



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

APPEAL NO. 7 OF 2020

CAREENAS HOLDINGS T/A DIGITEC CYBER.....APPELLANT

VERSUS

NAWAB MOHAMED HAJI MIRDOR.....RESPONDENT

RULING

(Application for leave to amend a memorandum of appeal; Order 42 Rule 3; application made before the giving of directions; Order 42 Rule 3 providing that it is after the giving of directions that the court may grant leave to amend a memorandum of appeal; court yet to give directions on the appeal; application premature and dismissed with costs)

The application before me is that dated 2 September 2020 and filed on 3 September 2020 by the appellant. The substantive order sought is for leave to amend the Memorandum of Appeal. The application is opposed.

This is an appeal arising out of the decision of the Business Premises Rent Tribunal (BPRT or the Tribunal) delivered on 30 January 2020. The dispute before the Tribunal was provoked after the respondent, as landlord, proposed to increase the rent payable from KShs. 25,000/= to KShs. 81,400/= vide a notice issued on 14 January 2019. The appellant contested the notice and filed a reference before the Tribunal. The matter was heard by the Chairman and in his judgment he assessed the rent payable at KShs. 59,500/= plus VAT with effect from 1 April 2019. Aggrieved, the tenant preferred an appeal to this court. The Memorandum of Appeal was filed on 19 March 2020, which was out of time, but it was agreed by consent that time be extended and no issue arises on the late filing of the Memorandum of Appeal. It is that Memorandum of Appeal which the appellant now wishes to amend.

From what I can see, the appellant proposes to amend the Memorandum of Appeal to include two more grounds as follows :-

(i) That the Tribunal erred in law and fact by failing to rely on the terms of the Lease Agreement dated 17th August 2018 especially in regard to the rent payable.

(ii) That the Tribunal erred in law and fact in failing to give the tenant a chance to be heard.

The motion is said to be brought pursuant to the provisions of Article 40, 50, and 159 of the Constitution, Section 3A of the Civil Procedure Act, and Order 8 and 51 of the Civil Procedure Rules. The supporting affidavit is sworn by George Andrew Amboko who is the proprietor of the appellant. He has deposed inter alia that it was an oversight that he failed to inform counsel about an existing lease agreement which is an important document that the appellant wishes to rely on during the appeal. He has further deposed that he was not given an opportunity to be heard.

The application is opposed through the replying affidavit of Meenad Hassan, who is counsel practising in the law firm of M/s N.A Ali & Company Advocates, which firm is on record for the respondent. The gist of his deposition is that the amendment attempts to introduce new evidence and ought not to be accepted.

I have taken note of the written and oral submissions of both Ms. Oweya, learned counsel for the applicant, and Ms. Ali, learned counsel for the respondent.

Ms. Oweya in her submissions refuted that the lease agreement is a new document sought to be introduced. She submitted that it is among the documents that the applicant filed during trial and that it is a document that the Tribunal failed to consider when making its judgment. She nevertheless submitted that the law gives this court power to admit evidence that ought to have been admitted or allow a document to be admitted to enable it pronounce a judgment. She referred me to Order 42 Rule 27 (1) on production of new evidence on appeal and Order 42 Rule 3(1) on amendment of a Memorandum of Appeal.

On her part, Ms. Ali, learned counsel for the respondent, inter alia submitted that the application is erroneously based on the wrong provisions of the law. She submitted that in so far as amendment of a Memorandum of Appeal is concerned, the applicable law is Order 42 Rule 3 which has not been cited by the applicant. She further submitted that no lease agreement was ever produced before the Tribunal and she faulted the applicant for introducing one in the record of appeal. She further pointed out that even what the applicant is referring to is not a lease that was ever signed by the respondent as landlord. She thought it preposterous that the applicant would seek to have an unexecuted lease agreement enforced against the respondent. She submitted that this is an attempt to introduce new evidence on appeal disguised as an application for amendment of a Memorandum of Appeal. She submitted that in any event the applicant has not satisfied the conditions for introducing new evidence on appeal.

I do agree with Ms. Ali that the application is premised upon the wrong provisions of the law. If it is the intention of the applicant to amend the Memorandum of Appeal, then the applicable law, as rightfully pointed out by Ms. Ali, is Order 42 Rule 3 which provides as follows :-

3. (1) The appellant may amend his memorandum of appeal without leave at any time before the court gives directions under rule 13.

(2) After the time limited by subrule (1) the court may, on application, permit the appellant to amend his memorandum of appeal.

The provisions of the law cited by the applicant certainly do not apply to an application to amend a memorandum of appeal. In any case, I am yet to give directions in this appeal, and it follows that if the appellant wished to amend his memorandum of appeal, leave was not necessary, and therefore I need not make any order on leave to amend for I am yet to give directions in the matter. This application is therefore premature, in so far as it seeks leave to amend the memorandum of appeal, for as I have mentioned, I am yet to give directions on the hearing of the appeal.

There is the issue of a lease agreement that the appellant appears to be keen to rely on. I have perused the original file from the Tribunal, and I have not seen any reference to any lease agreement. Neither was there any lease agreement produced. However, I am not dealing with any application for the introduction of additional evidence on appeal, and I will therefore, not say much on this issue, at least at this stage of the matter. When the matter will come before me for the giving of directions, I will address myself on whether or not the introduction of this document in the record of appeal was proper.

I do not consider the application before me to be one for leave to introduce new evidence on appeal and I will therefore not pronounce myself on that.

For reason that this application is premature, it is hereby dismissed with costs to the respondent.

Orders accordingly.

DATED AND DELIVERED THIS 26TH DAY OF JANUARY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA