



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, JA (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. 192 OF 2008

BETWEEN

UCHUMI SUPERMARKETS LTD.....1ST APPLICANT

KASARANI MALL LTD.....2ND APPLICANT

AND

SIDHI INVESTMENTS LTD.....RESPONDENT

(Being an application seeking leave to amend the Memorandum of Appeal

dated 6th September 2008 and filed on 8th September 2008

in Civil Appeal No. 192 of 2018)

RULING

For determination by me is the motion on notice dated 17th July 2018 “*the application*”. The application seeks leave for the applicants to amend the memorandum of appeal dated 6th September 2008 and lodged in this Court on 8th September 2008 in respect of **Nairobi Civil Appeal Number 192 of 2008**. On 10th July 2018, when the said appeal came up for the highlighting of the respective written submissions that had been filed by the parties herein, the applicants’ advocates sought leave orally under rule **104 (a)** of this Court’s rules to introduce a new ground of appeal. The Court directed the advocates to make a formal application within 7 days, hence the instant application.

The ground of appeal that the applicants seek leave to introduce is to the effect “*that the learned Judge of the High Court erred in fact and in law in making a finding on an issue which had not been pleaded, and which issue had not been placed before the learned Judge for determination by any of the parties.*” The grounds in support of the application and which are elucidated further in the Supporting Affidavit sworn by **Mohamed Ahmed Mohamed** are that the said ground was inadvertently excluded in the initial memorandum of appeal; that the intended amendment was necessary to enable court determine all the issues with finality; that the High Court made a finding on un-pleaded issue and which finding resulted in the court dismissing the applicants’ application seeking to strike out the suit. It is further stated that if the new ground is introduced, the Court will be able to pronounce itself on whether the correspondence exchanged between the parties can amount to a contract; no prejudice will be occasioned to the respondent if the amendment was allowed; and finally, that the respondent will have opportunity to prepare for the hearing of the appeal and challenge the merit of the new ground.

The applicants’ pertinent and substantive ground in support of the application is that if the new ground is introduced, it will enable the appellate court to pronounce itself on whether correspondence exchanged between parties could amount to a contract sufficient to dispose of an interest in land.

To put the deposition into context, I must trace the origin of the dispute, albeit briefly. In February 2005, the respondent saw an advertisement in a local daily inviting bids for the purchase of LR No. 5875/2 and LR No. 23393 (original 11622/3) “*the suit properties*” located along Thika Superhighway, Nairobi. The respondent instructed Messrs **Daly & Figgis** Advocates to act for it and place a bid for purchase of the suit properties. After negotiations between the said advocates and the 1st applicant, a sale price of Kshs. 118,000,000/- was agreed upon. The respondent’s advocates then duly wrote to the applicants on 1st March, 2005 formally offering to purchase the suit properties at the agreed purchase price. The offer was duly accepted vide the applicants’ letter dated 9th March, 2005 whereupon the respondent’s advocates forwarded a cheque of Kshs. 11,800,000/-being 10% deposit of the purchase price.

On 11th March 2005, however, while the respondent was waiting for the formal sale agreement, the 1st applicant again caused an advertisement to be carried out for sale of the suit properties. It is then that the respondent instituted the suit that led to the appeal and the instant application respectively. The suit sought a permanent injunction against the applicants to restrain them from advertising or in any way alienating the suit properties and also for an order of specific performance to compel the applicants to complete the sale and transfer of the suit properties in its favour. The main thrust of its case was that after the applicants unconditionally accepted its offer and subsequently the deposit of the purchase price, then they were precluded from offering the suit properties for sale to anybody else. The respondent considered the second advert to be in bad faith; in breach of contract; illegal and therefore null and void. To it, the attempt to offer the suit properties for sale to a third party was improper and offended the sanctity of contracts.

Contemporaneously, with the filing of the suit, the respondent took out an application for injunctive orders against the applicants. Upon being served with the application, the applicants applied to strike out the suit on grounds that no suit can be brought upon a contract for the disposition of an interest in land unless it is written, signed by the parties and attested as provided for under section 3 (3) of the Law of Contract Act; that the offer made had been subject to contract and no formal contract for sale of the suit properties had been made; that a counter offer was made for the sale of shares in the 2nd applicant to the respondent which had not been accepted; that the applicants had not accepted any payment made in respect of the suit properties and tender of the cheque alone did not amount to acceptance; that the suit was frivolous and otherwise an abuse of the process of the court.

In his consideration of the application, the High Court, (**Osiemo, J**) found that the applicants offered the suit properties for sale, negotiated and agreed on the sale price with the respondent. That the applicants having received and accepted the deposit of the purchase price, then a constructive trust had been created in favour of the respondent which could be enforced in equity as per the proviso to section 3(3) of the Contract Act.

With those sentiments, the Judge refused to strike out the respondent's suit holding that it raised triable issue(s). On 8th September, 2008 the applicants lodged a memorandum of appeal in this Court which had eight grounds. However, the applicants as already stated, now crave for my leave to amend the said memorandum to add another ground.

The application was opposed on the grounds; that it was filed in bad faith and is therefore an abuse of the court process, filed after inordinate and unreasonable delay of about 10 years; that respective parties filed their submissions on 30th October, 2015 and 10th December, 2015 and appeared before the appellate court on various dates, *to wit* 10th June 2015; 13th October 2015; 4th December 2015; 26th July 2016; 2nd November 2016 and 20th September 2017 for highlighting of the said written submissions. According to the respondent, the applicants never indicated their desire to amend the memorandum of appeal during all those appearances and only did so for the first time on 10th July, 2018 when again the appeal had been scheduled for highlighting of the submissions. It is the respondent's view that the delay in filing the present application was a calculated move by the applicants to litigate by instalments and ambush it by setting up an entirely new and different ground than the one it came to meet. It accuses the applicants of failing to identify with specificity, the issue which the learned Judge determined that was purportedly not pleaded. In the circumstances, the respondent maintained that no sufficient basis had been laid to warrant the issuance of the orders sought. It disputed the applicants' assertion that if the amendment was allowed then the appellate court would have an opportunity to pronounce itself on whether correspondence between parties can amount to a contract sufficient to dispose of an interest in land. The respondent contended further that this being an interlocutory appeal, the appellate court is precluded from making final findings of fact which could prejudice the pending suit in the High Court. Further, that the issue of whether such correspondence can constitute a contract can only be determined by the High Court upon taking and hearing evidence.

According to the respondent, in order for the applicants to succeed in their application, they must demonstrate an improper exercise of discretion on the part of the learned Judge. Further, that the Judge in dismissing the application was not applying the principles of striking suit which are to the effect that the court's power to strike out must be exercised only in plain and obvious cases. As such, it contended that the proposed amendment was not necessary as it would not assist the Court in determining the real question in controversy which is whether the trial judge properly exercised his discretion in declining to strike out the respondent's suit. The respondent further opposed the amendment sought on grounds that it sought to introduce a new and inconsistent ground of appeal outside the statutory limitation period. In its view, the application was an afterthought and ought to be dismissed.

During the hearing, **Mr. Wilson Mwhuri**, learned counsel appeared for the applicants and reiterated that the ground to be included was inadvertently omitted. According to counsel, the principles that inform applications of this nature were espoused in the case of **R v AG & Another (2004) eKLR** where this Court stated that 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 party can be compensated by costs. To counter the submission that the present application was meant to further delay the hearing and determination of the suit, counsel pointed out that the appeal was scheduled to be heard on 15th October 2018. As such and according to counsel, if leave to amend the memorandum of appeal is granted then the applicants would file the amended memorandum and further submissions on the said ground within 48 hours of the leave pursuant to rule 44 of this Court's rules. Counsel denied that the respondent would be ambushed or that it would suffer any prejudice if the amendment was allowed.

Learned counsel for the respondent, **Mr. Melly** holding brief for **Mr. Odari**, in opposing the application submitted that the delay in bringing the application had been inordinate and not explained by the applicants. According to counsel, no material had been placed before me to form a basis on which I should exercise the discretion sought by the appellant. It was also his contention that leave to amend is never granted as of right and the applicants had failed to establish sufficient basis for the exercise of the discretion in their favour. Counsel reiterated that the ground sought to be included lacked specificity thus offending rule 44 of the Court of Appeal Rules. Counsel pointed out that the substantive dispute was still pending before the High Court and that the effect of entertaining the argument sought to be advanced would attract the risk of the appellate court making a final finding of fact in relation to a live issue. He cited the case of **Teachers Service Commission v Kenya National Union of Teachers & 3 Others (2015) eKLR** and **Yusuf Gitau Abdallah v Building Center (K) Ltd & 4 Ors (2014) eKLR** to buttress his point. In conclusion, counsel conceded that a memorandum of appeal is capable of amendment. However, counsel opined that the proposed amendment had to attain a particular threshold. In the instant case, counsel denied that the applicants had demonstrated sufficient basis to warrant grant of leave.

The issue before me is whether I should allow the application so as to enable the applicants to introduce the proposed new ground of appeal. The power the applicants wish me to exercise in their favour is discretionary. As such, there are guidelines upon which I should exercise such judicial discretion. In **Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] eKLR**, it was observed that;

“It is trite that the power reserved for the Court by rule 44(1) of the Court of Appeal Rules to amend any document is a discretionary power. Like all judicial discretion however, it must be exercised judiciously and upon reason, rather than arbitrarily, on humour, or fancy. (See Kanawal Sarjit Singh Dhim v. Keshavji Jivraj Shah [2010] eKLR). A memorandum of appeal, such as the one that the applicant seeks to amend is a document that is rightly amenable to amendment. (See Uhuru Highway Development Ltd v. Central Bank of Kenya [2002] 1 EA 314).”

The ground of appeal the applicants seek to introduce is to the effect that the Judge erred in fact and law in making a finding on an issue which had not been pleaded and which issue had not been placed before the learned Judge for determination by any of the parties. The generality of that ground of appeal is apparent or cannot be ignored. The applicants have been accused of failing to identify with specificity the issue they claim the Judge determined un-pleaded.

In the **Kenya Hotels Ltd** case (supra), the court went on to observe;

“Whether or not to allow an amendment will also depend on the nature and extent of the amendment. If the applicant is merely introducing a ground of appeal that is properly founded on the evidence that was adduced and canvassed before the trial court, which it is alleged the trial judge ignored or misapplied, the Court will more readily allow the amendment. Different considerations will however apply if the applicant is seeking to introduce a totally new ground of appeal that was not pleaded, evidence adduced, canvassed and determined by the trial court.”

The generality, or vagueness for that matter, of the new ground the applicants crave leave to introduce does not assist me to determine the nature of the amendment sought. Therefore, I am unable to determine if the proposed ground of appeal goes to the substance and root of the ruling delivered by the learned Judge. The respondent has expressed apprehension that the applicants may ambush it with an entirely new and inconsistent claim than the one it came to meet. Such a scenario would stand to prejudice the respondent if the ground admitted was successfully argued further impacting on the pending suit in the High Court. In **George Gikubu Mbuthia v Consolidated Bank of Kenya Ltd & Another (2016) eKLR**, this Court remarked as follows,

“As regards the law, the High Court readily accepted that the court has unfettered discretion to allow amendment of pleadings, which discretion must be exercised judiciously. It accepted too as a general proposition that parties to a suit have the right to amend their pleadings at any stage of the proceedings before judgment and that courts should liberally allow such amendments. However, he also noted situations when the court will refuse to exercise its discretion to allow amendments. Such cases include where a new or inconsistent cause of action is introduced; where vested interests or accrued legal rights will be adversely affected; where prejudice or injustice which cannot be properly compensated in costs is occasioned to the other”

The applicants’ pertinent ground in support of the application is that if the new ground is introduced, then the appellate court will have the occasion to pronounce itself on whether correspondence exchanged between parties can amount to a contract sufficient to dispose of an interest in land. That position has been discounted by the respondent on grounds that the appellate court is precluded from making a final finding of fact the effect of which would be to impact prejudicially the respondent’s pending suit in the High Court. Indeed the question whether correspondence would constitute a contract can only be determined by the High Court upon taking/hearing evidence and testing the veracity of the same in a trial. Any pronouncement by the appellate court on the same would be jumping the gun and certainly prejudicial to the suit in the High Court.

It is trite also that applications seeking amendments of pleadings ought to be brought within reasonable time. In **Kyalo v Bayusuf Brothers Ltd Civil Appeal No. 38 of 1983**, it was held that applications for amendment of pleadings should only be allowed if they are brought within a reasonable time because to allow a late amendment would amount to an abuse of the court process. In that case, the amendment had been sought after six years. In the instant case, the amendment sought is 10 years late. The applicants have not made any attempt to explain or give reasons as to the delay. Inadvertence without more cannot be a reason for the delay of 10 years. **Halsbury’s Laws of England, 4th Ed. Vol. 36(1) at paragraph 76**, is applicable as it provides *inter alia*;

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion.The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”

The generality of the proposed amendment does not infer confidence, persuade Court or thwart the possibility of it mutating into any ground under the sun through applied legal ingenuity. The integrity of the pending appeal must be protected in the interest of justice. The matter is compounded further by a long unexplained delay in seeking amendment. It is noteworthy that the parties appeared before this Court on 10th June 2015; 13th October 2015; 4th December 2015; 26th July 2016; 2nd November 2016 and 20th September 2017 when the appeal had been scheduled to be heard by way of oral highlight of the written submissions and the applicants never raised the question of amendment. The applicants only raised the issue for the first time on 10th July, 2018 when once again the appeal had been re-scheduled for highlighting of the written submissions. The instant application has further led to the delay in disposing off the appeal and is unmerited.

In the circumstances of this case, and as argued by the respondent, the basis upon which I would exercise discretion in favour of the

applicants has not been laid. The respective parties had prepared, filed and exchanged written submissions in respect of the appeal and the appeal was ready for canvassing but for the amendment sought. The record reflects the applicants filed their submissions in October 2015 and the respondent did so in December 2015. The appeal has therefore been pending for hearing for a period of about 3 years. Put succinctly, what the applicants are asking this Court is to allow an amendment sought at the eleventh hour; seeking to introduce a vague ground of appeal after a 10 year unexplained delay. This is not only untenable but raises suspicion that the applicants are not acting in good faith in bringing the application at the tail end of the appeal which has been pending for 10 years. This Court is not persuaded that the applicants or their advocates came to the realization of their folly of inadvertently failing to introduce the ground of appeal after a 10 years hiatus. It may be the applicants are seeking to salvage the suit pending before the High Court or give it a boost.

The upshot, and for the foregoing reasons, this application lacks merit and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 12th day of October, 2018.

ASIKE MAKHANDIA

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR