



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 161 OF 2013

EDWARD MUIRURI GATETE MBURU.....APPELLANT

VERSUS

SUSAN KITHEKA.....1ST RESPONDENT

ALIYA SAID2ND RESPONDENT

R U L I N G

1. The appellant filed this appeal against the judgment of S N Riechi Chief Magistrate (as he then was, now a Judge of the High Court) in CMCC No. 2261 of 2010. That judgment was delivered on 7th September, 2013, whereas the Memorandum of Appeal was filed on 19th December, 2013. Undoubtedly the Memorandum of appeal was filed out of the 30 days provided under Section 79 G of the Civil Procedure Act, Cap21.

2. Appellant filed a Notice of Motion dated 17th March, 2015. When that application came up for hearing the appellant sought to orally amend some of the prayers.

3. Appellant sought to amend prayer No 2 of that Motion. Prayer No.2 in motion was for:

“That there be a temporary stay of execution of Judgment and decree in the matter herein pending hearing and determination of prayer 3 of the present application.”

Appellant sought to amend it as follows:

“That there be a stay of execution of the judgment and decree arising from Mombasa CMCC No. 2261 of 2010 until the hearing and determination of HCCA NO. 161 of 2013.

4. Appellant also sought to amend prayer No.3 of that Motion. Prayer No.3 was for:

3. There be an extension of time to file and serve the Memorandum of Appeal from judgment and or decree dated 18th December.2013. And the memorandum of appeal filed herein be deemed as properly filed.

The appellant sought to amend that payer as follows:

“That there be an extension of time to file and served Memorandum of Appeal dated 18th December,2013 and the said memorandum of appeal filed on 19th December,2013 be deemed as

properly filed.”

5. The reason why those two prayers needed to be amended as was submitted by the appellant’s learned counsel, was because there was typographical error in typing the two prayers and the amendment was intended to capture the orders sought. He further stated that it was in the interest of justice that the amendment be allowed.

6. The 1st respondent opposed the application on the ground that the amendment was “improper and against procedure.” Counsel supported that argument by stating that appellant should have filed a formal application. 1st respondent cited the case **NATHAN CHESANG MOSON & 2 OTHERS –VS- COMMUNITY UPLIFT MINSTRIES (2013) eKLR**. Counsel failed to inform the court what was relevant in that authority to this case. Having read that authority I find no relevance at all to the appellant’s application to amend the Motion. The authority involved objection to a motion that has been amended without the leave of the court. Indeed this is what the appeal judges noted, that:

“It is not in dispute that the amendment Notice of Motion was filed without the leave of the court.”

The learned judges then made the following order;

The amended Notice of Motion dated 3rd July 2012 is irregularly filed as it was not filed with the leave court, the applicant not having made any application for leave to amend. Without the sanction of the court to amend, it is not properly on record. We find merit in the Preliminary Objection. We uphold it.

7. The general power to amend is stated in order 8 rule 5 (1) of the Civil Procedure Rule as:

“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.”

8. That power was discussed in the case:-

NYAMODE OCHIENG NYAMOGO V KENYA POST & TELCOMMUNICATION CORPORATION (2007) eKLR where the court stated:

“The guiding principle of cardinal importance on the question of amendment is that generally speaking all such amendments ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or correcting any defect or error in any proceedings. The rule of conduct of the court is that, however, negligent or careless and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side.

There is no injustice if the other side can be compensated for by costs. In **CROPPER V SMITH (1884) 26 ch d.700 at 710 BOWEN LJ** had this to say:

“I think it is well established principle that the object of the courts is to decide the rights of the parties, and not to punish them for mistakes which they make in the conduct of their cases by deciding otherwise that in accordance to their rights.”

9. The only objection raised by the 1st respondent was that appellant needed to make a formal application to amend rather than making an oral application.

10. The simple response to that objection is to be found in Order 8 Rule 8. That Rule permits parties to make oral application to amend pleadings.

11. Having done away with that objection I need to consider with the appellant's oral application to amend the motion meets the threshold set in Order 8.

12. I have looked at the prayers both in the motion and those sought to be substitution of existing prayers. On prayer No.2 in the motion appellant sought stay of execution pending determination of leave to extend time to file and serve the memorandum of appeal. By the proposed amendment appellant sought stay of execution pending determination of the appeal. The amendment to prayer No. 2 as sought is superfluous and unnecessary in my view. This is because appellant by prayer No.4 seeks stay of execution of the judgment until the hearing and determination of this appeal. It follows to allow the amendment on prayer No. 2 as sought would lead to the motion having two similar prayers. That cannot be allowed. It follows the oral prayer to amend prayer No.2 is disallowed.

13. Prayer to amend prayer No.3 is also unmerited in my view. A close look at the prayer as it appears on the motion and as sought to be amended one is left wondering what exactly is sought to be achieved by the proposed amendment. It will be recalled order 8 rule 5 (1) as reproduced above that an amendment should be allowed for the

“Purpose of determining the real question in controversy “or “correcting any defects or errors.”

The only words that would be added to prayer No.3 by the proposed amendment are “filed 19th December 2013.” In my view that proposed amendment would not assist the court determine the real question in controversy and would not correct a defect or error. In my view the memorandum for which appellant seeks leave to file and serve is sufficiently identified by prayer No. 3 of the motion because that prayer correctly states it is the one dated 18th December 2013. There is no value added to that prayer by the proposed amendment to add that it was filed on 19th December 2013.

14. It follows that there is no merit whatsoever, in the prayer to amend the Notice of Motion dated 17th March, 2015. That unmerited prayer to amend has done nothing more than delay the determination of the application of 17th March 2015. The oral application made on 4th June, 2015 is dismissed with costs being awarded to 1st respondent.

It is so ordered.

Dated and delivered at Mombasa this 25th day of June 2015.

MARY KASANGO

JUDGE

25.6.2015

Coram

Before Justice Mary Kasango

C/Assistant- Kavuku

For Appellant:

For 1st Respondent:

For 2nd Respondent:

Court:

Ruling delivered in their presence/Absence in open court.

MARY KASANGO

JUDGE