



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 29 OF 2018**

**EUSTACE N. PAUL.....1<sup>ST</sup> APPELLANT**

**MARY MUTHONI NJAGI.....2<sup>ND</sup> APPELLANT**

**CHARLES NJIRU KANGICU.....3<sup>RD</sup> APPELLANT**

**JAMES KARIUKI KANGICU.....4<sup>TH</sup> APPELLANT**

**VERSUS**

**JUNTUS PAUL NJERU KANGICU.....RESPONDENT**

**RULING**

**A. Summary of pleadings**

1. Before me is an application dated 18.02.2021 and wherein the appellants seeks leave to amend their memorandum of appeal dated 4.07.2018 and further that the costs be in the cause.
2. The application is premised on the grounds on its face and further supported by the affidavit of Eustace N. Paul.
3. The applicants' case is that at the time of preparing the record of appeal, the same was wrongly typed and had errors as to the date the judgment was delivered by the trial court. That when the appeal came up for hearing, this court noted that the proceedings forming part of the record had mistakes and ordered the same to be re-typed. That the most cardinal mistake in the old proceedings was the date of the ruling as two dates appear on page 62 of the record of appeal being 10.10.2017 and 3.02.2018 whereas the correct date is 12.06.2018 as appears in the new set of proceedings. Further that at the time of filing the appeal, the appellants did not have an advocate and they were not able to state clearly their grounds on the memorandum of appeal. They therefore sought leave to amend the memorandum so as to capture the correct date and frame/state the grounds of appeal properly.
4. The application is opposed by the respondent herein vide the replying affidavit sworn on 17.03.2021 and wherein he deposed that the error on the date of the ruling does not go the substance of the appeal but the substance is embodied in the proceedings themselves. Further that the issue of the appellants not having an advocate is not a reason enough to amend the memorandum of appeal as the reading of the said memorandum clearly indicate that the appellants were informed of the facts of their appeal and drew it holistically. As such the application is bereft of substance but only serve to delay justice and the same ought to be dismissed.

**B. Submission by the parties**

5. The application was canvassed orally at the hearing thereof. Mr. Njiru, the Learned counsel for the applicants relied on the supporting affidavit sworn on 18.02.2021 and further submitted that at the hearing of the appeal, the court noted that the date the impugned ruling was delivered is 10.10.2017 but as per the signature of the magistrate, the date is indicated as 3.12.2018 and that the right date should be 12.06.2018 which date is when the court gave the right to appeal within thirty days and the memorandum filed on 4.07.2018. He thus prayed that the appellants be allowed to amend the said memorandum of appeal.
6. The respondent made oral submissions to the effect that the correct date is 12.06.2018 and that justice delayed is justice denied. He thus prayed that the application be dismissed.

**C. Issues for determination**

7. I have considered the application before me and the replying affidavit in opposition of the same. I have further considered the oral

submissions by the parties herein. As I have already noted, the applicants seek leave to amend the memorandum of appeal. However, I note from the supporting affidavit that the applicants seek to amend the memorandum in two instances; in relation to the date of the ruling and further to add new grounds of appeal. It is my considered view that the issue which this court is invited to decide is whether the said amendments ought to be allowed.

#### **D. Determination of the issues**

8. Order 42 Rule 3 of the Civil Procedure Rules 2010 and which is the law upon which the application is premised provides as thus;-

*[Order 42, rule 3.] Amendment of memorandum of appeal.*

**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.***

9. Indeed, it has been held by this court and the superior courts that a memorandum of appeal is a pleading like any other and the rules that apply to amendment of pleadings also apply to a memorandum of appeal. In **Uhuru Highway Development Ltd vs Central Bank of Kenya (2002) 1 EA 314** the Court of Appeal held that

***“a memorandum of appeal, subject to the interests of justice, is always amenable to amendment”.***

10. Further **Order 8 Rule 3** of the Civil Procedure Rules 2010 provides that; -

***“Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as may direct, allow any party to amend his pleadings.”***

11. The Court of Appeal in **Central Kenya Limited –vs- Trust Bank limited (2000)2 E.A 365** in determining an application to amend a memorandum of appeal held that:-

***“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”***

12. In **George Gikubu Mbuthia –vs- Consolidated Bank of Kenya Ltd & Another (2016) eKLR**, this Court remarked as follows,

***“As regards the law, the High Court readily accepted that the court has unfettered discretion to allow amendment of pleadings, which discretion must be exercised judiciously. It accepted too as a general proposition that parties to a suit have the right to amend their pleadings at any stage of the proceedings before judgment and that courts should liberally allow such amendments. However, he also noted situations when the court will refuse to exercise its discretion to allow amendments. Such cases include where a new or inconsistent cause of action is introduced; where vested interests or accrued legal rights will be adversely affected; where prejudice or injustice which cannot be properly compensated in costs is occasioned to the other”***

13. It is trite also that applications seeking amendments of pleadings ought to be brought within reasonable time. In **Kyalo v Bayusuf Brothers Ltd Civil Appeal No. 38 of 1983**, it was held that applications for amendment of pleadings should only be allowed if they are brought within a reasonable time because to allow a late amendment would amount to an abuse of the court process.

