



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 351 OF 2018

DANIEL MAWEU.....APPELLANT

VERSUS

ALI ABDIKARIM HAJI.....1ST RESPONDENT

NOOR HASSAN ISSA.....2ND RESPONDENT

ELMI HASHIM ODHONA.....3RD RESPONDENT

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated 15th October 2019 and filed on 16th October 2019 sought leave for amendment of the Memorandum of Appeal. He swore his Affidavit in support of the present application on 15th October 2019.
2. He stated that during the hearing in the Trial Court, he adduced in evidence an Agreement for Sale dated 29th September 2019, which was physically in the lower court file but that the Learned Trial Magistrate indicated in the proceedings that he tendered in evidence a logbook. The same was marked P-Exh 2.
3. He pointed out that he could not seek a review of the proceedings on account of there having been an error on the face of the court record as he had already appealed to the High Court. He was categorical that the Memorandum of Appeal be amended as the subject Agreement for Sale was necessary for the determination of the issues before the court.
4. The Appellant submitted that the import of Order 42 Rule 3(2) of the Civil Procedure Rules was that a memorandum of appeal could be amended with the leave of the court. He was emphatic that he was not seeking to alter and/or rectify the record of the lower court but rather to raise the issue of what was marked as an exhibit during trial as a ground of appeal. It placed reliance on the case of **Alfred Washika Lukandu & Another vs Cynthia Nyanduko Mauncho [2018] eKLR** where the High Court considered a ground of appeal relating to an erroneous marking of an exhibit.
5. He argued that his application ought to be allowed for the court to consider whether or not the said new ground of appeal was merited.
6. In response to the said application, the Respondents filed Grounds of Opposition dated 1st November 2019 on 5th November 2019. Their argument was that the present application lacked merit, was misconceived, incompetent, frivolous, vexatious and an abuse of the process of court rendering itself to being dismissed. They added that the said application was time barred as directions in the Appeal had been issued and submissions in respect of the main appeal filed.
7. It was their further averment that this court had no jurisdiction to alter, rectify and/or amend the record of the lower court and that the import of the application was to introduce fresh evidence that was not produced during the trial.
8. They relied on the case of **Kemboi Kipkeu vs Bowen David Kangongo [2018] eKLR** where the Supreme Court held that proceedings in the trial court cannot be amended and the only remedy was to seek to expunge a document and/or file an additional document.

9. They asserted that the Appellant was guilty of delay that was inordinate and unexplained and added that an amendment would not be allowed at a late stage of the trial if it was intended to advance a new ground of defence. It was their contention that they would suffer prejudice as he would be ambushing them with a new ground of appeal and that the amendment would negate the essence of relying on certified copies of the proceedings.

10. Order 42 Rule 3 of the Civil Procedure Rules provides that:-

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.

11. Order 42 Rule 13 of Civil Procedure Rules provides as follows:-

1. On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.

2. Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.

3. The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise....

12. It is evident that a memorandum of appeal can be amended before or after directions under Order 42 Rule 13 can be given. The only difference is that if directions have been given, then the amendment can only be made with leave of the court and upon an application having been filed.

13. Under Section 100 of the Civil Procedure Act Cap 21 (Laws of Kenya), it is provided that:-

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

14. Order 8 Rule 5 of the Civil Procedure Rules further stipulates that:-

“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.”

15. It was the considered opinion that a memorandum of appeal is one such proceeding envisaged under Section 100 of the Civil Procedure Act and Order 8 Rule 5 of the Civil Procedure Rules. The understanding of this court was that the Appellant was seeking to challenge the action by the Learned Trial Magistrate to mark a document he purported not to have adduced in evidence marked as an exhibit and not marking and/or recording in the proceedings the document he actually produced in court as his evidence. This court did not understand it to mean that he wanted the proceedings rectified and/or altered.

16. Notably, there was delay on the part of the Appellant in making the present application. However, the same could not be said to have been inordinate considering that the Record of Appeal was filed on 14th March 2019. His advocates may have failed to exercise due diligence at the time of preparing the record of Appeal.

17. Having said so, it is well settled in law that no party should be penalised just because there was a blunder particularly by his or her advocate. Indeed, in the case of **Republic vs Speaker Nairobi City County Assembly & Another Ex Parte [2017] eKLR**, it has been held that blunders will continue being made and that just because a party has made a mistake does not mean that he should not have his case heard on merit.

18. Further, in the case of **Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet [2018] eKLR**, it was held that the law does not set aside the maximum and minimum period of delay and all that was required was for the delay to be satisfactorily explained.

19. This court noted that every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of the Constitution of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice.

20. It is also trite law that amendments should be freely allowed even when they are made very late in the proceedings provided that judgment has not been delivered provided that such amendment can be compensated by way of costs. In this regard, this court had due regard to the case of **Eastern Bakery vs Catelino E.A. (1958)** in which the law had been laid down that to the effect that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side.

21. Weighing the Appellant's right to have his dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the Constitution of Kenya and the equally important Respondents' fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Appellant if he was denied an opportunity to ventilate his Appeal on merit.

22. The delay suffered by the Respondents could be compensated by way of costs and filing of further written submissions so as to give the court an opportunity to hear and determine the real issues that were in contention between the parties herein.

DISPOSITION

23. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated 15th October 2019 and filed on 16th October 2019 was merited and the same is hereby allowed on the following terms:-

- 1. The Appellant be and is hereby granted leave to file an Amended Memorandum of Appeal within fourteen (14) days from the date of this Ruling**
- 2. The Appellant to pay the Respondent throw away costs in the sum of Kshs 30,000/= within fourteen (14) days from the date hereof.**
- 3. The Appellant to file and serve Written Submissions in respect of the amended Ground of Appeal only within fourteen (14) days from the date of service.**
- 4. The Respondents to file and serve Written Submissions in respect of the amended Ground of Appeal only within fourteen (14) days from the date hereof.**
- 5. Either party is at liberty to apply.**
- 6. Costs of the application will be in the cause.**

24. It is so ordered.

DATED and DELIVERED at NAIROBI this 7th day of May 2020

J. KAMAU

JUDGE