



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & ODEK, J.J.A.)

CIVIL APPEAL NO. 252 OF 2009

BETWEEN

KENYA HOTELS LIMITED.....APPLICANT

AND

ORIENTAL COMMERCIAL BANK LIMITED.....RESPONDENT

(An application for leave to amend the memorandum of appeal against the judgment

of the High Court of Kenya at Nairobi (Kimaru, J.) dated 28th August, 2009

in

HCCC No. 195 of 2005 (OS))

RULING OF THE COURT

1. This is a reference from the decision of a single judge, **K. M’Inoti, J.A.**, disallowing the appellant’s application to amend its memorandum of appeal by adding thereto an additional ground as follows:

“That the learned judge erred in failing to appreciate that, the transaction, the subject matter of the suit was tainted with illegality in that by Legal Notice published in the Kenya Gazette Supplement No. 36 dated 19th May, 1989 the suit property was declared to be agricultural land falling within the jurisdiction of the Land Control Act. Consequent thereto, any transaction by way of transfer, charge, (or) mortgage required the consent of the relevant Land Control Board and the absence of such consent made the transaction void and illegal.”

2. The brief background to this appeal, as summarized by K. M’Inoti, J.A. in his aforesaid ruling is that:

“.....in or about 2004, the respondent, Oriental Commercial Bank Limited, filed against the applicant, HCCC No. 1179 of 2004 (OS) which subsequently became HCCC No. 195 of 2005 (OS). In the suit the respondent sought leave to sell two parcels of land known as LR No. 6291/1 and LR No. 6901 (the suit properties), registered in the name of the applicant, to recover a sum of Kshs 69,112,319.17 owed to it by the applicant under a memorandum of equitable mortgage. The applicant opposed the suit, first by denying that it had received the money secured by the equitable mortgage, and secondly on technical grounds regarding the competence of the originating summons and the validity of the equitable mortgage.

After hearing the summons, Kimaru, J. found that the applicant was well truly indebted to the respondent, entered judgment in favour of the respondent and allowed it to sell the suit properties in exercise of the rights conferred on it by the memorandum of equitable mortgage. Aggrieved by the judgment, the applicant, through the firm of Messrs. Ochieng, Onyango, Kibet & Ohaga Advocates, filed Civil Appeal No. 252 of 2009 on 2nd October 2009 with an elaborate memorandum of appeal containing a total

of 30 grounds of appeal.”

3. The learned judge noted that there was no dispute that the question of the equitable mortgage being vitiated by lack of Land Control Board consent was never pleaded before the High Court, was never raised or addressed by any of the parties, and did not feature at all in the impugned judgment.

4. **Mr. Nyiha**, learned counsel for the appellant, argued before M’Inoti, J.A. that the issue of consent of the Land Control Board was not included by the appellant’s former advocates due to inadvertence; that the issue was raised before the High Court in an application for stay of execution of the High Court judgment; and that it was just and expedient to allow the amendment so as to meet the ends of justice.

5. The respondent opposed the application. It contended, *inter alia*, that the applicant had not demonstrated any inadvertence; the issue was not pleaded before the High Court; that it was an afterthought; and that the real intent of the appellant was to adduce new evidence. The respondent further contended that the appellant had not demonstrated that the suit properties were agricultural lands within the meaning of the Land Control Act.

6. In his considered ruling, the learned judge, dismissing the application, held, *inter alia*:

(i) the appellant’s intended new ground of appeal had neither been pleaded nor evidence led on it;

(ii) the parties had not addressed the trial court on the matter;

(iii) the trial judge did not pronounce himself on the matter;

(iv) the dispute was fought on the grounds whether the appellant had received the money secured by the equitable mortgage; whether the equitable mortgage was valid; and whether the originating summons by which the suit had been brought was competent;

(v) there is no evidence that would support the intended new ground of appeal.

7. The appellant urged this Court to set aside the single judge’s decision and in effect allow its application to amend its memorandum of appeal.

8. The principles upon which a three judge bench can interfere with a decision by a single judge in the exercise of the powers donated by **rule 44** of this **Court’s Rules** are well settled. They are akin to the ones that guide the Court in reference from a single judge’s decision in an application made under **rule 4** of the **Court’s Rules**. In **MWANGI v KENYA AIRWAYS LTD [2003] KLR 486**, this Court held, *inter alia*, that:

(i) A single appellate judge sitting alone and acting under rule 4 of the Court of Appeal Rules is exercising the powers vested in him alone on behalf of the whole court. A full court can only interfere with the exercise of those entirely discretionary powers for very specific reasons.

(ii) The circumstances under which the full court would be entitled to interfere with the exercise of the discretionary power by a single judge are similar to those under which an appellate court would be entitled to interfere with the exercise of a discretion by a trial judge.

(iii) Before a full court can interfere with the exercise of a single judge’s discretion it would have to be satisfied that in coming to his decision, the single judge has taken into account some irrelevant factor, or that he has failed to take into account a relevant factor, or that he has not applied a correct principle to the issue before him or that taking into account all the circumstances of the case, his decision is plainly wrong.

See also **SAMAKI INDUSTRIES (NAIROBI) LIMITED v SAMAKI INDUSTRIES (K) LIMITED [1997] eKLR**.

9. We must therefore examine the arguments advanced before us by counsel in respect of the single judge’s decision. Mr. Nyiha, learned counsel for the appellant, submitted that the learned judge failed to acknowledge the following:

(i) The concerned transaction was a controlled one within the meaning ascribed thereto by section 6 of the Land Control Act;

(ii) The ground sought to be introduced was a question of law that would automatically arise in a suit involving agricultural land;

(iii) In disallowing the application the court can be viewed as furthering an illegality as section 6 of the Land Control Act prescribes that no transaction should be conducted on agricultural land with consent of the Land Control Board.

10. On the other hand, **Mr. Khagram**, learned counsel for the respondent, submitted that the issue of whether the suit property is agricultural land or not is one of fact, not law. He referred the court to a valuation report that is in the record of appeal and which reveals that the Naivasha Country Club stands on **L.R. Nos. 6901 and 6291/1 (the suit property)**.

11. Counsel further drew the Court's attention to a letter dated 10th August, 2010 that was addressed to the respondent by the Municipal Council of Naivasha to the effect that the land in question was converted to commercial use. Further, the issue as to whether the suit land was agricultural or not was not raised in the High Court, as earlier stated.

12. Lastly, Mr. Khagram submitted that the appellant had not demonstrated that the single judge, in dismissing the application to amend the memorandum of appeal, exercised his discretion injudiciously. For those reasons, he urged us to dismiss the reference.

13. We have carefully perused the single judge's ruling. We must reiterate that a reference is not an appeal, though it has the nature of one. It is no more than a re-consideration of the manner in which a single judge exercised his or her discretion on behalf of the Court. As earlier stated, the full bench will not interfere with the exercise of a discretion of a single judge of this Court unless it is clear that the single judge erred or exercised his discretion injudiciously. The onus is on the party who asked for the reference to establish this. See **ATTORNEY-GENERAL v THEURI [1985] eKLR**.

14. In considering the application that was before him, the learned judge took into account the principles propounded by this Court in **NYANG'AU v NYAKWARA [1986] KLR 712** and **SECURICOR (KENYA) LTD v E.A. DRAPERS LTD & ANOTHER [1987] KLR 338**; that the power to admit a new point on appeal is discretionary and that whenever a point of law is raised for the first time on appeal, the Court has a duty to entertain the plea and decide upon it. However, the discretion is exercised sparingly and when the point is not at variance with the facts of the case as decided.

15. The learned judge also took into consideration the respondent's submission that the Court will not consider or deal with issues that were not canvassed, pleaded or raised at the lower court; and that **"for a matter to be a ground of appeal it has to have been sufficiently raised and succinctly made an issue at trial"**. See **OPENDA v AHN [1983] KLR 165**, **KENYA COMMERCIAL BANK LTD v OSEBE [1982] KLR 292**.

16. Looking at the reasons for rejection of the application, in our view, the learned judge exercised his discretion judiciously and cannot be faulted at all. In view of the contestation by one party that the property is agricultural land and by the other that it had been converted to commercial use, it remains a factual matter of evidence which was never subjected to assessment by the trial court. As suspected by the respondent the applicant was in effect seeking to adduce new evidence.

17. The learned judge rightly held that the intended new ground of appeal had not been argued before the High Court and the trial judge could not therefore have pronounced himself on the same.

18. All in all, we find no basis for disturbing the ruling by K. M'Inoti, J.A. Consequently, we dismiss this reference with costs to the respondent.

Dated and delivered at Nairobi this 25th day of January, 2019.

P.N. WAKI

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR