



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OTIENO-ODEK J.A. (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. 4 OF 2011

BETWEEN

NATHAN MUHATIA PALA

t/a MUHATIA PALA AUCTIONEERS1st APPELLANT

JOHNSON MUGWE NGANGA 2nd APPELLANT

AND

JOSEPH NYAGA KARINGIRESPONDENT

(An application for leave to amend memorandum of appeal against the judgment and decree of the High Court of Kenya at Embu (Hon. Lady Justice Joyce Khaminwa) delivered on 9th February 2009

in

Embu High Court Civil Suit No. 33 of 2004)

RULING

1. This is an application under Section 3 A and 3 B of the Appellate Jurisdiction Act and rule 44 (1) of the Rules of this Court's Rules. It seeks an order that this Honourable Court be pleased to grant leave to amend the memorandum of appeal dated 4th January 2011 against the judgment and decree of the High Court of Kenya at Embu (Hon. Lady justice Joyce Khaminwa) made on 9th February 2009.
2. The ground in support of the application is that the Honourable Judge delivered judgment on 9th February 2009 and awarded damages under Section 8 of the Distress for Rent Act (Cap 293 of the Laws of Kenya) when that Section had been repealed vide Section 34 (j) of Act No. 5 of 1996.
3. During the hearing of the application, the applicant was represented by learned counsel **P.G. Nganga** while the respondent was represented by learned counsel **A.L. Kariu** holding brief for

learned counsel **M.N. Nyaga**.

4. Counsel for the applicant elaborated the grounds in support of the application and emphasized that the judgment by the Honourable Judge was premised on a provision of law that had been repealed. That the application is seeking to introduce a new ground of appeal as Ground 8 A which is a point of law. The ground which is sought to be introduced read as follows:

8A The Learned Judge erred in applying section 8 of the Distress for Rent Act Cap 294 Laws of Kenya when the same was nonexistent having been repealed vide section 34 (1) of the Auctioneers Act, Act No. 5 of 1996.

5. Counsel for the applicant further urged this court to find that the amendment sought to the memorandum of appeal does not prejudice the respondents as the appeal has not been heard. It was submitted that the applicant/appellant should be allowed to ventilate all points of law and grounds of appeal in his case. Counsel stated that this point of law was not discovered until after the memorandum of appeal had been filed in court.
6. In reply, counsel for the respondent opposed the application to amend the memorandum of appeal. He submitted that the application to amend refers to the name of the 1st Appellant who has not filed or lodged any notice of appeal in this matter. Counsel was of the view that the present application is bearing the name of the 1st respondent is incompetent. Further, the respondent submitted that the issue relating to repeal of Section 8 of the Distress of Rent Act was not raised before the Honourable Judge and cannot be a ground of appeal as it was not canvassed before the High Court and the issue is time barred. Counsel submitted that amending the memorandum of appeal and raising the issue at this point in time will prejudice the respondent and defeat the benefit which has already accrued to the respondent.
7. I have taken into consideration the submission by both learned counsel and I am aware that the discretion I have to exercise under the Rules of this Court is unfettered and should be exercised judiciously (**See Kanwal Sarjhi Singh Dhiman – v- Keshavji Jivraj Shah (201) eKLR**). There is also a duty now imposed on the Court under **Sections 3A** and **3B** of the Appellate Jurisdiction Act to ensure that justice is dispensed in consonance with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court. The proposed ground of appeal that the applicant seeks to add to the memorandum of appeal is a point of law. The specific point of law proposed to be included in the amended memorandum of appeal goes to the substance and root of the judgment delivered by the Honourable Judge of the High Court. If a question relates to repeal of a provision of law that is the basis of a judgment, such a point of law can be raised at any time and it need not have been raised and canvassed before the High Court. The respondent cannot be prejudiced when a fundamental point of law is to be argued during the appeal. The judgment of any court must be based on law and the intended ground of appeal raises an issue of law that is central to the validity of the judgment delivered by the High Court.
8. The respondent raised a fundamental point of law that the 1st appellant has never filed a Notice of Appeal in this matter and urged this court to decline to amend the memorandum of appeal on the basis that there is no appeal pending before this Court lodged and filed by the 1st appellant. The instant application to amend the memorandum of appeal is supported by an affidavit sworn by the 2nd appellant who filed a Notice of Appeal. The draft amended memorandum of appeal attached to the supporting affidavit states that both the 1st and 2nd appellants apply to amend the memorandum of appeal dated 4th January 2011. According to the respondent's submission, the 1st appellant has never filed a notice of appeal and cannot be a party to an application to amend a memorandum of appeal when he has never filed a notice of appeal.
9. I have considered this submission by the respondent and it is my considered view that whether the 1st appellant has filed a notice of appeal or not is not an issue before me as single judge. This issue shall be canvassed before a bench of three appellate judges when the respondent's Notice of Motion dated 18th July 2013 to strike out the entire appeal shall be heard. What is before me is an application to amend the memorandum of appeal dated 4th January 2011 as presently filed. The validity or otherwise of the Memorandum of Appeal dated 4th January 2013 is not an issue before me and it is my considered view that granting the prayer to amend the said memorandum does not

prejudice the respondent's foretasted Notice of Motion dated 18th July 2013. Based on the foregoing reasons, I am inclined to allow the application to amend the memorandum of appeal as filed and I order that the memorandum of appeal dated 4th January 2011 be and is hereby amended to add paragraph 8 A thereto in the terms of the prayer in the Notice of Motion dated 5th August 2013. The appellant is to file an amended memorandum of appeal within 7 days from the date of this ruling.

10. The upshot is that the Notice of Motion dated 6th August 2013 is hereby allowed. Costs shall abide by the outcome of the appeal.

Dated and delivered at Nyeri this 17th day of October, 2013

OTIENO-ODEK.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR