



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL NO. 55 OF 2020**

**CONSOLIDATED WITH CIVIL APPEAL NO. 56 OF 2020.**

**DIAMOND TRUST BANK KENYA LIMITED.....APPELLANT/APPLICANT**

**VERSUS**

**INVESCO ASSURANCE COMPANY LIMITED.....1<sup>ST</sup> RESPONDENT**

**FRANCIS OCHIENG KOKA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling relates to an oral application by the counsel for Appellant/Applicant made on 23/11/2020 seeking leave to amend a Notice of Motion application dated 27/10/2020. Mr. Janjo, Counsel for the Applicant submitted that the Applicant wished to amend prayer 2(a) of the application to include prayers which were inadvertently omitted in the initial application.

2. Mr. Ananda, Counsel for the 2<sup>nd</sup> Respondents on the other hand opposed the application. His view was that the prayers sought can only be considered if a formal application for amendment is made to this court. Be that as it may, he submitted that Judgment in this case was delivered on 23/10/2020 and the Appellant ought to have filed a Notice of Appeal within 14 days thereof pursuant to Rule 75 of the Court of Appeal Rules but failed to do so. As such, the counsel argued that this court lacks Jurisdiction to grant leave to appeal or extend time of appeal where there is no Notice of Appeal before the court of Appeal. He added that the right forum for seeking the current prayers is before the Appellate Court as stipulated under Section 7 of the Appellate Jurisdiction Act. In the end, the counsel sought the court to dismiss the application dated 27/10/2020 for being an abuse of the court process.

3. In rejoinder, Mr. Janjo Counsel, for the Applicant submitted that his request was premised on Order 8 Rule 5 and Rule 8 of the Civil Procedure Rules. Order 8 of the Civil Procedure Rules stipulates that an application for amendment can be made orally and according to Mr. Janjo, the Section has dispensed with the need of a formal application for amendment. Mr. Janjo further argued that this court has jurisdiction under Section 7 of the Appellate Jurisdiction Act to extend the time for granting notice of intention to appeal.

4. The counsel also submitted that the proposed amendments will not prejudice the Respondents but will help the court in determining the real issue in controversy and in the interest of justice the court should allow the application for amendment.

**Determination**

5. Having laid out the parties' perspective positions as above, the main issues arising for determination in my view are: -

**a) Whether this court has Jurisdiction to consider an application for extension of time to appeal;**

**b) Whether an application for amendment can be made orally and if so, should this court exercise its discretion in the Applicant's favour and grant it leave to amend the Notice of Motion application dated 27/10/2020.**

**Whether this court has Jurisdiction to consider the Application for extension of time to appeal**

6. Mr. Ananda counsel for the Respondent premised his argument on Rule 75(1) and (2) of the Court of Appeal Rules, 2010, which provides that "a person who desires to appeal to the Court of Appeal shall give notice in writing to be lodged within fourteen days of the date of the decision against which it is desired to appeal."

7. That the subject judgment in this instant case was delivered on 23/10/2020 and the statutory 14 days period expired on 14/11/2020 while the instant application was filed on 6/11/2020. So that without any notice of appeal on record, the counsel submitted that the court lacked

jurisdiction to consider the application and the correct forum would be the court of Appeal.

8. Mr. Janjo on the other hand was of the view that pursuant to Section 7 of the Appellate Jurisdiction Act, this court has jurisdiction to consider an application for extension of time.

9. It is true that the court record reflects that Judgment was delivered on 23/10/2020 and fourteen days then lapsed on 6/11/2020. I note that the application having been filed on 6/11/2020, in my view it would have been safe for the Applicant to file a Notice of Appeal since the time clock was still ticking in its favour. In other words, the time frame within which the appeal would have been filed had not yet lapsed and the Applicant had not been locked out as at 6/11/2020. Be that as it may, I have considered Section 7 of the Appellate Jurisdiction Act, Cap 9 and it provides as follows: -

***“ S. 7 Power of High Court to extend time***

***The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:***

***Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”***

10. In view of the above provisions, it is explicitly clear that the High Court may extend time for giving notice of intention to appeal from a judgment of the High Court and in my view the said Section 7 does not need any more than a literal interpretation. Therefore, Section 7 of the Appellate Jurisdiction Act clearly confers to the High Court jurisdiction to extend time for the filing of a Notice of Appeal and to decide otherwise is akin to completely disregarding a clear provision in the law.

11. Similar finding is expressed in the decision of Odunga, J in the case of **Nyamodi Ochieng Nyamogo v Telkom Kenya Limited, Nairobi H.C.C.C. No. 1736 of 1993**. His observation therein was that:

***“It is clear that the High Court’s powers under section 7 aforesaid is limited to three instances and these are giving notice of intention to appeal from a judgment of the High Court and for making an application for leave to appeal or for a certificate that the case is fit for appeal.”***

**Whether the oral Application for amendment is viable.?**

12. On this issue, Mr. Janjo for the Applicant heavily relied on Order 8 Rule 5 of the Civil Procedure Rules in submitting that an application for amendment can be made orally and even if this court allowed the application, it would not be prejudicial to the Respondent. He added that the intended amendment was strictly limited to adding a prayer which had been inadvertently omitted and could only serve the purpose of aiding the court in determining the issues in controversy.

13. Mr. Ananda in opposing the request stated that an amendment could only be considered after a formal application has been tabled before the court.

14. The general power of the court to amend pleadings draws from Section 100 of the Civil Procedure Act. Parties to a suit also have a right to amend their pleadings at any stage of the proceedings, albeit that right is not absolute, for it is dependent upon the discretion of the court. However, this discretion should be exercised judicially and in line with criteria set out under Order 8 Rule 3 of the Civil Procedure Rules.

15. **Order 8 rule 5** of the Civil Procedure Rules provides as follows: -

***“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”***

16. It is clear that the section does not explicitly oust an oral application for amendment of pleadings and in my view it anticipates the application either being made orally or formally. Thus, the overriding consideration in an application for leave for amendment ought not to be based on the form but on whether the amendment sought is necessary for the determination of a suit and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs. The Court of Appeal addressed itself on the foregoing discussion in the case of **Central Kenya Limited v Trust Bank limited (2000)2 E.A 365** as follows: -

***“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”***

17. I find further guidance in the scholarly work of Bullen and Leake & Jacob's **Precedents of Pleading, 12<sup>th</sup> Edition**, which provides as follows concerning amendment of pleadings: -

***“...power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can***

*compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action...”*

18. In the instant case, the Applicant seeks leave to amend the application dated 27/10/2020 so as to include a prayer which was inadvertently omitted. It is argued that the amendment will help in determining the issues in controversy especially whether the Applicant is entitled to the prayer for extension of time and for stay of execution as sought. The Respondents have not shown any prejudice they are likely to suffer if the court allows the application for amendment. Further, without any evidence that the application has been made on bad faith, I see no reason why the Applicant should be denied the chance to amend its Application.

19. In my view allowing the amendments accords well with the provisions of Article **159(2)(d)** of the **Constitution of Kenya, 2010** which emphasizes that in exercising judicial authority, the courts and tribunals shall be guided by *inter alia* the principle that “*justice shall be administered without undue regard to procedural technicalities*”.

20. Consequently, I allow the oral application for amendment made before me on 23/11/2020 by Mr. Janjo Counsel for the Appellant/Applicant. However, the said amendments shall be limited to inclusion of the allegedly omitted prayer. The Counsel for the Respondent is also granted leave to respond to the Amendment.

It is so ordered.

**Dated, Signed and Delivered at Mombasa this 12<sup>th</sup> day of February, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**Order**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

**JUSTICE D.O. CHEPKWONY**