



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NYERI
ELCA NO. 36 OF 2015
(Formerly ELCA NO. 46 OF 2013)

TABITHA WANDIA APPELLANT/APPLICANT

-VERSUS-

FRANCIS MWANGI RESPONDENT

RULING

1. On **8th May, 2014** the appellant/applicant herein, Tabitha Wandia, filed the notice of motion of even date seeking leave to amend her memorandum of appeal and file an amended memorandum of appeal together with a supplementary record of appeal within such time as the court may direct.
2. Subject to issuance of the above prayer, the appellant/applicant prays for issuance of fresh directions under **Section 42 Rule 3(13)** of the Civil Procedure Rules.
3. The application is premised on the ground that there is need to amend the record of appeal she filed with a view of including important documents which were excluded in the record of appeal she filed.
4. According to the applicant's counsel, the orders sought will assist the court to fairly, justly and expeditiously dispose of the appeal.
5. The application is supported by the affidavit of the applicant (supporting) in which the applicant deposed that the appeal arises from the determination of the Provincial Appeals Committee (Central) on a dispute filed by the respondent at the Kirinyaga District Land Disputes Tribunal at Baricho; that the dispute was over a portion of land measuring $\frac{1}{4}$ of an acre comprised in her parcel to wit Kiine/Kiangai/4 which is adjacent to parcel No. Kiine/Kiangai/642 owned by the respondent.
6. The appellant contends that though disguised as a boundary dispute, the dispute was about ownership of $\frac{1}{4}$ acre of land comprised in her parcel of land to wit Kiine/Kiangai/4.
7. The applicant contends that the effect of the award by the Provincial Appeal's Committee was to deprive her $\frac{1}{4}$ an acre of land with mature tea planted by her husband in 1970.
8. She reiterates that she was advised by her counsel that the pleadings she drew require to be amended and filed with a supplementary record of appeal.

9. The application is opposed on the grounds that there has been inordinate delay in bringing the application (delay of almost 4 years); that no reasons have been given for the delay; that the applicant has raised new grounds; that the amendments sought will not strengthen the appeal which is said to be not arguable. The respondent contends that the grounds of appeal sought to be introduced through the intended amendment ought to have been made within the 60 days provided in law for lodging an appeal against the decision of the Provincial Land Disputes Appeals Committee.

10. According to the respondent, the appeal is not arguable and is weak because the Land Disputes Tribunal had jurisdiction to entertain a claim based on boundaries.

11. When the matter came up for hearing, directions were taken to the effect that the application be disposed of by way of written submissions. Consequently, parties filed submissions which I have read and considered.

Submissions

12. In the submissions filed on behalf of the applicant, reference is made to **Section 2** of the Civil Procedure Act, Cap 21 Laws of Kenya which defines a suit to include an appeal and the provisions of **Order 8 Rule 3(2)** of the Civil Procedure Rules, 2010 which gives the court discretion to allow amendment to pleadings even where an application for amendment is made after the relevant period of limitation has expired. It is submitted that the law allows for amendment of pleadings (in the circumstances of this case a memorandum of appeal) despite the fact that the time provided for in law for lodging the pleading has expired.

13. In the circumstances of this case it is pointed that the appellant complied with the provisions of **Section 8(9)** of the Land Disputes Tribunal Act by filing an appeal within the time stipulated therein and that as by law required, the appeal was admitted by the High Court.

14. Concerning the respondent's contention that no reasons have been given for the delay in making the application for amendment of the memorandum of appeal, it is submitted that the appellant has through paragraph 5 of the affidavit she swore in support of the application, explained why there was delay in making the application (she was not represented by counsel). It is contended that the explanation offered by the applicant for the delay in lodging the application to *wit*, lack of representation by counsel and that it was only after she instructed counsel to represent her that the defects in the pleadings she filed were discovered, is said to be uncontroverted.

15. The above cited submissions by counsel for the applicant are in response to the submissions by counsel for respondent that the intended amendments are by dint of the provisions of **Sections 8 sub section 8 and 9** of the Land Disputes Tribunals Act time barred. According to counsel for the respondent, because the Land Disputes Tribunals Act does not provide for amendment of appeals made under it, the applicant should have ventilated her full claim within the 60 days provided by law for lodging an appeal. Arguing that the appellant seeks to introduce new grounds of appeal outside the time stipulated in law for lodging an appeal against the decision of the Provincial Land Disputes Tribunal, counsel for the respondent submits that the application should not be allowed at this stage.

16. While acknowledging that this court has power to grant or deny the applicant leave to amend her memorandum of appeal, counsel for the applicant urges the court not to exercise the discretion vested in it in favour of the applicant because the applicant has not provided sufficient reasons for exercise of the discretion in her favour.

17. Counsel for the respondent also submits that the application should be denied because there has been unexplained inordinate delay in bringing the application.

Law on amendment of pleadings

18. The general power of the court to amend pleadings draws from **Section 100** of the Civil Procedure

Act (CPA) which provides as follows:-

“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.” (Emphasis supplied).

19. The power is also donated by **Order 8 Rule 3** of the Civil Procedure Rules (CPR) which provides as follows:-

“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.”

20. It is clear from the foregoing provisions of the law that the court has discretionary power to **“amend any defect or error in any proceeding in a suit”**.

21. By dint of the provisions of **Order 8 Rule 3** of the CPR, the court may allow amendment of pleadings **“at any stage of the proceedings”**.

22. The principles that guide the court in considering an application for amendment of pleadings were set out by the Court of Appeal in *Central Kenya Limited v Trust Bank limited (2000)2 E.A 365* as follows:-

“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.”

23. In the case of *Institute For Social Accountability & Another v Parliament of Kenya & 3 others [2014]eKLR* it was observed:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”

24. **Bullen and Leake & Jacob's Precedents of Pleading, 12th Edition** provides as follows concerning amendment of pleadings:-

“...power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action...”

25. It is quite clear from the above cited provisions of the law, case law and treatises that the discretion of a trial court to allow amendments of pleadings is wide and unfettered except that it should be exercised judicially upon the foregoing defined principles. It is also clear that the power to amend can be exercised at any stage of the proceedings including, at appeal stage.

Application of the foregoing legal principles to the instant case

26. In applying the foregoing principles to the instant case, the applicant seeks leave to amend her memorandum of appeal on the ground that it does not properly reflect the case the applicant wants to urge before court. The reason for the need to amend the memorandum of appeal is identified as the advice that the applicant has been given by counsel to the effect that there are important documents missing in her record of appeal.

27. Concerning the delay in filing the application, it is pointed out that it is only after the applicant instructed counsel to represent her that the defect in the pleadings was discovered.

28. I have read and considered the memorandum of appeal filed in this matter and the amendments intended to be made thereto. In my view the intended amendments are necessary for the purpose of understanding the real issue in controversy and for effective and fair adjudication of those issues.

29. As the issues raised in the appeal are issues of Law, which issues the court can address *suo moto*, for purposes of doing justice to the parties and the respondent having failed to demonstrate that he stands to suffer any prejudice incapable of being redressed by way of costs, I find the application to be merited and allow prayers 1 and 2 in the application.

30. To fast track the hearing and determination of the appeal, I direct that the applicant prepares, files and serves the amended memorandum of appeal, as per the draft amended memorandum of appeal annexed to the application herein, together with a supplementary record of appeal within 21 days from the date hereof.

31. Parties to fix the appeal for issuance of fresh directions under **Order 42 Rule 3(13)** of the CPR within 21 days of service of the amended memorandum of appeal and the supplementary record of appeal.

32. Costs of the application to abide the outcome of the appeal.

33. Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 16th day of August, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Wachira Kebuka for the respondent

Muchiri for appellant/applicant

Court clerk - Esther