



REPUBLIC OF KENYA



KENYA LAW
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**Mbembe v Kamere (Civil Appeal (Application) E355 of 2020)
[2023] KECA 1258 (KLR) (13 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1258 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E355 OF 2020
PM GACHOKA, JA
OCTOBER 13, 2023**

BETWEEN

MWAURA GITUKUI MBEMBE APPLICANT

AND

SIMON KAMERE RESPONDENT

*(An application for leave to amend the Memorandum of Appeal dated
28th September 2020 pursuant to Rule 31, 44(1) of the Court of Appeal
Rules, 2010 and Article 159 (2) (d) of the Constitution of Kenya)*

RULING

1. Before me is Notice of Motion dated July 3, 2023 seeking the following orders:
 - a. Spent.
 - b. That leave be granted to the Appellant/ Applicant to amend his Memorandum of Appeal dated the 28th day of September 2020.
 - c. That the draft Memorandum of Appeal annexed herein be deemed as duly filed upon payment of the requisite court fees and that the same be substituted in place of the Memorandum of Appeal dated the 28th day of September 2020.
 - d. That leave be granted to the Appellant/Applicant to file a Supplementary Record of Appeal limited to prayer No 3 above.
 - e. The costs of this Application abide the outcome of the Appeal.
2. The Motion is supported by the affidavit of Mwaura Gitukui Mbebe. In a nutshell, the applicant who states that he is 89 years old is dissatisfied with the judgment and decree of the Land and Environment Court, Thika, ELC Case Number 310 of 2017 (Gacheru, J) delivered on July 30, 2020. In summary,



the Court held that the respondent had acquired the suit property by way of adverse possession, and that his counter-claim was merited. The appellant's suit was dismissed and the Court found that the fence that the respondent had erected was not done illegally as he was the owner of the property. The Court further held that the matter could not be referred back to the Land Registrar for fixing of the boundary as there was no boundary to fix. The Court held that the appellant herein had failed to prove his case on the required standard of balance of probabilities and dismissed his claim as stated in the plaint dated June 24, 2014. Each party was ordered to bear their own cost.

3. Aggrieved by the judgement, the applicant filed a Notice of Appeal on August 4, 2020 and a record of appeal dated September 28, 2020.
4. The applicant states that his advocate has now realized that the memorandum of appeal had omitted to cite the prayers that they he is seeking. He states that the mistake is an honest mistake by counsel and that no prejudice will be caused to the respondent. The applicant has filed written submissions dated August 8, 2023 reiterating the same facts and has also cited the following cases in support of his case; *John Gakuo & another vs. County Government of Nairobi & another* (2017)eKLR, *George Gikubu Mbutia vs. Consolidated Bank of Kenya Limited & another* (2016) eKLR, *John Mugambi & Mugambi & Company Advocates vs. Kiama Wanagi* (2021) eKLR and *Charo vs. Municipal Council of Mombasa & 2 others* (Civil Application No 56 of 2019) (2022) KECA 137 (KLR).
5. He has also filed a supplementary affidavit sworn on August 8, 2023 stating that the land is vacant and therefore it is in the interest of justice for the appeal to be heard and determined.
6. The application is opposed and the respondent has filed a replying affidavit sworn July 10, 2023 stating that the application is an afterthought and has been brought late in the day and that an honest mistake of counsel is not a good basis for allowing the application. He states that he will suffer prejudice as he has waited anxiously for long for the appeal to be heard and that he has been unable to use his land for all that time. He adds that the inordinate delay is an abuse of the court process and amounts to prejudice.
7. The respondent has also filed submissions dated August 17, 2023 reiterating the same facts and relies on the case of *Uchumi Supermarkets Limited vs Sidbi Investments Limited* (2018) eKLR.
8. I have considered the application, the rival affidavits, the documents and written submissions. Rule 46 of the *Court of Appeal Rules, 2022* provides as follows:

“ 46.

- (1) Whenever a formal application is made to the Court for leave to amend a document, the amendment for which leave is sought shall be set out in writing and— Applications for leave to amend.
 - a. if practicable, lodged with the Registrar and served on the respondent before the hearing of the application; or
 - b. if it is not practicable to lodge the document with the Registrar, handed to the Court and to the respondent at the time of the hearing.
- (2) Where the Court gives leave for the amendment of a 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 forty-eight hours of the giving of leave and on failure to comply with the requirements of this sub- rule, the leave so given shall determine.”

9. The Rule gives the Court discretion to grant leave for an amendment to be done. It is trite that the power reserved for the Court by rule 46 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 vs. Keshavji Jivraj Shab* [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 *Kenya Hotels Limited vs. Oriental Commercial Bank Limited* [2018] eKLR).
10. The only question for me to determine is whether I should exercise my discretion in favour of the applicant. It is noteworthy, that the notice of appeal and record of appeal were filed on time. Further, the subject matter of the appeal is land and the issue to be determined in the appeal is whether the land belongs to the appellants or the respondent.
11. I note that the only omission by the applicant and which is sought to be cured by the amendment is the prayers. The applicant seeks to amend the memorandum of appeal to add the following:
 - a. The Appeal be allowed;
 - b. The judgment made by the Environment and Land Court at Thika delivered on the 30th day of July 2020 before Honourable L Gacheru in Thika Environment and Land Court Case No 310 of 2017 be and is hereby set aside,
 - c. The costs of this Appeal be borne by the Respondent.
12. It cannot be denied that this amendment is coming late in the day. However, the respondent will not suffer any prejudice as the applicant is not introducing any new ground in memorandum of appeal. Clearly, such an amendment cannot be said to be prejudicial to the respondent. Concomitantly, it is in the interest of justice for the amendment to be made and the appeal to proceed for proper determination and to avoid a scenario where the appeal is thrown out for want of proper drafting and thus a technicality that goes against the oxygen principles and the need to avoid technicalities.
13. My view therefore as was the view of this Court in *George Gikubu Mbuthia vs. Consolidated Bank of Kenya Ltd & Another* (2016) eKLR, 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.
14. Accordingly, the orders sought to be included in the memorandum of appeal are necessary and no prejudice will be caused to the respondent. The Notice of Motion dated July 3, 2023 is allowed and costs to abide in the appeal. The applicant is hereby granted 14 days to file and serve the amended memorandum of appeal. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF OCTOBER, 2023.

M. GACHOKA CIArb, FCIArb

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JUDGE OF APPEAL



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

Signed.

DEPUTY REGISTRAR

