



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Application 150 of 2012

NATHAN CHEASANG MOSON 1ST APPLICANT

JOSPHINE CHELANGAT 2ND APPLICANT

SERVANTHOOD & LIGHT

DEVELOPMENT FOUNDATION3RD APPLICANT

VERSUS

COMMUNITY UPLIFT MINISTRIES..... RESPONDENT

(Being an application for stay of execution and injunction pending the hearing and determination of an intended appeal against the ruling and orders of the High Court of Kenya at Kitale by the Honourable Mr. J. R. Karanja dated and delivered on 15th and 23rd May, 2012 in Civil Case No.34 of 2011)

BETWEEN

COMMUNITY UPLIFT MINISTRIES PLAINTIFF/APPLICANT

VERSUS

NATHAN CHESANG MOSON..... 1ST DEFENDANT/RESPONDENT

JOSEPHINE CHELANGAT 2ND DEFENDANT/RESPONDENT

SERVANTHOOD & LIGHT

DEVELOPMENT FOUNDATION.....3RD DEFENDANT/RESPONDENT

RULING

The Application by Notice of Motion dated 30th May 2012 coming up for hearing before us on 16th January 2012 was amended on 3rd July 2012 and the amended Notice of Motion was filed in court on 3rd July 2012. No leave was sought or obtained to amend it.

Although the Notice of Motion dated 30th May 2012 did not contain prayers for reliefs against Essau Mnerca Mengich, the Receiver/Interim Manager who is not a party, the amended Notice of Motion sought

in the amendments to introduce prayers seeking reliefs (a) to compel him to vacate the 3rd Applicants premises and/or business activities pending the lodging, hearing, and determination of the intended appeal and (b) restraining him from interfering and/or dealing with the properties and operations of the 3rd Applicant in any manner whatsoever, and (c) compelling him to render accounts for the business and/or operations of the 3rd Applicant for the entire period they have operated the 3rd Applicant's business and (d) staying further execution of the orders of the Superior Court delivered at Kitale on 23rd May 2012 pending the lodging, hearing and determination of the intended appeal.

Mr. Paul Lilan, learned counsel for the Respondent, raised a Preliminary Objection pursuant to a Notice dated and filed in court on 19th July 2012 on the ground that the amendment was without leave of court and should therefore be struck out.

The filed Notice of Preliminary Objection states:

- 1. That the Applicant filed the application without leave of court contrary to Rule 16(1) of the Court of Appeal Rules*
- 2. That the Applicants have not sought or obtained leave to enjoin the party named as the 2nd Respondent in the amended Notice of Motion.*

Consequently, the amended Notice of Motion is incompetent and should be struck out forthwith. Dated at Nairobi this 19th day of July 2012.

Lilan & Koech Associates

Advocates for the Respondents

In response to the Preliminary Objection, Mr. Lablon Mokuia, the learned counsel for the Applicant, submitted that the court had ordered that the Receiver be served, hence the need to amend, join and serve the Receiver. He relied on the Appellate Jurisdiction Act, Cap 9, and contended that the court has power to allow the amended Notice of Motion. But prior to the Preliminary Objection, the Applicant had not made any application for leave to amend.

It is not in dispute that the amended Notice of Motion was filed without the leave of the court. The learned counsel for the Respondent, Mr. Mokuia, however submitted that the court has wide powers under the Appellate Jurisdiction Act to deem the amended Motion to be duly filed.

We have duly considered the Preliminary Objection and the submissions of counsel for both parties. Rule 44 of the Court of Appeal Rules stipulates as follows:

“Rule 44(1) 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 Court and to the respondent at the time of the hearing.

(2) Where the Court gives leave for the amendment of any document, whether on a formal or an informal application, the amendment shall be made or an amended version of the document be lodged within such time as the Court when giving leave may specify and if no time is so specified then within forty-eight hours of the giving of leave and on failure to comply with the requirements of this sub-rule, the leave so given shall determine.

Rule 16(1) of the Rules of this Court states;

Rule 16(1) where any person obtains leave to amend any document, the document itself may be amended or, if it is more convenient, an amended version of the document may be lodged.

It is implicit from these rules that amendments of any document must be by the leave of court. Such leave must be sought through an application whether formal or informal and the amendments for which leave is sought must be in writing and served on the Respondent prior to the hearing of the application for leave. Where leave is granted, the amendment shall be made or an amended version of the document be lodged pursuant to Rule 44(2) (supra).

The Applicant filed the amended Notice of Motion dated 03.07.2012 without seeking or obtaining leave to do so. There is no freedom for any litigant to amend documents without leave of the court under the Rules of this court. The Applicant should have taken cue from the decisions of this court which show that in the past, this court has emphasized the need to bring applications to amend at the earliest convenience (see Kenya Ports Authority v. E.A.P. & Lighting Company Ltd [1982] KLR 40) and also pointed out that its discretionary power to grant leave to amend documents will be given where there has been inadvertent omission and where all the material necessary is before the court and there is no need for further evidence to be taken (see Kihuni v. Gakunga & Another [1986] KLR 572).

The amended Notice of Motion dated 3rd July 2012 is irregularly filed as it was not filed with the leave of court, the Applicant not having made any application for leave to amend. Without the sanction of the court to amend, it is not properly on record. We find merit in the Preliminary Objection. We uphold it.

Accordingly, the amended Notice of Motion dated and filed in court on 3rd July 2012 is hereby struck out and expunged from the record. The costs of the application shall be borne by the Applicant.

Dated at Nairobi this 22nd day of February 2013.

D. MARAGA

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JUDGE OF APPEAL

G.B.M. KARIUKI, SC

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JUDGE OF APPEAL

GATEMBU KAIRU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR