouting the sub-judice rule as their application filed first is still pending. The loss of such right can be compensated in costs. It cannot be used to shut out the applicant from accessing this court in exercise of a substantive right on a technicality.
17. Accordingly, the applicant’s application dated 30th April, 2021 is granted as prayed with costs to the respondents. The applicant is granted leave to amend the Notice of Appeal within 7 days from the date of delivery of this ruling.



DATED AT AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER 2021

J. LESIT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

