



REPUBLIC OF KENYA



KENYA LAW
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**Trust Bank Limited v Shah & 3 others (Civil Appeal (Application)
16 of 2015) [2022] KECA 75 (KLR) (4 February 2022) (Ruling)**

Neutral citation: [2022] KECA 75 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 16 OF 2015
DK MUSINGA, JA
FEBRUARY 4, 2022**

BETWEEN

TRUST BANK LIMITED APPLICANT

AND

AJAY SHAH 1ST RESPONDENT

NITIN CHANDARIA 2ND RESPONDENT

VINOD PATEL 3RD RESPONDENT

JIGNESH DESAI 4TH RESPONDENT

*(Being an application for leave to amend the application to review
the Judgment of this Court in Civil Appeal no. 16 of 2015 (Ouko,
Gatembu & Kantai, JJ.A.) dated and delivered on 27th September 2019)*

RULING

1. Before me is a notice of motion dated 18th May 2020, brought pursuant to section 3A and 3B of the [Appellate Jurisdiction Act](#) and under rules 43 and 44 of this Court's Rules in which the applicant is seeking two orders as follows:
 - a. "Leave be granted to the appellant/applicant to amend the Notice of Motion dated 11th October 2019 in terms of the annexed draft Amended Notice of Motion;
 - b. The costs of the application be provided."
2. Before I address the application, it is necessary that I provide a brief background of the dispute between the parties. The appellant/applicant and the respondents enjoyed an employer-employee relationship. In the year 2001, the appellant/applicant instituted suit against the 1st to the 4th respondents at the High Court, to wit, H.C.C.C No. 875 of 2001, seeking to recover the sum of USD 2,693,258 and



Kshs.266,888,741 plus compound interest, general damages and costs from the respondents, who were alleged to have embezzled those sums through fraudulent schemes. F. Azangalala, J. (as he then was) vide a judgment dated 22nd November 2001 dismissed the appellant/applicant's claim. Parties were ordered to bear their own costs.

3. The appellant/applicant, being dissatisfied with the judgment of the trial court, appealed to this Court via Civil Appeal No. 16 of 2015. This Court (Ouko, Gatembu & Kantai, JJ.A.), in its judgment delivered on 27th September 2019 found no merit in the appeal and accordingly dismissed it with costs to the 1st, 3rd and 4th respondents.
4. The appellant/applicant has filed an application for review of the judgment of this Court vide its notice of motion dated 11th October 2019. In the application for review, the appellant/applicant prays that the Court be pleased to review and reverse or set aside its decision and that the appeal be allowed and costs of the appeal and the application be awarded to the appellant/applicant. That application is pending for hearing and determination before this Court.
5. The amendment sought to be introduced by the appellant/applicant seeks to amend its application for review of the judgment to include the following prayer:

“2A. Further and/or alternatively the Court’s Judgment delivered in favour of the 3rd respondent on 27th September 2019 in Civil Appeal No. 16 of 2015 be reversed and/or set aside.”
6. The background to this application is evident from the motion itself as well as the supporting affidavit sworn by Micah Lekeuwan Naburi, the Liquidation Agent of the appellant/applicant on 18th May 2020. At the heart of the application is the question whether the 3rd respondent is alive or dead, which question the appellant/applicant argues is material and/or crucial for the proper determination of the pending review application.
7. Briefly, the appellant/ applicant argues that the 3rd respondent has never filed any witness statement in the litigation, which began in the year 2001. The 3rd respondent did not appear before the trial court. Further, that there were several applications filed in this litigation which by law required the 3rd respondent to give affidavit evidence, either in support or in opposition thereof. The 3rd respondent has, personally never sworn any affidavit, the appellant/applicant stated.
8. The appellant/applicant argues that all the affidavits filed in the litigation on behalf of the 3rd respondent have been sworn by Advocates Mukite Musangi or Singh Gitau, to the extent that the said advocates became de facto witnesses on behalf of the 3rd respondent. The appellant/applicant contends that no explanation was given as to why the 3rd respondent was unable to appear in court and give oral evidence, or personally swear an affidavit. For these reasons, the appellant/applicant argues that the 3rd respondent was or is not a proper party before this Court because he is presumed to be dead.
9. The appellant/applicant has put in its written submissions dated 13th May 2020. It submits that the issues raised in its application go to the jurisdiction of this Court regarding the appeal, the judgment sought to be reviewed and the pending review application. The appellant/applicant further argues that if the 3rd respondent is dead, then under rule 99 of the Rules of this Court the proceedings by or against the 3rd respondent could only have been continued through his legal representatives, after making an application for substitution; that if no application was made within 12 months from the date of his death, the appeal or all proceedings against him abated. The appellant/applicant further submits that the advocates of the 3rd respondent have not been able to confirm that the 3rd respondent is alive, and if so his whereabouts.



10. The 3rd respondent has opposed the application by way of a replying affidavit sworn by Andrew Mukite Musangi on 29th October 2020. On behalf of the 3rd respondent, he argued that the instant application is an afterthought, is mala fides and was deliberately filed with the sole intention of frustrating the 3rd respondent from enjoying fruits of his judgment.
11. The 3rd respondent further argues that the issues being raised in the application were brought up by the appellant/applicant before the High Court in its application for stay of execution dated 19th March 2010; that these issues were heard and determined against the appellant/applicant vide a ruling dated 17th July 2012 and are therefore moot, having been heard and determined. Further, that the amendments sought will be highly prejudicial to the 3rd respondent for reasons that the 3rd respondent's bill of costs having been taxed at Kshs.17,002,770.00 and parties having entered into a consent for the entire sum to be deposited in a joint account pending the hearing of the intended appeal, the appellant/applicant declined to release the funds to the 3rd respondent upon its appeal being dismissed by this Court and instead made an application for review of the judgment.
12. The 3rd respondent further submits that rule 44 of this Court's Rules does not apply where the applicant seeks to introduce a totally new ground of appeal that was not pleaded, evidence adduced, canvassed and determined by the trial court. In support of this argument, the 3rd respondent relied on this Court's decision in *Kenya Hotels Ltd v. Oriental Commercial Bank Ltd [2018] eKLR*. On the threshold for granting leave to amend a pleading, the 3rd respondent submits that according to the case of *Central Kenya Ltd v. Trust Bank Ltd [2000] eKLR*, the Court should consider whether there was undue delay in filing the application and whether in granting leave, his vested or accrued legal rights will be affected. In this case, the 3rd respondent submits that the appellant/applicant has not explained the delay of about 7 months from the date of filing the application for review and the instant application. Further, that the High Court, having pronounced itself on the aforesaid issues sought to be introduced by the amendment, the matter is res judicata.
13. The 1st and 4th respondents also oppose the application for review vide their joint written submissions dated 30th October 2020. They submit that the appellant/applicant has not laid sufficient basis to allow the Court to exercise discretion in its favour as provided in *John Gakuo & another v. County Government of Nairobi & another [2017] eKLR*. Further, that the proposed amendment raises new issues that were not canvassed in the appeal. It is also submitted that the amendment sought does not in any way assist the Court in arriving at a determination of the pending application for review. The 1st and 4th respondents submit that there was delay in and 4th bringing this application. In this regard, the 1st respondents have relied on the case of *Kassam v. Bank of Baroda (Kenya) Ltd [2002] eKLR* where it was held that delay is a material factor for consideration by the court in the exercise of its discretion in an application of this nature.
14. The instant application is brought pursuant to, among others, rule 44 of this Court's Rules, which provides for applications for leave to amend. Rule 44 (1) states:

“Whenever a formal application is made to the Court for leave to amend any document, the amendment for which leave is sought shall be set out in writing and, if practicable, lodged with the Registrar and served on the respondent before the hearing of the application, or if that is not practicable, handed to the Court and to the respondent at the time of the hearing.”
15. The principles that guide courts in an application for amendment of pleadings are clear and well settled. Amendments to pleadings sought before hearing should be freely allowed, so long as they do not cause



injustice to the other side. This Court's predecessor in *Eastern Bakery v. Castelino* [1958] EA 461 held as follows:

“Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs.”

16. Further, the provisions of sections 3A and 3B of the *Appellate Jurisdiction Act* are also in favour of this Court facilitating the just, expeditious, proportionate and affordable resolution of matters governed by the Act and in handling matters before it.

17. In addition, I am alive to the fact that I have discretionary jurisdiction in the motion before me, and that the discretion must be exercised judicially.

18. In *John Gakuo* (supra) the Court held as follows:

“Before exercising this jurisdiction in favour of the appellants, the court needs to be satisfied that the application is made in good faith; whether the same is material for the proper determination of the issues before court; is it meant to clarify issues or to cloud and confuse issues? Will the amendments if allowed be prejudicial to the respondents or can they be compensated by way of costs?”

19. In the present case, the appellant/applicant seeks to introduce the issue that the 3rd respondent should be presumed dead. This is premised on the non-attendance of the 3rd respondent for hearings before the trial court and/or his failure to personally swear affidavits. This issue was never raised during the hearing before the High Court and no reason was advanced for that failure. Can it now be introduced by way of an amendment to the review application as the appellant/applicants intends to? In *Irungu Kibuni v Wambugu Gakunga & Another* [1986] eKLR, this Court (Hancox & Nyarangi, JJ A & Gachuhi, Ag. J A.) held thus:

“In a proper case, the court has power on appeal to give leave to a party to amend his pleading: *Jupiter General Insurance Co Ltd v Rajabali Hasham & Sons* [1960] EA 592 and *G P Jani Properties Ltd v Dar-es-Salaam City Council* [1966] EA 281. But such leave would seem to be given where there has been an inadvertent omission and where all the material necessary is before the court and there is no need for further evidence to be taken. It appears that leave is very rarely given.”

20. I agree with the 3rd respondent that the issue having not been raised before the trial court, rule 44 cannot be invoked since what the appellant/applicant seeks through its application is to introduce a totally new ground of appeal that was not pleaded, evidence adduced, canvassed and determined by the trial court. There was ample opportunity before the trial court for the appellant/applicant to make such an application. For the appellant/applicant to wait to make this application, even after its appeal to this Court has been determined can only be said to be motivated by bad faith, particularly so having refused to release to the 3rd respondent the money that was deposited in the joint account pending hearing and determination of the appeal.



21. In addition, the trial court pronounced itself on the issue of the 3rd respondent's advocates executing affidavits on his behalf. I have perused the ruling of the trial court regarding that application and I find it necessary to rehash part of that ruling:

“On the issue of the Supporting Affidavit sworn by James Singh Gitau, I have already considered the arguments of the parties on that issue. Contrary to the contention by the Plaintiff, both the application and the Supporting Affidavits are drawn by the firm of Mukite Musangi Advocates. Therefore, the documents have been properly drawn and the issue of the filing of a Notice of Change of Advocates under Order 9 Rules 5 and 7 of the *Civil Procedure Rules* does not arise. What Mukite Musangi Advocates have done is to have the Affidavit in Support and Further Affidavit sworn by Mr. James Singh Gitau.

Is it wrong for Mr. Singh Gitau to have sworn the Affidavits? Mr. Singh Gitau has sworn that he has had the personal conduct of the matter on behalf of the 3rd Defendant, that he has been the one appearing in this matter on the instructions of Counsel on record. He has sworn that the contents he has deposed to are true and within his knowledge. Under Order 19 Rule 3, the requirement imposed on a deponent of an Affidavit is that he shall only confine his depositions to facts based on his knowledge. It has not been contended that Mr. Singh Gitau has no knowledge of the matters he has deposed to in the two affidavits. His averments have not been controverted. Even if they were denied, that Affidavit is not in breach of the Advocates Practice Rules that bar Advocates from swearing Affidavits on behalf of their client. In the instance case, Mr. Singh has deposed that the matters he has deposed to are within his “Knowledge, information and belief.” I have perused the entire Affidavits and I entertain no doubt that the matters deposed to are in the knowledge of Mr. Singh. This is because, they relate to the prosecution of this suit which he has sworn he has been undertaking personally.

Further, as I understand the law, in any litigation evidence will be received from any witness a litigant puts forward provided the evidence is relevant, and direct evidence i.e. it is within the personal knowledge of the witness. The same way a litigant can choose not to testify at a trial but call evidence through other witnesses, I am of the view and so hold that a litigant can do so in an application by authorizing someone else who has firsthand knowledge of the matters in issue to swear the Affidavit on his behalf.

My decision in this issue is informed by the decision of the Court of Appeal in the case of *Julianne Ulrike Stamni –vs- Jiwi Beach Hotel Ltd (1995) eKLR* wherein it was held that: -

“There is no reference in this rule to the Plaintiff himself giving evidence first or at all. But a Plaintiff is bound to produce evidence in support of the issues which he is bound to prove and which evidence can be given by any competent witness not necessarily himself. A Plaintiff does not have to be personally present when he is represented by a duly instructed Counsel as was the case here.”

22. I fully adopt the finding of the trial court on this issue. In the absence of any other form of evidence, the non-attendance of the 3rd respondent before the trial court or his failure to swear any affidavit does not per se invite the presumption of his death.
23. Regarding the question of delay, this Court in *Central Kenya Ltd (supra)* held as follows:

“...Likewise mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The



policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”

24. The delay herein of about 7 months between the date of the impugned ruling and the date of this application has not been explained. According to the 1st and 4th respondents, the application was brought after parties filed and exchanged written submissions in the application for review of the judgment of this Court, which application the appellant/applicant seeks to amend. I have no doubt in making a finding that the delay is likely to prejudice the respondents.
25. For the aforesaid reasons, I decline to exercise my discretionary powers in favour of the appellant/applicant. Consequently, I dismiss the application with costs to the 1st, 3rd, and 4th respondents. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

