



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 48 OF 2017

REGISTERED TRUSTEES OF CHRIST

CO-WORKERS FELLOWSHIP.....APPELLANT

=VERSUS=

KENYA RAILWAYS STAFF RETIREMENT

BENEFITS SCHEME..... 1ST RESPONDENT

NAIROBI RAILWAY CLUB.....2ND RESPONDENT

RULING

1. On 1/2/2018, the appellant brought a notice of motion dated 31/1/2018 seeking the following prayers:

1. That the appellant/applicant be granted leave to amend the filed record of appeal dated 11/12/2017 out of time by filing a supplementary record of appeal to include the following documents;

- i. Appellant's application dated 4/10/2016 under certificate of urgency filed in the Reference before the Tribunal.**
- ii. 1st respondent's replying affidavit by Mr Simon Nyakundi dated 3/2/2017 filed in the Reference before the Tribunal.**
- iii. 2nd respondent's replying affidavit by Mr Sospeter Kamau Githendu dated 7/2/2017 filed in the Reference before the Tribunal.**
- iv. Annexure "SSK6" of the appellant's application dated 16/2/2017 filed in the Reference before the Tribunal**
- v. 1st respondent's replying affidavit sworn by Mr Simon Nyakundi on 14/3/2017 the Reference before the Tribunal.**
- vi. 1st respondent's list of authorities dated 17/3/2017 in the Reference e before the Tribunal.**
- vii. Appellant's application dated 24/10/2017 filed in the Reference before the Tribunal.**
- viii. The appellant's notice of motion application dated 16/2/2017 and filed and the supporting affidavit of Steve Sumbi Kamuya marked as "SSK 1" filed before the Tribunal.**

2. That the appellant/applicant be granted leave to amend the filed memorandum of appeal dated 13th October out of time as per the annexed draft marked "SK 1"

3. That the annexure contained in page 45 – 48 of the record of appeal being an affidavit sworn by Sospeter Kamau Githendu be struck out from the Record of Appeal

4. That subject to the grant of orders 1, 2 and 3 above, the annexed draft amended memorandum of appeal dated 31st January, 2018 and the filed record of appeal dated 31st January, 2018 be deemed as duly and properly filed upon payment of the requisite court fees.

5. That costs of this application be costs in the cause.

2. The application was supported by the affidavit of Peris Muthoni Mwangi sworn on 31/1/2018.

3. The appellant's case is that the amendments sought will enable the court to adjudicate the real issues in the appeal and arrive at a just final decision. Secondly, it is contended that various documents were inadvertently left out of the record of appeal. Lastly, it is contended that the amendments will not prejudice the respondents in any way.

4. The respondents have conceded to prayers 1 and 3 of the Notice of Motion. They however oppose prayers 2 and 4. Prayer 2 relates to the plea for leave to amend the memorandum of appeal. Prayer 4 is a plea that once leave is granted, the documents annexed to the application be deemed to be duly filed.

5. The respondent's case is that the appellant instituted this appeal against orders made on 13/10/2017. The amendments sought relate to the orders made on 24/10/2017 yet there is no appeal filed in relation to the orders made on 24/10/2017. The respondent argues that Section 15(1) of the Landlord and Tenant, (Shops, Hotels and Catering Establishments) Act Cap 301, requires that an appeal be filed within 30 days. No appeal was lodged in respect of the orders of 24/10/2017 and no application for extension of time was made. It is the view of the respondent that in the absence of an appeal in respect of the order of 24/10/2017, the contemplated amendments have no basis and are unmerited.

6. I have considered the application together with the party's respective submissions. I have also considered the relevant provisions of Section 15 of the Landlord and Tenant, (Shops, Hotels and Catering Establishments) Act together with Order 42 rule (3) of the Civil Procedure Rules. Section 15 of the Landlord and Tenant (Shops, Hotels, Catering Establishments (Cap 301) provides as follows:

(15) Appeal to court

1. Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the Environment and Land Court. Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

2. In hearing appeals under subsection (1) of this section the Court shall have all the powers conferred on a Tribunal by or under this Act, in addition to any other powers conferred on it by or under any written law.

3. Deleted by Act No. 2 of 1970 Section 13

4. The procedure in and relating to appeals in civil matters from subordinate courts to the Environment and Land Court shall govern appeals under this Act: Provided that the decision of the Environment and Land Court on any appeal under this Act shall be final and shall not be subject to further appeal.

7. Order 42(3) of the Civil Procedure Rules 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 sub rule (1) the court may, on application permit the appellant to amend his memorandum of appeal.

8. Directions were given in this appeal on 22/1/2018. Parties have since filed their respective written submissions in relation to the substantive appeal.

9. Jurisdiction to grant leave to amend a memorandum of appeal, though discretionary, is regulated by clear provisions of the law. Under Section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, an appeal lies to this court against any determination or order of the Tribunal within thirty (30) days from the date of the determination or order. The amendments sought in the present application seek to introduce an appeal against the orders made on 24/10/2017. The present appeal relates to the orders made on 13/10/2017. In my view, the discretion granted to the court under Section 42(3)(2) of the Civil Procedure Rules to grant leave to amend a memorandum of appeal does not amount to power to extend the time within which an appeal is to be lodged. If the appellant was aggrieved by the orders of 24/10/2017 they had the right of appeal within 30 days. Outside the 30 days limitation period, the only avenue available to them is to bring a proper motion for extension of time within which to lodge an appeal against the order of the Tribunal. If that motion is brought and found to be merited, any ensuing appeal can properly be lodged independent of the present appeal. For those reasons, prayer 2 of the application is declined.

10. For the sake of orderly documentation and ease of reference, I will decline to grant prayer 4 of the application. Let the appellant present their supplementary record of appeal for assessment, pay court fees, file, and serve the supplementary record of appeal.

11. The upshot is that prayers 1 and 3 of the Notice of Motion dated 31/1/2018 are granted. The supplementary record of appeal shall be filed and served within 10 days. In default, the order granting leave shall stand vacated. Prayers 2 and 4 are declined. The respondents shall have costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF OCTOBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Ms Muthoni holding brief for Mr Onyango Advocate for the appellant

Mr Milimo and Mr Masivo Advocates for the respondent

June Nafula - Court Clerk