REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

HCCA NO. 28 OF 2012

BRIAN MUBWEKA NDEDA.....1ST APPELLANT

MARY STELLA AWINO NDEDA.....2ND APPELLANT

VERSUS

CHRISPINUS NDEDA.....1ST RESPONDENT

BONELLA NDEDA.....2ND RESPONDENT

EUGENE NDEDA.....3RD RESPONDENT

R U L I N G

1. The application under focus in this ruling is a Notice of Motion dated 29/1/2018 filed here on 30/1/2018. The application is brought under Order 8 Rule 1 and Order 51 Rule 1 of Civil Procedure Rules, 2010. The two Applicants – **BRIAN MUBWEKA NDEDA** and **MARY STELLA AWINO NDEDA –** are the Appellants in the suit while the three Respondents in the application – **CHRISPINUS NDEDA, BONELLA NDEDA** and **EUGENE NDEDA –** are also the Respondents in the suit.

2. The application has three prayers. The prayers are formulated thus:

> (a) That the honourable court be pleased to grant leave to the Appellants to further amend their record and memorandum of appeal as per the draft record and memorandum of appeal annexed to the affidavit in support hereof.
>
> (b) That the draft record and memorandum of Appeal annexed to the affidavit in support hereof be deemed as duly filed.
>
> (c) That the costs of this application be provided for.

3. The need to amend was brought out clearly in the supporting affidavit accompanying the application. That need was again reiterated by the Applicants during hearing. In brief, the Applicants pointed out the need to include some documents in the record and also to bring out clearly the prayers they are seeking. Some of the documents sought to be included are a copy of the title deed for land parcel No. BUKHAYO/BUGENGI/5052 and a court order dated 10/4/2013.

4. The 1st Respondent opposed the application vide a replying affidavit dated 12/3/2018 filed on 14/3/2018. The other two Respondents were served but did not respond. According to the 1st Respondent, the application is brought under the wrong provisions of law and the intended amendment was said to be a tactic to delay the hearing of the appeal. The 1st Respondent also alleged that the Applicants have not shown any new evidence for inclusion in the appeal and that the 1st Applicant lacks authority from the 2nd Applicant to bring the application on his behalf. The averment by the 1st Respondent were reiterated by his counsel, Mr. Nyengenye, during hearing of the application.

5. I have considered the application, the response by 1st Respondent, and the rival arguments proffered by each side during hearing. I have also had a look at the draft amended memorandum of appeal and the record of appeal. Clearly included in the new record of appeal is a copy of title deed for land parcel No. BUKHAYO/BUGENGI/5052 (see page 42) and a court order dated 10/4/2012 (see page 70). It is therefore not true to say that no new evidence is shown in the record. These two records are new evidence as they were not included in the previous record. And the record of appeal includes a new prayer seeking cancellation of new title numbers so that registration can revert back to the original number. The need to amend is therefore clearly manifest and counsel for the 1st Respondent is wrong when he alleges non-inclusion of new evidence.

6. The Applicants were also faulted for citing the wrong law. This is a technical point and it cannot be used to defeat the application. Infact the Applicants could even choose not to cite any law at all. And this position is confirmed by the provisions of Order 51 Rule 10(1), (2) which provides thus:

> **Order 51 Rule 10(1)**
>
> **"Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.**
>
> **(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.**

7. Before I make my decision, I find it necessary to explain generally the procedural law on amendments. Our courts have wide and extensive powers to allow amendments. The powers are aimed at preventing the failure of justice due to procedural errors or defects. They are meant to serve the aims of justice. The overall objective is to determine the true substantive merits of the case; to focus on a substance rather than form; and to free the court and even the parties themselves from technicalities of procedure. To achieve this, parties are allowed to alter or amend their case to ensure that the litigation between them is conducted not on the false premise of the facts already pleaded or the remedy already claimed, but rather on the basis of true facts or true remedy.

8. In deciding whether to allow amendments, our courts are generally guided by the following considerations:

> **(a) The intended amendment should not visit injustice on the other side. But a disadvantage that is compensable or remediable by way of costs is not treated as injustice.**
>
> **(b) The ends of justice are better achieved by avoiding multiplicity of proceedings. Amendments that aim at avoiding such multiplicity should always be allowed.**
>
> **(c) An application for amendment made in bad faith should not be allowed.**
>
> **(d) No amendment should be allowed where the law expressly or implicitly is against such amendment.**

9. In the matter at hand, the Applicants have shown justification for amendment. There is no law against what they are seeking. The intention to delay the matter is alleged by the other side but a persuasive argument to support the allegation was not made during hearing. Besides, I think that the Respondents can be compensated by way of costs for any hardship visited upon them. Additionally, I do not read any bad faith in the way or manner the application is brought.

10. Bearing all this in mind, the finding I make is that the application herein is meritorious. But I need to observe that this is the second amendment that the Applicants are making. The first amendment failed to capture all the necessary details and the requirements. That is why this second amendment is sought. If the Applicants are always easily allowed to amend, they might not be serious. They may seek to do so repeatedly after this and thus delay the case. It is therefore necessary to order them to pay costs of this application before further progress of their appeal. The upshot therefore, when all is considered, is that the application herein is allowed but the Applicants are ordered to pay the costs of the application before the appeal is heard.

Dated, signed and delivered at Busia this 20th day of June 2018.

A. K. KANIARU

JUDGE

<u>In the Presence of</u>:

1st Appellant: ……..……..……..……..……

2nd Appellant: ……

1st Respondent: ……..……...……..……..……

2nd Respondent: ……..……...……..……..……

3rd Respondent: ……..……...……..……..……

Counsel of Appellants: ……..……..……

Counsel of Respondents: ……..……..……..……