



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL CASE NO. 65 OF 2019

MAKUENI COUNTY GOVERNMENT.....APPELLANT/APPLICANT

VERSUS

GRACE MWELU DAVID.....RESPONDENT

RULING

1. The application for determination is dated 02/06/2020 and was filed under certificate of urgency. It is brought under Order 51 Rules 1, 3, 4, Order 42 Rules 3 (i), 2 & 4 of the Civil Procedure Rules (CPR) and section 3A of the Civil Procedure Act (CPA). It seeks the following orders;

a) *Spent.*

b) **That**, the Applicant/Appellant be granted leave to amend the memorandum of appeal as per the proposed amended memorandum of Appeal.

c) **That**, the annexed proposed amended memorandum of appeal be deemed as duly filed and served upon the payment of the requisite court fees.

d) **That**, costs of the application do abide the results of the appeal.

2. The application is supported by the grounds on its face, the supporting affidavit of Mr. Francis Masika advocate sworn on the same day and his supplementary affidavit sworn on 16/06/2020. The principle ground is that at the time of filing the appeal, the Appellant had a copy of the judgment only but later on, he got the certified copy of proceedings and it became necessary to amend the Memorandum of Appeal. The Amended Memorandum of Appeal is exhibited as **FMM-1**

3. The application is opposed through the replying affidavit of Mr. Muendo Uvyu advocate sworn on 08/06/2020. The gist of the opposition is that the firm of Manthi Masika & Co. advocates deliberately failed to obtain the certified copies of the proceedings since January 2020 when they were informed and waited until the court gave directions on hearing of the appeal on 04/05/2020. Various correspondences have been exhibited as **MMU-1, 2 & 3.**

4. He deposes that this application is highly prejudicial to the Respondent because she filed her submissions on 19/05/2020 and forwarded them to the Applicant's counsel. The forwarding letter has been exhibited as **MMU-4.** It is also his deposition that the Applicant has submitted on grounds in the proposed amended memorandum of appeal without leave of court.

5. In rejoinder, Mr. Masika agrees that they were indeed notified of the typed proceedings and judgment but deposes that upon sending his clerk to collect them, the clerk was informed that they were in draft form and would be advised on when to collect. Further, he deposes that the proceedings and judgment were not supplied until 06/05/2020 despite having paid for them on 31/01/2020.

6. It is also his deposition that the civil registry misplaced their letter but the Deputy Registrar apologized for the mistake. The apology is exhibited as **FM-1.** He also deposes that they had closed their office from early March to end of April and that the delay is not inordinate.

7. Further, he deposes that the Respondent's submissions should be expunged from the record for failing to adhere to the procedure which requires the Appellant to be heard first and the Respondent to follow.

8. The application was canvassed by way of written submissions.

9. Relying on section 100 of the CPA, the Applicant's counsel submits that the court has absolute discretion to allow an amendment at any stage of the proceedings. He cites the case of **George Gikubu Mbuthia –vs- Consolidated Bank of Kenya Ltd & Anor (2016) eKLR**

where the Court of Appeal expressed itself as follows;

“As regards the law, the High court readily accepted that the court has unfettered discretion to allow amendment of pleadings, which discretion must be exercised judiciously. It accepted too as a general position that parties to a suit have the right to amend their pleadings at any stage of the proceedings before judgment and that court should liberally allow such amendments. However, he also noted 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 other.”

10. He also submits that under Article 159 of the Constitution, the court can address grievances in all manner of form in order to ensure that justice is done to the parties.

11. Further, he submits that the reason for the delay in making the application has been sufficiently explained and that the amendment seeks to deal with issues that were raised during the trial and issues that subsequently occurred including illegal execution against the Appellant.

12. It is also his submission that the application has not been made in bad faith and will not cause prejudice that cannot be cured by way of costs.

13. The Respondent submits that the proposed amendments will cause prejudice and injustice because she had already filed and served her submissions before the current application was filed. She relies *inter alia* on Malindi HCCC No. 5 of 2014: **Merry Beach Ltd –vs- Barclays Bank Kenya Ltd & Anor (2018) eKLR** where it was stated that;

“Various authorities will show that amendment of pleadings should be allowed if the amendment will assist the court to determine the real question in controversy.

Such an amendment should not introduce new or inconsistent cause of action. The amendment should not occasion prejudice or injustice to the opposing party. It is also a principle of law that it cannot be said that prejudice can be occasioned where costs can provide adequate compensation.”

14. She has also cited the case of **Uchumi Supermarkets Ltd & Anor –vs- Sidhi Investments Ltd (2018) eKLR** where the Court of Appeal stated that;

“In the circumstances of this case and as argued by the Respondent, the basis upon which I would exercise discretion in favour of the Applicants has not been laid. The respective parties had prepared, filed and exchanged written submissions in respect of the appeal and the appeal was ready for canvassing but for the amendment sought.”

15. Further, she submits that applications for amendments of pleadings should only be allowed if they are brought within a reasonable time because allowing a late amendment amounts to abuse of the court process.

16. Having considered the application, the affidavits in support, the replying affidavit and the rival submissions, it is my considered view that the only issue for determination is whether leave to amend the memorandum of appeal should be granted.

Analysis and determination

17. **Order 8 Rule 5(1)** of the CPR 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 document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

18. I have looked at the record and noted that indeed, the Applicant filed its request for the proceedings and judgment on 31/01/2020 and paid for them on the same day. The exhibited email correspondence from the Deputy Registrar of this Court shows that an email was sent to Mr. Masika on 06/05/2020 indicating that their request letter had been misplaced and apologizing for the same. Accordingly, Mr. Masika did not deliberately fail to obtain the certified copies of proceedings and judgment as submitted by the Respondent.

19. According to the Respondent, it will be prejudicial to allow the application because she has already filed and served her submissions on the appeal. On 04/05/2020, this court gave directions for the disposal of the appeal by way of written submissions and each party was given 30 days to file and serve. The Respondent filed her submissions on 19/05/2020 and the Appellant filed its submissions on 02/06/2020.

20. As much as parties should be encouraged to comply with Court orders promptly, it is evident that the Respondent was too hasty and the Appellant was still within its period of compliance which was to lapse on 04/06/2020. As correctly submitted by the Applicant, the right to begin belongs to the Appellant. Be that as it may, I am not convinced that the fact of having filed submissions will occasion any prejudice to the Respondent because she will have an opportunity to file further submissions if need be.

21. I have also looked at the proceedings vis-à-vis the amended memorandum of appeal and I am satisfied that the proposed amendments will assist the court to determine the real questions in controversy. I am also in agreement with the sentiments of the Court of Appeal in the **George Gikubu** case (*supra*) that amendments of pleadings before judgment should be allowed liberally even as courts strive to exercise the

discretion judiciously.

22. The upshot is that the application has merit and is allowed in terms of prayers b, c and d.

23. Parties are granted leave to file further submissions if need be. Each party will have 21 days starting with the Appellant/Applicant.

Orders accordingly.

Delivered, signed & dated this 29th day of July 2020, in open court at Makeni.

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H. I. Ong'udi

Judge