



REPUBLIC OF KENYA



**Mbirika & another v Shamshi Kassam Holdings (Environment & Land Case
A72 of 2018) [2023] KEELC 16312 (KLR) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 16312 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE A72 OF 2018
JA MOGENI, J
FEBRUARY 22, 2023**

BETWEEN

TOM AKOYO MBIRIKA 1ST APPELLANT

VIOLET MUKABI JORAM 2ND APPELLANT

AND

SHAMSHI KASSAM HOLDINGS RESPONDENT

RULING

1. The instant ruling is in regard to a Notice of motion dated November 15, 2022 under certificate of urgency and duly filed in court. The applicant/appellant, Tom Akoyo Mbirika through M/s S.M Munoko and Company advocates, is seeking orders infra:-
 - a. That the Applicant/Appellant be granted leave to amend the Memorandum of Appeal as per the proposed amended Memorandum of Appeal.
 - b. That the annexed proposed amended Memorandum be deemed as duly filed and served upon the payment of the requisite court fees
 - c. That the costs of the Appeal to abide the results of the Appeal.
2. The motion is anchored on the applicant's 6–paragraphed supporting affidavit sworn on even date and grounds (a) to (f) set out on its face. It is not necessary to reproduce the contents of the affidavit and the grounds which are noted herein accordingly.
3. The motion is initiated pursuant to provisions of the law, inter alia, Order 51 Rules and Order 8 Rule 5 of the *Civil Procedure Rules*, Sections 3A and 78 pf the *Civil Procedure Act* Chapter 21 Laws of Kenya (the CPA) and Article 159 of the *Constitution*.



4. He deposes that the amendment is necessary following the ruling by this court on March 24, 2022 allowing the evidence of the document examiner from the police to be produced.
5. The application was opposed by the respondent vide a replying affidavit sworn on a date not clear from the document filed. He deposes that the application is an abuse of the court process and a waste of precious judicial time. That the amendment to the memorandum of appeal sought to raise the issue of forgery yet the question of forgery is not within this honorable court's jurisdiction. Further that the issue.
6. That allowing the amendment introduce new and/or inconsistent cause of action. Further that the Examiner's Report is an opinion and it is not binding on the court. That the Chief Magistrate's court in CMCC CR 1680 of 2009 rested the issue of forgery. That the grounds of appeal as drawn are sufficient for the court to arrive at conclusive decision and give an opportunity for a fair hearing. It is the respondent's contention that the judgment delivered on November 16, 2018 found that there is a licensee relationship between the Appellant and the Respondent which is the subject of the Appeal.
7. I have carefully considered the application, submission by the parties and the law governing the application. Section 78 (1) of the CPA provides as follows;

“ Subject to the conditions and limitations as may be prescribed, an appellate Court shall have power;

- a. To determine the case finally.
 - b. To remand a case.
 - c. To frame issues and refer them to trial.
 - d. To take additional evidence or to require evidence to be taken.
8. Under Order 42 rule (3) (1) an appellant may amend his memorandum of appeal without leave at any time before the court gives directions under rule 13. The issue I have to consider is whether the amendment sought is merited. The applicants filed their memorandum of appeal on November 15, 2022. Order 42 rules (3) (2) provides that:

“ After the time limited by sub-rule (1) the court may, on application, permit the appellant to amend his memorandum of appeal.”

9. Under sub rule 2 the court has the discretion to consider the applicant's application. A memorandum of appeal is a pleading in the appeal. In seeking an amendment of a memorandum of appeal the principles to be considered are those applicable to amendment of pleadings. The principles which guide the exercise of discretion in amendment of pleadings were set out in the case of [Central Kenya Ltd vs. Trust Bank Ltd & Others](#) Appeal No 222 OF 1998. The Appellant has also cited the Court of Appeal case of [George Gikubu Mbutia vs Consolidated Bank of Kenya Ltd & Anor](#) (2016) eKLR in their submissions.
10. The principles that guide the court in allowing amendment at the appeal can be summarized as follows, that the amendment;
 - i. Should be necessary for purposes of determining the real question or issue which has been raised by parties;
 - ii. to avoid multiplicity of suits provided there has been no undue delay;



- iii. Does not introduce new or inconsistent cause of action;
- iv. Does not take away or affect any vested interest or accrued legal rights; and
- v. Does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.

11. In *Kenya Hotels Limited v Oriental Commercial Bank Limited* [2018] eKLR, it was observed that;

“It is trite that the power reserved for the Court by rule 44(1) of the Court of Appeal Rules to amend any document is a discretionary power. Like all judicial discretion however, it must be exercised judiciously and upon reason, rather than arbitrarily, on humour, or fancy. (See *Kanawal Sarjit Singh Dhim v. Keshavji Jivraj Shah* [2010] eKLR). A memorandum of appeal, such as the one that the applicant seeks to amend is a document that is rightly amenable to amendment. (See *Uhuru Highway Development Ltd v. Central Bank of Kenya* [2002] 1 EA 314).”

12. The ground of appeal the applicant seek to introduce at paragraph 3 of the annexed amended Memorandum of Appeal is to the effect that the Learned Magistrate erred in law and facts by relying on a forged license agreement to decide in favour of the respondent.

13. In the *Kenya Hotels Ltd* case (*supra*), the court went on to observe;

“Whether or not to allow an amendment will also depend on the nature and extent of the amendment. If the applicant is merely introducing a ground of appeal that is properly founded on the evidence that was adduced and canvassed before the trial court, which it is alleged the trial judge ignored or misapplied, the Court will more readily allow the amendment. Different considerations will however apply if the applicant is seeking to introduce a totally new ground of appeal that was not pleaded, evidence adduced, canvassed and determined by the trial court.”

14. The applicant state that the it is in the interest of justice that the application to amend the Memorandum of Appeal be allowed since it will enable the Honorable Court make a sound decision with the evidence of the document examiner and examiner’s report. Further that the respondent will not be prejudiced by the amendment since it is intended to enable the court make an informed decision based on facts adduced before it. That the proposed amendment is intended to bring before the court the real matters in controversy between the parties herein. This also follows this court’s decision in the ruling dated March 24, 2022.

15. In case of *Nathan Muhatia Pala t/a Muhatia Pala Auctioneers and another vs. Joseph Nyaga Karingi* (*supra*) Justice Odek (as he then was) held that;

“A duty now imposed on the Court under Sections 3A and 3B of the *Appellate Jurisdiction Act* is to ensure that justice is dispensed in consonance with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.”

16. It is clear therefore that the discretion that the court may exercise in respect of appeals filed before it may in deserving cases be extended to appeals transferred to it. There is no plausible ground advanced by the respondent herein as to why the memorandum can be deemed to be not amenable to amendment simply because the matter was litigated in the Chief Magistrate’s court Case No. 380 of 2014. Upon



being brought to this court, it becomes part of the record of this court and must be handled in the manner other appeals are handled.

17. In my view the applicant deserves the orders sought for the above mentioned reasons. It is also observed that the respondent will suffer no prejudice by the granting of those orders.

18. Given the foregoing I order as follows:

- a. That the Applicant/Appellant be and is hereby granted leave to amend the Memorandum of Appeal as per the proposed amended Memorandum of Appeal.
- b. That the annexed proposed amended Memorandum be deemed as duly filed and served upon the payment of the requisite court fees.
- c. That the costs of the Appeal to abide the results of the Appeal*

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 22ND DAY OF FEBRUARY 2023.

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MOGENI

JUDGE

