



REPUBLIC OF KENYA



KENYA LAW

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**Owiti v Onyango & another (Civil Appeal E1269 of 2023)
[2025] KEHC 11754 (KLR) (Civ) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11754 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1269 OF 2023

LP KASSAN, J

JULY 31, 2025

BETWEEN

MIKE OKOTH OWITI APPELLANT

AND

TARIQ ORUTO ONYANGO 1ST RESPONDENT

DISMAS MUSIRIA MOGAKA 2ND RESPONDENT

RULING

1. For determination is the motion filed by Mike Okoth Owiti (hereafter the Appellant) dated 20.01.2025 as against Tariq Oruto Onyango and Dismas Musiria Mogaka (hereafter the 1st and 2nd Respondent/ Respondents) seeking inter alia -
 - a. Spent.
 - b. Spent.
 - c. That the honorable Court be pleased to grant leave to the Appellant to amend the memorandum of appeal in this appeal by filing a fresh memorandum of appeal.
 - d. That the honorable Court be pleased to admit and or adopt the annexed draft memorandum of appeal as part of the record of appeal upon payment of the requisite Court fees and issue fresh direction on filing of submission and judgment date.
 - e. That the cost of the motion be provided for.
2. The motion is brought among others pursuant to Section 1A, 1B, 3A & 100 of the *Civil Procedure Act* (CPA), Orders 42 Rule 3 of the *Civil Procedure Rules* (CPR) and on grounds on the face of the motion amplified by the supporting affidavit deposed by the Appellant. The gist of his brief affidavit is



that erstwhile counsel in the matter had been filing numerous interlocutory applications that blurred discovery of a defect in the memorandum of appeal that had originally been filed. That his current counsel filed a record of appeal premised on the said memorandum of appeal whereas present counsel has since informed him that earlier file memorandum of appeal was defective as it constitutes grounds irrelevant to the subject of the appeal and lacks the requisite reliefs on appeal. He goes on to depose that the error in the memorandum of appeal was only realized after parties had already taken directions on disposal of the appeal whereas he was unreachable to enable him instruct counsel to file the said amended memorandum of appeal due to admission in hospital as a consequence of infirmity. In summation he deposes that the intended amendments are necessary for determining the real question in controversy, avoid injustice therefore it is in the interest of justice and fairness that the motion is allowed in order to file a proper memorandum of appeal to support the record of appeal before the parties submit on the appeal.

3. The Respondents oppose the motion by way of a joint replying affidavit dated 27.01.2025. They begin assailing the motion as a non-starter, misrepresentation of material facts, an abuse of Court process and thus ought to be dismissed with costs. That the present counsel for the Appellant has been on record for more than a year as such they ought to have been vigilant with respect to the Appellant's pleading on record. In conclusion they depose that they have since filed submissions on appeal whereas delay in seeking the amendment has been inordinate meanwhile serves the purpose of further delaying their realization of fruits of successful litigation.
4. Directions were taken on disposal of the motion, to wit, the Appellant filed submissions whereas the Respondents opted to rely on their affidavit material. That said, the Court has duly considered the rival affidavit material alongside the Appellant's submissions.
5. In presenting the instant motion, the Appellant has relied on among others provisions of the CPA, Section 3A which specifically reserves "the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court." This Court's inherent powers was judiciously addressed by the Court of Appeal in Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR and requires no restatement. Alongside the above provision, the Appellant has equally relied on Order 42 Rule 3 of the CPR which provides that-
 - (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.
6. The purport of the latter provision is echoed in Section 100 of the CPA wherein it can be deduced the kernel of amendment of pleadings serves the purpose of aiding the Court determine the real questions or issues in controversy as between disputing parties. The Court in the case of Institute for Social Accountability & another v Parliament of Kenya & 2 others; Commission for the Implementation of the Constitution (Interested Party) [2014] KEHC 7356 (KLR) while addressing the objective of amendment of pleadings observed-;

"The object of amendment of pleadings is to enable the parties to alter their pleadings, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings".



7. The same Court went on to render itself to the effect-;

“A party that wishes to amend its pleadings at any stage of the proceedings may do so with leave that the court will normally allow parties to make such amendments as may be necessary..... to avoid a multiplicity of suits, provided there has been no undue delay, or new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side”

8. It is mindful to observe that Order 42 Rule 3 is an echo of Order 8 Rule 3 of the CPR. That said, having duly considered the cited authorities and legal provisions underpinning the subject of amendments as stated above, it can be deduced therefrom that this Court is empowered to allow amendments to assist it determine the real issues in controversy in a matter. The Court in Institute for Social Accountability (supra) observed that an amendment ought to be allowed even if the cause of action changes so long as the facts relied upon for the amendments sought are the true facts the parties finally intend to rely on. Thus, the Court is clothed with wide powers to allow amendment of pleadings for a fair and just hearing to be conducted in terms of Article 50 of the Constitution as well as under Sections 1A, 1B & 3A of the CPA, toward facilitating the just, expeditious, proportionate and affordable resolution of civil disputes for the just determination of the proceedings and to avoid multiplicity of suits.

9. Upon the above, the Court has taken the liberty of perusing the draft amended memorandum of appeal (Annexure MO2) and the intended amendments that the Appellant wishes to introduce in their entirety. It implores me to mention that the Court is diffident to address the said amendments given the live risk it poses of addressing the substantive appeal and thus embarrassing the appellate proceedings. While it is trite that Courts are neutral arbiters in our adversarial system and are only called upon to determine the issues as presented and pleaded by the parties, I stand to reiterate that the purpose of amendments serves to aid the Court determine the real issue in controversy as between disputing parties. By the said amendments in the memorandum of appeal the Appellant reasonably believes that real issues in controversy would be determined by this Court.

10. By all accounts the said amendment would not cause injustice or irreparable loss to the Respondents or appear to mutate the claim or be an abuse of the Court process given that at the heart of the appeal is the impugned lower Court decision rendered on 24.08.2023. The Respondents will have an opportunity to address the appeal on the premise of their submissions, to wit, a decision will subsequently be rendered. While I agree that the amendment comes rather late in the day, I restate that the Respondents will have an opportunity to address the Court on appeal whereas any inconvenience may reasonably be compensated by an award of costs. Consequently, while the Respondents' reservations are noted, the same do not outweigh the purport of the amendment towards having the Appellant heard on its appeal and the exhortation in Article 50 of the Constitution as well as under Sections 1A, 1B & 3A of the CPA.

11. The upshot is that the Appellant's motion succeeds and is allowed in the following terms-;

- a. Leave is granted to the Appellant to amend its pleadings by way of filing and serving a fresh memorandum of appeal as evinced in the annexed draft memorandum of appeal within seven (7) days of this ruling.
- b. Upon compliance with the above the respective parties will each have twenty-one (21) days from the date of service of memorandum of appeal within file and exchange submissions.
- c. Thereafter, the matter be mentioned before the Deputy Registrar (DR) to confirm compliance on filing of submissions.



- d. Failure to comply with (a) above, the leave granted will cease to have effect.
- e. Costs of this motion shall abide the outcome of the appeal and shall be borne by the Appellant in any event.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JULY 2025

LINUS P. KASSAN

JUDGE

In the presence of:-

Kinuthia holding brief Karoki for Applicant

Mwalombo holding brief Ngumba for Respondents

Carol – Court Assistant

