



**Charo v Municipal Council of Mombasa & 2 others (Civil Application
56 of 2019) [2022] KECA 137 (KLR) (18 February 2022) (Ruling)**

Neutral citation: [2022] KECA 137 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 56 OF 2019
JW LESSIT, JA
FEBRUARY 18, 2022**

BETWEEN

DAMA CHARO APPLICANT

AND

MUNICIPAL COUNCIL OF MOMBASA 1ST RESPONDENT

TAIB ALI BAJABER 2ND RESPONDENT

ABDALLA ALI BAJABER 3RD RESPONDENT

*(Being an application to amend the memorandum of appeal
dated 18th April 2019 and lodged herein on 24th April 2019)*

RULING

1. This Notice of Motion application, dated 12th May, 2020 has been brought pursuant to Rule 44 of the Court of Appeal Rules, seeking leave to amend the memorandum of appeal dated 18th April 2019 and lodged in court on the 24th April 2019 in respect of the decision of the Environment and Land Court Civil Suit No. 124 of 2018 (O.S.), and for the amended memorandum of appeal dated 13th May 2020 annexed herein be considered as duly filed with the leave of the court, upon payment of the requisite filing fees.
2. The grounds for the application are: that it is imperative to amend the memorandum of appeal in that important material particulars and/or grounds were not pleaded yet are necessary for the just determination of the appeal; in order to put the matter in its proper perspective to facilitate a just determination of the appeal; that the omission to include the necessary and important grounds was occasioned by excusable mistake on the part of the counsel on record; that the amended memorandum of appeal is annexed to the application and is proof that it is not introducing new matter but matters



similar to the submissions urged before the Environmental and Land Court; and that no prejudice shall be suffered by the Respondents if the application is allowed.

3. In the supporting affidavit sworn by the Applicants advocate he deposes that the appeal came up for case management on the 18th December 2019 and the same was set down for hearing on the 12th of May 2020. This application was filed on the date set for hearing.
4. There is no replying affidavit. There are however submissions filed on behalf of the 1st Respondent. The other Respondents filed no papers.
5. This application was heard virtually on the 24th November, 2021. Mr. Kenga learned counsel for the Applicant appeared for the hearing. The Respondents' learned counsels on record, Mr. Muchai for the 1st Respondent and Mr. Taib for the 2nd and 3rd Respondents were served with the hearing notice on the 16th November 2021 but both did not appear for the hearing.
6. In the submissions filed on behalf of the 1st Respondent, he opposes the application on the grounds that the reasons given for the amendment was too general and vague. Referring to paragraph 4 of the supporting affidavit, counsel urged that the reasons given were not just deficient but lacked preciseness. It was urged that the draft amended memorandum introduced fresh cause of action in that the previous grounds of appeal were premised on adverse possession, but the Applicant has proffered new grounds challenging the validity of the consent judgment of 4th May 2017. He cited [*Merry Beach Ltd Vs Barclays Bank Ltd & another \[2018\] eKLR*](#) for the proposition that an amendment should not introduce new or inconsistent grounds. Counsel decried the filing of the application 12 days to the scheduled date of hearing urging that the application should be allowed as it amounts to abuse of court process, citing the case of [*Uchumi Supermarkets Ltd & another Vs Sidbil Investments Ltd \[2018\] eKLR*](#) and [*Kyalo Vs Bayusuf Brothers Ltd Civil Appeal No 38 of 1983*](#) of for that proposition.
7. I have considered the application, the supporting affidavit and the submissions filed by the learned counsels for the Applicant and the 1st Respondent. The issue before me is whether to grant the orders sought. 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. (See [*Kanawal Sarjit Singh Dhim v Keshavji Jivraj Shah \[2010\] eKLR*](#)).
8. The Court of Appeal had occasion to interrogate whether a Memorandum of Appeal is amenable to amendment. In [*John Gakuo and Another Vs County Government of Nairobi & another \[2017\] eKLR; Civil Appeal \(Application\) No. 201 OF 2016*](#), Wanjiru Karanja, JA stated as follows:

“To start with, this Court has pronounced itself on whether a memorandum of appeal is amenable to amendment or not. This issue was not taken up in this application and so we shall start from the premise that a memorandum of appeal is a pleading like any other and the rules that apply to amendment of pleadings also apply to a memorandum of appeal. See *Uhuru Highway Development Ltd vs Central Bank of Kenya (2002) 1 EA 314* where this Court held that “a memorandum of appeal, subject to the interests of justice, is always amenable to amendment”. The general principle is that amendments should be allowed liberally, particularly where the hearing of a case has not commenced. In the case of *Eastern Bakery –vs– Castelino (1958) E.A. 461*, Sir. Kenneth O'Connor P. stated as follows:-

“Generally speaking this Court will not interfere with the discretion of a Judge in allowing or disallowing an amendment to a pleading, unless it appears that in reaching his decision he has proceeded upon wrong materials or a wrong principle.”



The same authority espouses further some of the principles to be taken into account when considering whether to allow an amendment of any pleadings as herein under:-

“It will be sufficient, for the purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.... The court will not refuse leave to allow an amendment simply because it introduces a new case.... But there is no power to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject matter of the suit... The court will refuse leave to amend where the amendment would change the action into one of a substantially different character; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g. by depriving him of a defence of limitation accrued since the issue of the writ.”

[22] The learned authors of *Halsbury's Laws of England*, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, give some insights on the amendments of pleadings:-

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion.

... the person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”.

9. It is settled that a memorandum of appeal, such as the one that the applicant seeks to amend is a document that is rightly amenable to amendment. It is very clear 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.
10. I have looked the annexed memorandum of appeal. The question is whether the reasons advanced as the grounds for the amendment are vague and devoid of precision, and whether the Applicant's amended memorandum of appeal has introduced fresh cause of action by changing from adverse possession to challenging the validity of the consent judgment of 4th May 2017. More importantly whether the Applicant has introduced a new or inconsistent cause of action.
11. In order to answer these questions, one should not confine oneself to the previous and draft amended memorandum of appeal. In addition, it is important to look at the pleadings and the impugned ruling or judgment of the court to see what the issues before the court were. The draft amended memorandum as recast almost all the grounds of appeal previously relied on, as well as introduced a challenge to the validity of the consent judgment. The prayer to vary, review or set aside the consent order was in fact the subject of the orders sought in the application dated 23rd June 2017, which gave rise to this appeal.



The submissions presented before the trial court made extensive mention of the consent judgment and its validity or lack of it. It cannot be correct to say that it is a new and inconsistent ground.

12. As to the delay involved in bringing this application, the Applicant in the supporting affidavit sworn by his counsel on record explains that the notice and the memorandum of appeal were filed on the 20th March 2018 and 24th April 2019. The appeal came up for case management on 18th December 2019 where the appeal was set for hearing in 12th May 2020. That was the day this application was filed. There was delay in bringing the application in that the Applicant waited until the date for the hearing of the appeal.
13. Is that sufficient reason to decline this application? I do not think that there is sufficient ground to drive the Applicant from an opportunity to articulate her case. Instead of that, the 1st and 2nd Respondents can be awarded costs to ameliorate any prejudice they may stand to suffer if the application is allowed.
14. Having considered the application and all the relevant material before me I find that none reveal any basis to deny the application herein. In the result, the Notice of Motion dated 12th May 2020 is allowed. The 1st Respondent will have the costs of the application.

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

JESSIE LESIIT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

