



**Mtsonga & another v Miringu (Environment and Land Appeal
E029 of 2023) [2024] KEELC 6069 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6069 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E029 OF 2023
FM NJOROGE, J
SEPTEMBER 24, 2024**

BETWEEN

CHARLES MTSONGA 1ST APPLICANT

FELISTER SIDI KABATHE 2ND APPLICANT

AND

GEORGE KIIRU MIRINGU RESPONDENT

RULING

1. Before me is the notice of motion dated 7/3/2024 wherein the applicants seek leave to amend the memorandum of appeal lodged on 21/6/2023 as per the proposed amended memorandum of appeal. The grounds in support of the application for leave to amend is to the effect that: -
 - a. It has become imperative that the memorandum of appeal be amended.
 - b. The proposed amendments will assist this honourable court to determine all the issues in controversy/dispute between the Appellants and the Respondent.
 - c. The amendment will not prejudice the Respondent and it is in the interest of justice that the Appeal be amended.
2. In support of the application is the affidavit sworn on the even date by Samuel Odhiambo Eleakim, counsel for the Applicants.
3. As at the time of writing this ruling, the Respondent had not filed any response. The application is therefore unopposed. Moreover, none of the parties filed written submissions as directed by the court on 3/6/2024. That notwithstanding, I will consider the application on its merits.



4. It is trite that the court has unfettered discretion to allow an amendment at any stage of the proceedings. Section 100 of the [Civil Procedure Act](#) provides that: -

" The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding."

5. The Court of Appeal in [George Gikubu Mbutia –v- Consolidated Bank of Kenya Ltd & Anor](#) [2016] eKLR expressed itself as follows: -

" As regards the law, the High court readily accepted that the court has unfettered discretion to allow amendment of pleadings, which discretion must be exercised judiciously. It accepted too as a general position that parties to a suit have the right to amend their pleadings at any stage of the proceedings before judgment and that court should liberally allow such amendments. However, he also noted 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 other."

6. Order 8 Rule 5(1) of the [Civil Procedure Rules](#) provides as follows:

For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just."

7. I have carefully looked at the proceedings vis-à-vis the amended memorandum of appeal and I am satisfied that the proposed amendments will assist the court to determine the real questions in controversy. In any event, directions on disposal of the appeal are yet to be issued, as such I find that no prejudice will be occasioned to the Respondent should the present application be allowed. The outcome is that the application dated 7/3/2024 is merited and it is hereby allowed with no orders as to costs.

8. The appellants shall file and serve their record of appeal and serve it upon the respondent within 30 days of this order. Upon the filing of that record the Deputy Registrar of this court shall call for the original court record for Malindi CMC Land Case Number 142 Of 2019 and attach it to this appeal and this appeal shall be listed on 13/11/2024 for issuance of directions as to hearing.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 24TH DAY OF SEPTEMBER, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

