



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. 71 OF 2018**

**ISAAC MUTHURI MUGAMBI .....APPELLANT**

**VERSUS**

**SILAS BUNDI MARETE & 2 OTHERS .....RESPONDENTS**

**RULING**

1. Before me is an application dated 21.8.2020 where the appellant/applicant is seeking leave to amend the memorandum of appeal. The applicant contends that he was supplied with the proceedings of the primary suit on 17.8.2020 and he desires to include further grounds of appeal in terms of the draft amended memorandum of appeal.

2. In his submissions the applicant has cited the case of **Nakumatt Holdings Limited & another vs Ideal Locations Limited (2018) eKLR** and **Joseph Yano vs Stephen Kibet Kiptum (2019) eKLR**.

3. The respondents oppose the application averring that the application is meant to procrastinate the expeditious hearing of the suit, that the application is frivolous and an abuse of the due process of the court. They contend that the issue of consent does not arise as the appellant has stated in his pleadings and evidence that he applied for and obtained the relevant consent.

4. The respondents have submitted that the application to amend pleadings should be brought within reasonable time. That judgment was delivered in open court on 13.12.2018 and the applicant was represented. The filing of the application in August 2020 therefore amounts to a long inordinate, inexcusable and unexplained delay.

5. Further, respondents submit that the applicant did not require the proceedings in order to lodge the application and that the applicant has not availed any evidence to show that he followed up the issue of obtaining proceedings. The respondents urge the court to dismiss the application with costs. They have relied on the case of **Uchumi Supermarket Ltd & another vs Sidhi Investments Ltd (2018) eKLR**.

**Determination**

6. In the case of **Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] eKLR**, the Court of appeal considered the various principles to the adhered to in considering new grounds raised in the appellate stage.

*“Different considerations will however apply if the applicant is seeking to introduce a totally new ground of appeal that was not pleaded, evidence adduced, canvassed and determined by the trial court. Thus for example, in exercising its discretion in the former type of case involving an amendment that did not entail introduction of an entirely new point, the Court, in Kanawal Sarjit Singh Dhim v. Keshavji Jivraj Shah (supra) took into account a number of considerations such as that the dispute involved a prime and valuable property in Nairobi, the judgment the subject of appeal had been obtained ex parte; the need to afford the applicant an opportunity to ventilate all the issues that he wished to raise on appeal; the fact that the intended amendment was not irrelevant to the appeal; and that the respondent stood to suffer no prejudice as he had the opportunity to oppose the appeal”.*

7. On the issue of consent, the applicant avers that the trial magistrate failed to find that the consent had not been obtained. The respondents on the other hand aver that the applicant had even admitted to having obtained the consent. It follows that the applicant is not trying to introduce a new point which was never raised before the trial court. The merits of the new point can adequately be considered during the hearing of the appeal.

8. On the issue of delay, I find that indeed the delay in filling the application has been inordinate. The applicant only needed a copy of the judgment to decipher the impact of the magistrate’s decision and to lodge an appeal or application to amend the appeal.

9. However, as indicated in a raft of authorities – see ***Kenya hotels Limited (supra), Uchumi supermarkets Ltd vs Sidhi investments***

(*supra*), *Nakumatt holdings (supra)*, a court has the discretion to consider various issues like whether the application is made in good faith and whether any injustice will be occasioned unto the opposite party.

10. In the instant suit, although the memorandum of appeal was filed way back on 24.12.2018, the appeal was not admitted to hearing until 14.7.2020, when the court directed the applicant to file the record of appeal within 30 days (by 31.8.2020). The record of appeal was filed promptly on 24.8.2020. It cannot therefore be said that the current application has stalled the prosecution of the appeal. The suit was not ready for trial before 14.7.2020.

11. Considering that appeals are generally heard by way of written submissions, hence the prosecution of the suit can be expedited, then I am inclined to allow the application but with costs to the respondents.

**DATED, SIGNED AND DELIVERED AT MERU THIS 10<sup>TH</sup> DAY OF FEBRUARY, 2021**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 16.11.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to 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.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**