



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL (APPLICATION) NO. 30 OF 2018

BETWEEN

NAKUMATT HOLDINGS LIMITED.....1<sup>ST</sup> APPELLANT

ATUL SHAH .....2<sup>ND</sup> APPELLANT

AND

IDEAL LOCATIONS LIMITED.....RESPONDENT

(An appeal from the Ruling of the Environment and Land Court at Mombasa (Yano, J.) dated 5<sup>th</sup> March, 2018 in E.L.C Case No. 400 o 2017)

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RULING OF THE COURT

1. Pursuant to a suit filed at the instance of the respondent, that is, E.L.C Case No. 10 of 2017, the Environment and Land Court (ELC) vide a ruling dated 5<sup>th</sup> March, 2018 ordered the eviction of the 1<sup>st</sup> appellant from L.R No. 14407 & 16988, Section 1/Mainland/North wherein it was operating its business. Aggrieved with that decision, the appellants filed an appeal which is still pending determination.

2. Meanwhile, the appellants by an application dated 24<sup>th</sup> April, 2018 seek *inter alia*:

**a. Leave to amend the memorandum of appeal lodged alongside the record of appeal filed on 15<sup>th</sup> March, 2018.**

**b. Leave to file a further supplementary record of appeal.**

3. The application is anchored on the grounds that the appellants wish to introduce an additional ground of appeal in the memorandum of appeal *to wit*:

**“The learned Judge erred in law and fact, in generally allowing prosecution of the respondent’s Notice of Motion Application dated 23/11/2017, and indeed, allowing the prosecution of the respondent’s suit, in the face of express orders of stay emanating from Nairobi High Court Insolvency Cause No. 10 of 2017; Re: Nakumatt Holdings Limited as read against the express, mandatory provisions of the applicable law.”**

According to the appellants, the proposed ground is essential to the determination of the appeal. Similarly, the appellants intend to draw this Court’s attention to all the relevant orders issued in Nairobi High Court Insolvency Cause No. 10 of 2017; Re: Nakumatt Holdings Limited which they believe has a bearing on the appeal in issue by filing a supplementary record.

4. In response, the respondent filed grounds of opposition. The gist of the opposition is that the proposed amendment seeks to address an issue that was not raised before the Environment and Land Court (ELC); the appellants seek to adduce additional evidence in the appeal without meeting the requisite threshold; and that the amendment and the introduction of the orders alluded to will prejudice the respondent.

5. Mr. Ngonze, learned counsel for the appellants, submitted that the appellants had no intention of introducing anything new. The record of appeal bore witness that members of the public including the respondent were informed of the 1<sup>st</sup> appellant’s insolvency. The orders issued in the insolvency case were clear that all proceedings in respect of the 1<sup>st</sup> appellant had been stayed. He argued that the appellants stand to

suffer grave injustice if the orders sought were not granted.

6. On his part, Mr. Oluga, learned counsel for the respondent, contended that the orders in the insolvency suit were not part of the ELC record. In effect, the appellants were attempting to change the substance of the case. Moreover, some of the orders sought to be introduced had been issued before the hearing of the ELC suit yet they were never produced before the said court. Other orders were issued after the hearing of the ELC suit. As far as he was concerned, the orders issued in the insolvency case had no bearing on the appeal.

7. In a brief rejoinder, Mr. Ngonze submitted that during the hearing of the ELC suit the appellants did not have the orders in question.

8. We have considered the application, arguments made on behalf of the parties as well as the law. As a general rule amendments to pleadings ought to be allowed freely where such amendments facilitate the determination of the issue in dispute. See *Eastern Bakery vs. Castelino (1958) E.A. 461 & Halsbury's Laws of England, 4<sup>th</sup> Edition (re-issue), Vol. 36(1)*.

9. In exercising its discretion to either allow or disallow an amendment, a Court is guided by a number of considerations. *Mulla, The Code of Civil Procedure, 18<sup>th</sup> Edition, Vol.2 at pages 1751-1752* sets out the following useful guidelines when dealing with amendments of pleadings:-

**“On the basis of the different judgments, it is settled that the following principles should be kept in mind in dealing with the applications for amendment of the pleadings-**

- i. All amendments should be allowed which are necessary for determination of the real controversies in the suit;**
- ii. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;**
- iii. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;**
- iv. Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;**
- v. Amendment of a claim or relief barred by time should not be allowed;**
- vi. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;**
- vii. No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;**
- viii. The delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;**
- ix. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings.”**

10. In addition, the Court should not consider the merits of the proposed amendment in allowing or rejecting an amendment. This is because the merits are to be determined at the hearing of the suit or in this case the appeal. See also this Court's decision in *Anders Bruel T/A Queenscross Aviation vs. Nyambura Musyimi & 2 others - Civil Appeal No. 96 of 2015 (unreported)*.

11. Applying those principles to the application at hand, we are persuaded that the proposed amendment will facilitate the determination of the appeal. We also see no reason for declining to grant leave to the appellants to file a supplementary record incorporating the orders issued in the insolvency suit.

12. Accordingly, the application has merit and is hereby allowed. For avoidance of doubt we direct the appellants to file the amended memorandum appeal and the supplementary record within 5 days of this ruling. Costs of the application shall abide the outcome of the appeal.

**Dated and delivered at Mombasa this 7<sup>th</sup> day of June, 2018**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**