



REPUBLIC OF KENYA



Mbeta v Ongong'a (Civil Appeal 151 of 2023) [2025] KEHC 7589 (KLR) (29 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7589 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CIVIL APPEAL 151 OF 2023

EN MAINA, J

MAY 29, 2025

BETWEEN

LILIAN MWENDE MBETA APPLICANT

AND

ISAAC ODHIAMBO ONGONG'A RESPONDENT

RULING

1. The Applicant's Notice of Motion is dated 18th February 2025 and is seeking orders to amend the Memorandum of Appeal filed and that the annexed amended Memorandum of Appeal be deemed as duly filed and served upon payment of the requisite fees. The Application is supported by an affidavit sworn by Kinyanjui Theuri, Advocate who deposes that it is necessary to amend the Memorandum of Appeal to so as to add more grounds of appeal on liability and quantum which were inadvertently omitted and that the mistake of Counsel should not be visited upon the Appellant. Counsel also deposes that that parties have a right to amend pleadings at any stage before judgment and that the said amendments will help the court to make a holistic determination.
2. The Application is not opposed.

Determination

3. Order 42 Rule 3 of the [Civil Procedure Rules](#) which provides for amendment of the Memorandum of Appeal, states: -

“Amendment of Memorandum of Appeal [Order 42, rule 3]

(3)

- (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.”

4. From the above rules it is evident that the power of the court to grant leave to appeal is unfettered. However, the discretion of the court must always be exercised judicially but not whimsically or capriciously.
5. In the case of *Kanwal Sarjit Singh Dhiman v Keshavji Kivrai Shah* [2010] KECA 149 (KLR) the Court of Appeal held that as the memorandum of appeal is not one of the primary documents in an appeal it is amendable to amendment. Their main consideration in determining whether to grant leave to amend the memorandum of appeal was whether the intended amendment was irrelevant to the issues raised in the appeal and whether there was any likely prejudice to the Respondent.
6. I have considered the annexed amended Memorandum of Appeal and I am satisfied that the amendments sought are made in good faith. I am also satisfied that the intended amendments are not irrelevant but that they raise fundamental issues that go to the root of the judgment of the trial court. I am also satisfied that no prejudice will be occasioned to the Respondent by the amendment as he shall be afforded an opportunity to defend the appeal. He has not in any event opposed the application.
7. In the premises the application is allowed and leave is granted to amend the memorandum of appeal. The amended memorandum of appeal shall be filed and served within twenty one (21) days of this ruling failure to which the leave shall lapse.
8. There shall be no order for costs as the application was not opposed.

Orders accordingly.

RULING SIGNED, DATED AND DELIVERD VIRTUALLY ON THIS 29TH DAY OF MAY 2025.

E.N. MAINA

JUDGE

In the presence of:

Ms Said for Respondent

Mr. Gathara for Appellant/Applicant

Geoffrey – Court Assistant

