



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO. 10 OF 2017**

**THE CLERK OF THE NATIONAL ASSEMBLY**

**THE PARLIAMENTARY SERVICE COMMISSION.....APPLICANT/ APPELLANT**

**VERSUS**

**KAUNDA ROBERT KEARI.....1<sup>ST</sup> RESPONDENT**

**HON. RICHARD NYAGAKA TONGI.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion dated the 5<sup>th</sup> September 2018 the appellants/ applicants ( Applicants) brought under Order 42 Rule 3 of the Civil Procedure Rules, 2010; Section 1A, 1B and 3A of the Civil Procedure Act the applicants seek the following orders;

- i. That the Appellants/Applicant be allowed to amend its Memorandum of Appeal dated 20<sup>th</sup> February, 2017 and filed in this Honorable Court on the same date as per the draft annexed hereto.
- ii. That the Amended memorandum of Appeal hereto be treated as the Appellant/Applicant Amended Memorandum of Appeal and that the same be deemed as having been duly filed and served.
- iii. That the costs of this application be costs in the cause.

2. The application is based on the grounds that:-

1. That the Appellants/Applicants proposed amendments are intended to bring before this Honorable Court, the real matters in controversy between the parties herein so that the same are determined on their true and substantive merits.
2. That the proposed amendments are necessitated by information relevant for the fair and just determination of the real questions in controversy in this suit which came to the Appellant's knowledge subsequent to the filing of the memorandum of appeal herein, which information includes *inter alia*:-

i. That on 7<sup>th</sup> February 2017, a judgment was made jointly against the Appellant herein and the 2<sup>nd</sup> Respondent herein in CMC Case No.483 of 2015; Kaunda Robert Kears –vs- Hon. Richard Nyagaka Tongi and 2 others.

ii. That through a letter dated 14<sup>th</sup> February, 2017 to the Executive officer, Chief Magistrate's Court at Kisii and copied to M/S Aboki Begi & Co. Advocates, the advocates on record for the 1<sup>st</sup> Respondent herein, I requested on behalf of 2<sup>nd</sup> Defendant therein, for certified copies of the judgment and decree of the Hon. J.M. Njoroge given at Kisii on the 7<sup>th</sup> day of February, 2017; and copies of proceedings leading to the delivery of the said judgment, for purposes of lodging an appeal in High Court.

iii. That being dissatisfied and or aggrieved with the judgment and decree herein above, the Appellant herein appealed against the entire judgment through a memorandum of Appeal dated 20<sup>th</sup> February, 2017 and filed on the same date.

iv. That despite having requested for proceedings and certified copy of the decree on 14<sup>th</sup> February, 2017 the Appellant tried on several occasions through physical travel to Kisii law Courts and making calls to the court to follow up on the certified copies of proceedings and judgment to no avail.

v. That it was not until 3<sup>rd</sup> day of May, 2018 that the said copies of the proceedings and judgment were ready for and were collected.

vi. That upon collection of the said certified copies of proceedings and judgment on 3<sup>rd</sup> May 2018, the appellant proceeded to prepare a record of appeal that was filed in court on 19<sup>th</sup> June, 2018 and served to the 1<sup>st</sup> Respondent on the same day.

3. That the new grounds of appeal were discovered after directions for hearing of appeal had been issued by this Honorable Court and upon perusal of the proceedings in comparison with the judgment delivered on 7<sup>th</sup> February 2017 in CMC Case No.483 of 2015; Kaunda Robert Kearsi –vs- Hon. Richard Nyagaka Tongi and 2 Others.

4. That the question of the relationship between the Parliamentary Service Commission and the employees of Members of parliament at the Constituency level, has been conclusively determined in Court of Appeal in Mombasa in **Petition 59 of 2014 Parliamentary Service Commission –vs- George Okoth Owuor & 2 Others** which had similar issues up for determination.

5. That in the interest of justice and fairness therefore, the Appellants should be granted leave to amend their memorandum of appeal filed herein so as to include, *inter alia*, new grounds of appeal.

6. That the time allowed under Civil Procedure Act and the Civil Procedure Rules for amendment of memorandum of appeal has since expired.

7. That the proposed amendments will not occasion any prejudice to the Claimant.

8. The application is supported by the supporting affidavit of Sherrif Mwendwa the Deputy Director, Directorate of Litigation and Compliance Services. He deposes the affidavit on behalf of the parliamentary Service Commission and the Clerk of the National Assembly. The affidavit reiterates what is stated in the grounds. The application was opposed.

9. **Mr. Mwendwa** for the applicants reiterated what is deposed by the applicants adding that under the Civil Procedure Rules once directions have been taken on the appeal leave to amend is discretionary. That the proposed amended Memorandum of Appeal is necessary, the Respondent will not be prejudiced by the intended amendment and that it is fair for the court will consider the entire controversy in determining the appeal. That under Article 159 of the Constitution the court's direction is wide and it is intended to help the parties to achieve justice and fairness. That the applicants have complied with the court's directions and the ground raised in the purposed amended memorandum of Appeal are covered in their written submissions that there are six (6) grounds on points of law the court can visit them under Order 42 (4). That the appellants cannot rely on them without leave of the court. That the delay was not inordinate. The applicants relied on the following court of appeal decisions; **Governors Ballon Safaris Limited vs. Skyship Company Limited & another (2018) eKLR, Nathan Muhatia Pala t/a Muhatia Pala Auctioneers and another vs. Joseph Nyaga Karingi (2013) eKLR, Johnstone Nyaga t/a Geris Hotels vs. Purity Njagi (2016) eKLR and Edith Gichungu Koine vs. Stephen Njagi Thoithi (2014) eKLR.**

10. **Mr. Begi** for the respondents submitted that application is opposed on issues of law. That the horse has bolted and that the applicants are coming too late in the day. That directions were done and a date taken. At the time of directions the applicants had the proceedings they cannot come now and say that they discovered new grounds. That they shall suffer substantial prejudice as they faced only one ground of appeal. That they are in the middle of our submissions. That they will face prejudice as they have to go back to their client. On the decisions relied on it was submitted that they considered the issue of delay in bringing an application. That the Court of Appeal rules are different from this court's appellant rules. That the court's jurisdictions are contained with CPA and CPRs. This application is confined to Order 42 of the Civil Procedure Rules. That the court will have to look at the conduct of the appellant. They didn't inform the court at the time of directions that they could possibly amend the memorandum of Appeal. That the court should not assist an indolent party. Those points of law can be raised at the hearing of the appeal.

11. **Mr. Mwendwa** in response submitted that under Order 42 rule 3 of the Civil Procedure Rules a remedy is provided for situations of this nature. The appellants have not been indolent as they have executed their matter expeditiously. That Counsel is in Nairobi and in less than a year the Record of Appeal was available. That the points being raised are points of facts and law. That under Order 42 rule (4) there will be miscarriage of justice if he doesn't prosecute the Memorandum of Appeal. That the respondents have not filed their submissions and they can still address the issues raised. That the appellant deposited the decretal amount in court close to 2 million. The issue of prejudice doesn't arise.

12. I have carefully considered the application, submission by the parties and the law governing the application. The court gave directions on the 11/7/2018. The appeal is to be heard on the 29<sup>th</sup> October 2018. Under Order 42 rule (3) (1) an appellant may amend his memorandum of appeal without leave at any time before the court gives directions under rule 13. The issue I have to consider is whether the amendment sought is merited. The applicants filed their memorandum of appeal on the 20<sup>th</sup> February 2017. They state that they sought the court proceedings and it is not until the 3<sup>rd</sup> May 2018 that they got the proceedings and they prepared a record of appeal which they filed on the 19<sup>th</sup> of June 2018. It is deposed that the new grounds of appeal were discovered after directions for hearing of the appeal had been issued and upon perusal of the proceedings in comparison with the judgment delivered on the 7<sup>th</sup> February 2017 in CMCC No. 483 of 2015; Kaunda Robert Kearsi vs. Hon Richard Nyagaka Tongi and 2 others. That the question of the relationship between the Parliamentary service Commission and the employees of Members of Parliament at the constituency level has been conclusively determined in Court of Appeal in Mombasa in petition 59 of 2014 Parliamentary Service Commission vs. George Okoth Owuor & 2 Others which had similar issues up for determination. Order 42 rules (3) (2) provides that, "*After the time limited by sub rule (1) the court may, on application, permit the appellant to amend his memorandum of appeal.*" The court under sub rule 2 has the discretion to consider the applicants application. A memorandum

of appeal is a pleading in the appeal. In seeking an amendment of a memorandum of appeal the principles to be considered are those applicable to amendment of pleadings. The principles which guide the exercise of discretion in amendment of pleadings were set out in the case of **Central Kenya Ltd vs. Trust Bank Ltd & Others Appeal No 222 OF 1998** summarized as follows, that the amendment,

- (i) Should be necessary for purposes of determining the real question or issue which has been raised by parties;
- (ii) s to avoid multiplicity of suits provided there has been no undue delay;
- (iii) Does not introduce new or inconsistent cause of action;
- (iv) Does not take away or affect any vested interest or accrued legal rights; and
- (v) Does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.

13. The applicants have come to court timeously with their application. The applicants state that the proposed amendments are intended to bring before the court the real matters in controversy between the parties herein. They have satisfactorily explained the reasons for the amendment. The respondent has not filed their submissions. They will suffer no prejudice. In case of **Nathan Muhatia Pala t/a Muhatia Pala Auctioneers and another vs. Joseph Nyaga Karingi** (supra) Justice Odek held that, *a duty now imposed on the Court under Sections 3A and 3B of the Appellate Jurisdiction Act is to ensure that justice is dispensed in consonance with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.* In my view the applicant deserves the orders sought the respondent will serve no prejudice. The applicant is allowed to amend its Memorandum of Appeal dated the 20<sup>th</sup> February 2017. The applicant shall file and serve the amended Memorandum of Appeal within 7 days from the date herein. The respondent shall file their submissions by the 23<sup>rd</sup> of October 2018. Hearing of the appeal on the 29<sup>th</sup> of October 2018 Costs of the application shall be in the cause.

**Dated Signed and delivered this 4th day of October 2018**

**R.E. OUGO**

**JUDGE**

**In the presence of;**

Mr. Mohammed h/b M/S Mukindia For the Applicants

Mr. Begi For the Respondents

Ms. Rael Court Clerk