



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 148 OF 2019

HERMAN NYAMBU OMBOK.....APPELLANT

VERSUS

NATIONAL BANK OF KENYA LTD.....RESPONDENT

(Being an appeal from the judgment by Hon. R. K. Langat, Senior Resident Magistrate in Rongo Senior Magistrate's Court Civil Case No. 355 of 2018 delivered on 14/11/2019).

RULING

The Notice Motion dated 21/3/2020 was brought by the Respondent/Applicant, National Bank of Kenya Ltd against the Applicant/Respondent seeking the following orders:

- 1. Spent**
- 2. That the Respondent/Applicant be granted leave to amend the Memorandum of Appeal dated 11/12/2019;**
- 3. That the application be place before the court for directions/ hearing;**
- 4. Costs of the application.**

The application is premised on grounds found in the body of the application and the affidavit of **Doreen Nanjala Musebe**, counsel who has conduct of this matter on behalf of the applicant. It is the applicant's case that the applicant was aggrieved by the courts judgment in **CMCC 355 of 2018 Rongo Herman Nyambu Ombok =vs= NBK Ltd** (the applicant) where judgment was entered against the applicant for Kshs. 1,000,000/=. A Memorandum of Appeal was filed in Court on 11/12/2019 (DMM2) and on 14/1/2020, a stay of execution was granted when the applicant was ordered to deposit Kshs. One Million in an interest earning account in the names of both Advocates which was done; that in the process of preparing the Memorandum of Appeal, the counsel inadvertently referred to the parties Herman Ombok as the applicant and NBK Ltd as the Respondent (DMM2); that the error was noted when the matter came up for directions on 24/1/2020 and it necessitated the amendment of the Memorandum of Appeal to refer to the parties correctly and hence is application.

The Respondent Herman Ombok, filed a replying affidavit dated 12/2/2020 opposing the application for reasons that there is an error on the face of the application whereby the Respondent has been referred to as the applicant whereas the applicant has been referred to as the Respondent. The Respondent contends that the error on the Memorandum of Appeal is grave to the Respondent in that it implies that the Respondent is the applicant yet that is not the position; that there are too many errors in the appeal and it is on a ploy to defeat the ends of justice; that the application is bad in law and a miscarriage of justice.

The court directed that the application be disposed of by way of submissions and each party did file their respective submissions.

The applicant identified three issues for determination being; whether a Memorandum of Appeal can be amended; whether the proposed amendment will introduce a new cause of action and whether the Respondent will suffer any prejudice if the amendment is allowed.

H. Obach Advocate filed submissions on behalf of the respondent and argued two issues, whether an amendment can cure the error on the Memorandum of Appeal and whether the applicant has established a prima facie case with a probability of success.

I have considered both the pleadings and submissions; I think that the pertinent issues to consider are whether:

- 1) A Memorandum of Appeal can be amended;**

2) Whether the proposed amendments will introduce a new cause of action to the appeal and;

3) Whether the Respondent will suffer any prejudice.

Section 100 of Civil Procedure Act grants the court a wide discretion at anytime and on such terms as to costs or as it otherwise thinks fit, to amend any defect or error in any proceedings in a suit. The object of amendment is also captured as being for the purposes of determining the real question or issue raised depending on the proceedings.

Order 8 Civil Procedures Rules also provides for amendment of pleadings, Order 8 (3)(1) captures the spirit of Section 100 Civil Procedure Act, that an amendment can be made with leave of the Court.

Order 8 (3)(3) Civil Procedure Rules also provides for amendment to the names of the parties to a suit while Order 8(5) Civil Procedure Rules provides for amendment even if it were to add another cause of action.

Order 42 (3) (1) specifically addresses amendment to a Memorandum of Appeal “3(1)& (2)

(1) the applicant may amend his Memorandum of Appeal without leave at any time before the court gives direction under Rule 13

(2)After the time limited by Sub rule (1) the Court may, on application, permit the applicant to amend his Memorandum of Appeal.”

This appeal came up for directions on 27/2/2020 when the error in the Memorandum was noted. In the **Court of Appeal 201 of 2016 John Gakuo & Another vs= County Government of Nairobi (2017)eKLR** which cited **Uhuru Highway Development Ltd vs= Central Bank of Kenya (2012) 1EA 314** the Court of Appeal held that :-

“A Memorandum of Appeal, subject to the interest of justice, is always amenable to amendment.”

The court stated that the general principle is that the amendments should be allowed liberally, especially when the hearing of the case has not commenced. In the Uhuru Highway case, the court set down some of the principles to be taken into account in such case (supra):

“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.”.....”

Based on the law and the cited authorities, I am satisfied that this court has a wide and unfettered discretion to amend a Memorandum of Appeal after taking into account the special circumstances of each case.

Whether the amendment will introduce another cause of action; in this case the only error known is the interchange of the titles of the parties whereby the applicant described itself as the respondent while the respondent became the applicant. The titles do not go to the substance of the appeal as to introduce a new cause of action. The decision of **Social Accountability & Ano vs= Parliament of Kenya (2014) eKLR** aptly captured the spirit of Section 100 Civil Procedure Act when it held that the object of amendment of pleadings is to enable parties to alter their pleadings to ensure that litigation between them is conducted on the true state of the facts. An amendment can also be allowed to introduce a new ground of appeal but it all depends on the circumstances of each case – See **ELCA 36 OF 2015 Tabitha Wandia vs= Francis Mwangi**. Although the court has the discretion to allow an amendment to include a new ground of appeal, that is not the case herein.

Will the Respondent suffer any prejudice? The Respondent’s submission is that the appellant needs to demonstrate that it has an appeal with high chances of success. However, that is not necessary at this stage. This is not an application for stay of execution. The issue of stay has been dealt with and the court ordered the defendant to deposit One Million shillings in an interest earning account of counsel for both parties. The court deemed it sufficient security for the due performance of the decree.

It is clear that the Respondent has not filed any appeal and the error made by counsel is purely inadvertently. Besides the applicant has demonstrated that it is keen to have its appeal heard and determined on the merits and it would be an injustice to lock out the applicant from its right of appeal just because of an inadvertent error committed by counsel for the applicant.

The upshot is that the application has merit. It is hereby allowed. The applicant is allowed to amend its Memorandum of Appeal to reflect the correct titles of the parties.

The applicant will bear the costs of this application.

Dated, Signed and Delivered at Migori this 14th day of December, 2020

R. WENDOH

JUDGE