



John Mbau Mburu & Company Advocates v County Government of Mombasa; Robison Onyangi Malombo t/a OM Robison & Company Advocates (Interested Party) (Civil Appeal (Application) 73 of 2019) [2022] KECA 1163 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KECA 1163 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) 73 OF 2019
JW LESSIT, JA
OCTOBER 21, 2022**

BETWEEN

JOHN MBAU MBURU & COMPANY ADVOCATES APPLICANT

AND

COUNTY GOVERNMENT OF MOMBASA RESPONDENT

AND

**ROBISON ONYANGI MALOMBO T/A OM ROBISON & COMPANY
ADVOCATES INTERESTED PARTY**

(An application to amend and adduce additional evidence on a Memorandum of Appeal from the judgment of the High Court at Mombasa (E.K.O Ogola, J) delivered on 20th December, 2018 In HC Petition No. 4 of 2017)

RULING

1. Before the court is a notice of motion dated January 28, 2022 and filed by John Mbau Mburu t/a JM Mburu & Company Advocates, the applicant against the judgment of the High Court at Mombasa (Ogola, J) rendered on December 20, 2018 in Petition No 4 of 2017. The same is brought under rule 44, 16 and 29(1) of the Court of Appeal Rules [herein after Rules] and section 3A and 3B of the Appellate Jurisdiction Act. He seeks various orders in this application which I summarize as follows:
 - 1). The applicant be granted leave to amend his memorandum of appeal in the manner indicated in the draft amended memorandum of appeal filed herewith.

The amendment sought to be made are as follows;

 - a). in the draft, words intended to be adduced and underlined in red.



- b). In the draft, words intended to be removed are cancelled in red.
- 2) The court do take additional evidence or direct same be taken by the trial court or by a commissioner by way of affidavit sworn by the applicant on grounds it relates to bias, malice and collusion on the part of the Hon Eric Ogola, J against whose judgment the appeal was instituted. That, the proposed amendments and additional evidence to be introduced are necessary for the purpose of enabling the applicant to ventilate his case properly and thereby enable the court to adjudicate on issues pertaining to the matters in controversy between the parties
 - 3) The evidence sought to be adduced will be wholly or substantively along the lines of the supporting affidavit attached hereto and such supplementary affidavit as may be filed with the leave of the court.
 - 4) The amendment sought are clear from the draft amended memorandum of appeal filed with herewith while the additional evidence relates to the following:
 - a). The existence of an improper relationship between the Hon Eric Ogola, J and the Mombasa County Governor, Mr Joho, which led to the dismissal of the suit being HC Petition No 94 of 2017.
 - 2). Robinson Onyango Malombo t/a OM Robinson & Company, advocates by Justice Ogola.
 - b. The existence of an improper relationship between Justice Ogola and one Robinson Onyango Malombo, the interested party herein, which also led to the dismissal of the said suit.
 - c. The existence of bias, malice and collusion between Justice Ogola and the 2 persons in a and b above separately to defeat the applicant's suit.
2. The application is supported by the affidavit sworn by the applicant dated January 28, 2022. It is a 77-paragraph affidavit contained in 88 pages, excluding annexures which run into 324 pages. It is supported further by the written submissions filed by GBM Kariuki, SC for the applicant.
 3. The application was heard virtually on the June 22, 2022. Senior Counsel Mr GBM Kariuki was present for the applicant, while learned counsel Ms Maitai was present holding brief for Mr Ngomba for the interested party. There was no appearance for the respondent despite service with the hearing notice on the May 18, 2022.
 4. Mr Kariuki begun his address by opposing the presence of the interested party (hereinafter IP) in the proceedings urging it had no locus standi, and going by the definition of who an interested party is in the Mutunga Rules, rule 2 thereof the IP before court did not fit that definition. He stated that the definition given is 'one who has an identifiable stake, legal right or legal duty in the proceedings, but is not a party to the proceedings. Senior counsel urged the court to strike out the affidavit filed by the IP opposing the application.
 5. Mr Kariuki, SC in his oral submissions urged that the application is merited for reason the amendments sought to be brought were not introducing anything new in the cause of action but was illuminating same. That the judge entertained a preliminary objection that sought to strike out the petition the subject of this application. That instead of making a decision on the PO he went into the merits of the petition and held the claim was not a constitutional matter. Counsel urged that the court concluded



- that the petition related to fees the recovery of which could be pursued under *Advocates Act* or in a civil suit.
6. Mr Kariuki SC urged that there was a fundamental error as the petition related to violation of the applicant's constitutional rights. He urged that violations of constitutional rights could arise in infinite situations ranging from breaches of contract and tortious actions. He urged that to say that a civil suit was the answer was to put a cloak on the *Constitution* and is a fundamental error on the court's part. Counsel relied on his written submissions and urged the court to liberally look at the application and allow the amendments to the memorandum of appeal, and adduction of evidence in line with the applicant's submissions.
 7. Ms Maitai for the IP submitted that there were three issues for determination; one, role of an IP; two, issue of adduction of new evidence at appellate stage; and three, amendment of the memorandum of appeal.
 8. In regard to the IP, Ms Maitai submitted that the IP was an IP in the petition before the High Court and was therefore a party to these proceedings. Counsel urged that the IP had a stake in the proceedings because the applicant was leading the IP to defend a suit in respect of which he filed the constitutional petition to recover fees, which the IP had an interest. Counsel urged court not to strike out its pleadings.
 9. Regarding the adduction of new evidence Ms Maitai urged that the applicant has filed voluminous material, which counsel urged, was new material. She urged that the evidence sought to be adduced was introducing improper conduct between the trial judge and Governor Joho; that it was adduction of bad blood between the applicant and the trial judge.
 10. Ms Maitai submitted that the documents that were being sought to be introduced had no relationship with the case; that it was introducing decisions between the trial judge in favour of the governor and the IP counsel urged that those were irrelevant.
 11. In regard to the issue of Mombasa County Government, counsel urged, the governor was not a party, and that that evidence was not new and nothing stopped him from adducing it in the High Court. Counsel urged that the court had power to allow or reject new evidence. Counsel submitted that new evidence should be rejected where it was introducing a new cause of action. Further that new evidence should be rejected where prejudice or injustice may not be compensatable by an award of damages. That the new evidence was introducing a new action.
 12. Mr Kariuki, SC in response urged that the IP's counsel took a simplistic view of the petition which was an error; that nowhere did the applicant claim fees in entire petition. In regard to the IP championing cause of his fees, SC urged that he had no claim against the applicant or the respondent; that his fees were paid. He urged that the IP was not required to get directly involved in the litigation; and that in any case the IP stood to suffer no prejudice.
 13. I have considered the application before me. I also considered the submissions of counsel, the affidavits filed and the annexures therein. Before I consider the application let me at this stage by way of background state as follows: The petition before the High Court was dated January 13, 2017. The parties in that petition are the same ones in this appeal, with the applicant as the appellant, the County Government of Mombasa as the respondent and Robinson Onyango Malombo as the interested party (IP). In the petition, the applicant claimed that he had suffered violations of his constitutional rights due to actions of the County Government of Mombasa.
 14. The applicant was the sole proprietor of the firm of JM Mburu & Company Advocates. He was appointed by the County Government as the lead counsel to the IP in respect of the case of Kenya Ports Authority v The Municipal Council of Mombasa & the Attorney General Civil Appeal No 283



of 2007. The applicant, the IP and the council entered into an oral agreement where the consideration for the legal services was agreed, to the effect the applicant's professional fees comprising half of the professional fees payable was to be paid directly to the IP. Following the oral agreement, the applicant and the IP formalized those terms by reducing the same into writing in which the IP assigned 50% of fees payable to him to the applicant, which sum was payable directly to the applicant. The IP rendered an interim fee note for KShs 174,101,975. The council then proceeded to split the said sum into two equal parts in favour of the applicant and the IP. The sum due to the applicant was then lumped together with the balance of fees, which the council then paid to the applicant in varying instalments arising from professional services rendered to them in different matters.

15. The trial court found that the claim for unsettled legal services was not a proper matter for a constitutional petition. The applicant was aggrieved by the whole of the decision of the High Court and so filed this appeal.
16. Mr Kariuki, SC raised a preliminary point in regard to the entrance of the IP to the application. The counsel was of the view that the IP ought not to participate in the notice of motion. I do not wish to dwell much on this objection. I note that the IP was named in the petition, and that he fully participated at the hearing before the High Court. Being one that participated in the petition and or was a party to those proceedings in that capacity, his role cannot be denied, or relegated to that of a stranger to this proceeding. It is my view that having been enjoined in the appeal by the applicant, he is a party in this appeal. The objection to his participation in the application is not merited.
17. The application before me seeks substantively two prayers, one, leave to amend the memorandum of appeal; and two, leave to adduce new evidence. Dealing with the first issue of leave to amend the memorandum of appeal, the applicant cited the decisions in *Uhuru Highway Dev Ltd v Central Bank of Kenya (2002) 1 EA 314* and *St Patrick's Hill School Limited v Bank of Africa Kenya Limited eKLR HCCC No7 of 2017* for the proposition that the memorandum of appeal is always amenable to amendment and as a general rule amendments should be allowed liberally. The applicant also cited the decision in *John Gakuo & Anor v County Government of Nairobi, Civil Application No 201 of 2016* relying on the principles that guide the court when considering such an application. Some of the principles are that an amendment should not introduce any new cause of action; that an amendment is meant to illuminate a point on appeal, that it should be made in good faith and should correct a genuine mistake or oversight.
18. The interested party filed a replying affidavit in opposition to the applicant's prayers and in it contends that the application was unfounded and brought in bad faith since the applicant's proposed amendments failed to meet the threshold required for the amendment of the memorandum of appeal dated June 7, 2019. That it is trite that under rule 44(1) of the *Court of Appeal Rules, 2010* the power to amend a memorandum of appeal is discretionary which ought to be exercised judiciously and upon reason but not arbitrarily or whimsically. The interested party referred to the principles enunciated in *George Gikubu Mbuthia v Consolidated Bank of Kenya Ltd 7 Another (2016) eKLR* where this court stated 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.' [Emphasis mine]



17. Rule 44 of the rules (46 under 2022 rules) provides for form and process an application for leave to amend should take and stipulates as follows:
- (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 applicable, 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 time of the hearing.
 - (2) Where the court gives leave for the amendment of any document, whether on a formal or an informal application, the amendment shall be made or an amended version of the document be lodged within such time as the court when giving leave may specify and if no time is so specified then within 48 hours of the giving of leave and on failure to comply with the requirements of this sub-rule, the leave so given shall determine.
19. Mr Kariuki did not deal with each item of the intended amendments and so I will have to examine them to test, one whether a new or inconsistent cause of action is introduced; two, whether vested interests or accrued legal rights will be adversely affected; three, whether prejudice or injustice which cannot be properly compensated in costs is occasioned to the respondent.
20. With that in mind, I have examined the amended portions of the memorandum of appeal and find that paragraph 5, 10, 11, 15 and 16 challenges findings of the superior judge touching on the petition and the judgment. Paragraph 2, 9 and 17 contains minor corrections, which at the hearing Ms Maitai for the IP did not oppose.
21. As for the proposed amendment contained in paragraphs 13 and 20, these are scandalous and personalized attacks on the person of the judge who heard the petition. In addition, the same paragraphs 13 and 20 introduces a new cause of action and brings in a new party. The two paragraphs contain serious allegations against this new person who was not a party in the petition before the High Court. The proposed amendment in paragraphs 13 and 20 cannot be allowed in the circumstances.
22. I will now deal with the prayer for orders for leave to adduce new evidence. The application is grounded on rule 29 of the Court of Appeal Rules of 2010, which is identical to rule 31 of the 2022 rules, and which provides as follows:
- 1) On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the court shall have power—
 - (a) to re-appraise the evidence and to draw inferences of fact; and
 - (b) in its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.
 - (2) When additional evidence is taken by the court, it may be oral or by affidavit and the court may allow the cross-examination of any deponent.
 - (3) When additional evidence is taken by the trial court, it shall certify such evidence to the court, with a statement of its opinion on the credibility of the witness or witnesses giving the additional evidence; when evidence is taken by a commissioner, he shall certify the evidence to the court, without any such statements of opinion.
 - (4) The parties to the appeal shall be entitled to be present when such additional evidence is taken.



21. In the exercise of the court's discretion under rule 29 the principles that should guide the court were summarized by Chesoni, Ag JA (as he then was) in *Mzee Wanjie and 93 others vs AK Saikwa and others* (supra) as follows:

' The principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ, as he then was, in the case of *Ladd v Marshall* [1954] 1 WLR 1489 at 1491 and those principles are:

1. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
 - (b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;
 - (c) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.'

23. The applicant has in the notice of motion set out the kind of additional evidence he seeks to adduce in his appeal. And in his affidavit he makes reference to that evidence. Under order 2 and 4 of the application, the applicant states that he wishes to adduce additional evidence which relates to bias, malice, and collusion between the trial judge and the IP, on the one hand and the trial judge and the former governor of the Mombasa on the other. In order 3 what is sought to be introduced is not stated.

24. What the applicant needed to show is: one that the evidence he seeks to introduce could not have been obtained with reasonable diligence for use at the trial. Two, that the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive. Three, that the evidence is such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

25. With due respect to the applicant, these issues were not addressed at all, and yet they needed to be explained to assist the court make an informed decision. I see in paragraph 24 of the supporting affidavit the applicant makes reference to YouTube clips; in paragraph 25 he makes reference to a case filed by a party not in this appeal and makes serious allegations of misconduct of criminal nature; paragraph 34 talks of information received from a third party. This is but a small fraction of what is covered in the 324 pages affidavit. The issue is whether in exercise of due diligence the applicant could not have had this evidence before. Secondly, whether the information clips and documents are credible, likely to be believed? Finally, whether they are relevant to this case. In regard to relevance of this material to this case, the clips and documents are meant to adduce evidence which adversely affects persons who are not parties to the case, secondly, these persons have not been served so that they can be heard before adverse orders are made which may affect them.

26. In regard to the trial judge, allowing such an application would set a very dangerous precedent, because it would have great repercussions to the judicial function and justice system in this country. It would be a permanent intimidation to judges and judicial offices that they could be dragged into cases and made parties in matters they adjudicated upon by parties whose cases they dismissed or ruled against. I do not think we need to take that route. For this caution I will rely on the Supreme Court of Kenya decision where it has also set out guidelines for the admission of additional evidence before appellate



courts in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party) [2019] eKLR*;

' (79) We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

(a) to (h)

(i) The court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The court must find the further evidence needful;

(j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case;

(k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.'

27. I have carefully considered this application and find that it partly succeeds. The result is that I will allow the application dated January 28, 2022 as follows:

- a. The applicant is granted leave to amend his memorandum of appeal as indicated as per paragraphs 2, 5, 9, 10, 11, 15, 16 and 17 of the application.
- b. The applicant will file and serve the amended memorandum of appeal within 30 days of today's date, and pay requisite fees, if any.
- c. Failure to comply with order b. above, the leave granted shall lapse.
- d. The costs shall abide the outcome of the appeal.

Those are my orders.

DELIVERED AD DATED THIS 21ST DAY OF OCTOBER, 2022

J LESIT

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JUDGE OF APPEAL