14. It is therefore clear from the above cited provisions of the law and case law that the discretion of a trial court to allow amendments of pleadings is wide and unfettered except that it should be exercised judicially **and upon reason, rather than arbitrarily, on humour, or fancy.** (See **Kanawal Sarjit Singh Dhim –vs- Keshavji Jivraj Shah [2010] eKLR**). It is also clear that the power to amend can be exercised at any stage of the proceedings including, at appeal stage. By a memorandum of appeal being a pleading, the said principles ought to apply in determining whether to allow an application for amendment thereof.

15. Applying the above principles to the matter herein, I note that the application was brought within a reasonable time. The memorandum of appeal was filed on 5.07.2018 but the error on the date of the application was noted on 23.11.2020 when the advocate on record for the appellants prayed for the correct set of proceedings to enable him proceed as the date was in error.

16. The file was ordered to be taken to the typing pool for typing. The record further shows that as at 17.12.2020 the proceedings were not yet ready. However, the application herein was filed on 23.02.2021. In my view, the application was brought within a reasonable time. Further it is my view that amending the date of the ruling on the memorandum of appeal cannot in any way prejudice the respondent herein. In fact, the respondent in his replying affidavit deposed that the date does not go to the substance of the appeal and therefore, the same is allowed.

17. However, as I have noted, the other prong of the intended amendment is aimed at introducing new grounds of appeal. The applicant deposed that they were unrepresented at the time they prepared the memorandum of appeal and thus they were not able to capture all the grounds.

18. In **Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] eKLR** the Court of Appeal in determining an application for leave to amend the memorandum of appeal so as to introduce a new ground held that;-

*“Whether or not to allow an amendment will also depend on the nature and extent of the amendment. If the applicant is merely introducing a ground of appeal that is properly founded on the evidence that was adduced and canvassed before the trial court, which it is alleged the trial judge ignored or misapplied, the Court will more readily allow the amendment. 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. And in **Nathan Muhatia Pala t/a Muhatia Pala Auctioneers & Another v Joseph Nyaga Karingi [2013] eKLR**, the Court also took into account the duty imposed by sections 3A and 3B of the Appellate Jurisdiction Act to ensure that justice is dispensed in consonance with the overriding objective so as to realize just, expeditious, proportionate and affordable resolution of disputes.....”*

*.....Due to these fundamental concerns, the Courts has developed fairly elaborate principles that guide it in determining whether or not to allow a new point on appeal. In **Openda v. Ahn**, (supra) this Court identified some of the principles to include that all grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; that the point sought to be introduced must be consistent with the applicant’s case as conducted in the trial court, not changing it into a totally different case; the matter must have be properly pleaded and the facts in support of the new point must have come out in the trial court; a new point which has not been pleaded or canvassed in the trial court should not be allowed to be taken on appeal, unless the evidence establishes beyond reasonable doubt that the facts before the trial court, if fully investigated, would support the point; where the question is one of law turning on the construction of a document, the new point may be allowed but only if the facts when fully investigated support the new plea.....”*

19. However, in the instant case, the appellants did not attach to the application, the draft amended memorandum of appeal. As such it becomes difficult for this court to determine as to the nature of the intended new ground(s) of appeal. This court does not have the opportunity to peruse the same and see whether it is properly founded on the evidence that was adduced and canvassed before the trial court and which it is alleged the trial judge ignored or misapplied. Further, the court cannot tell as to whether the issues to be introduced vide the new ground(s) were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial or that the point sought to be introduced are consistent with the applicant’s case as conducted in the trial court, not changing it into a totally different case or that the facts in support of the new point came out in the trial court. In short this court cannot therefore be able to tell the nature of the amendments. As such the said proposed amendment (to introduce new grounds of appeal) cannot be allowed. The prayer in that respect fails.

20. In the end, the application herein succeeds only to the extent that the memorandum of appeal should be amended so as to indicate the correct date of the ruling being 12.06.2018.

21. Each party to bear his or her own costs.

22. It is so ordered.

**Delivered, dated and signed at Embu this 7<sup>th</sup> day of July, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent