



**Tarmohamed v Mariakani Holdings Limited & another (Civil Appeal
(Application) 76 of 2019) [2022] KECA 122 (KLR) (18 February 2022) (Ruling)**

Neutral citation: [2022] KECA 122 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) 76 OF 2019
P NYAMWEYA, JA
FEBRUARY 18, 2022**

BETWEEN

SHAMSHUDIN TARMOHAMED APPELLANT

AND

MARIAKANI HOLDINGS LIMITED 1ST RESPONDENT

MINISTER'S APPEAL TRIBUNAL 2ND RESPONDENT

*(An appeal against the ruling of the High Court at Mombasa delivered
on 12th April 2018 (Ogola J.) in JR Misc. Application No. 45 of 2015)*

RULING

1. The Notice of Motion before this Court is dated 4th May 2020, wherein Shamshudin Tarmohamed, the Applicant/Appellant herein, seeks leave to amend his memorandum of appeal as per the draft amended memorandum of appeal he has annexed and to file a supplementary Record of Appeal. The application is supported by an affidavit sworn on same date by the Applicant/Appellant. The ground upon which the application is based that during the pre-trial conference in 2020 with his advocate, he realised that some of the complaints he had against the judgment had not been pleaded or raised in the memorandum of appeal, which was as caused by the fact that the advocates who represent him in the High Court and in this Court are different, and his current lawyer was not properly briefed by his previous lawyer. Further, that he has been informed by his advocate that unless the said issues are pleaded in the memorandum of appeal, they cannot be taken out on the appeal thereby necessitating the instant application. The Applicant urged that the mistakes of his Advocates should not be visited on him, and that the application was in no way prejudicial to the respondent and was brought at the earliest upon realization of the need to amend the Memorandum of appeal.
2. The Applicant/Appellant's counsel filed submissions dated 6th July 2020 and reiterated the above facts, save to add that the Respondents were served with the application and no objection to the application



was filed. The Appellant further submitted that the amendment to the memorandum of appeal before the commencement of the hearing should be allowed in the exercise of this Court's wide and unfettered discretion and in the interest of justice, and relied on the the principles set in *John Gakuo & another vs County Government of Nairobi & another* [2017] eKLR He therefore urged that the application be allowed considering it was unopposed, it had been filed before the commencement of the hearing and it was in the interest of justice.

3. The Respondents did not file any pleadings or submissions. When the application came up for hearing before this Court on 15th December 2021, Mr. Jengo, learned counsel for the Applicant/Appellant was present, as was Mr. Asige, learned counsel for 1st Respondent. Mr. Jengo relied on his submissions, while Mr. Asige informed the Court that he did not oppose the application. There was no appearance of the 2nd Respondent who was represented by the Attorney General.
4. It is settled that the power reserved for the Court by rule 44 (1) of the *Court of Appeal Rules* to grant leave to amend pleadings and documents upon a formal application is a discretionary power, which must be exercised judiciously and upon reason. In the exercise of this discretion, the principles that guide this Court are that a memorandum of appeal is a pleading like any other, and the rules that apply to amendment of pleadings will apply, namely that amendments should be liberally allowed, if they can be made without injustice to the other side, or where such injustice can be compensated by costs. See in this regard the decisions in *Uhuru Highway Development Ltd vs Central Bank of Kenya (2002) 1 EA 314*, *John Gakuo & another vs County Government of Nairobi & another* [2017] eKLR, and *Kenya Hotels Limited vs Oriental Commercial Bank Limited* [2018] eKLR.
5. As regards leave to file a supplementary record of appeal, Rule 88 of the Court's Rules provides that where a document referred to in rule 87(1) and (2) is omitted from the record of appeal the appellant may within fifteen days of lodging the record of appeal, without leave, include the document in a supplementary record of appeal filed under rule 92(3) and thereafter with leave of the deputy registrar on application. While the application ought to have been made to the deputy registrar, this Court will dispose of the prayer in the interests of expeditious hearing of this appeal, which is an obligation placed upon this Court by Article 159(2) (d) of the *Constitution*.
6. It is my view that the Applicant/Appellant has satisfactorily explained the reasons necessitating the amendments of the memorandum of appeal and filing of the supplementary record of appeal, which are also necessary to enable this Court to determine the dispute fairly and correctly. In addition, the Respondents have not indicated that they will suffer any prejudice and did not oppose the application.
7. In the circumstances, the application dated 4th May 2020 is allowed, and the Applicant/Appellant shall file and serve the Respondents with Amended Memorandum of Appeal and Supplementary Record of Appeal within 30 days of the date of this ruling.
8. There shall be no order as to the costs of the application.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF FEBRUARY 2022.

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

