



**IN THE COURT OF APPEAL
AT MOMBASA**

(CORAM: ONYANGO OTIENO, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 171 OF 2010

BETWEEN

1. MUSAMARINI LIMITED
 2. PARADISE MOMBASA LIMITED
 3. HOLIDAY OWNERS (TRUSTEES) LIMITED
 4. FREE HOLIDAY LIMITED
 5. HANNAH ADINI
 6. CATHERINE MWINIK NGAMBI
7. YOSEH GUZIAPPLICANTS
- AND**
1. A.D.M. LIMITED1ST RESPONDENT
 2. EIDEN ENTERPRISES LIMITED2ND RSPONDENT
 3. SANDAL WOOD HOTELS & RESORTS LTD3RD RESPONDENT
 4. YARON ABRAHAM4TH RESPONDENT
 5. YARON YEHUDIT.....5TH RESPONDENT
 6. SULAMI YEHUDA6TH RESPONDENT

*(An application for leave to amend the title of the record of appeal and to file supplementary record of appeal and extension of time in Civil Appeal No. 43 of 2010, an appeal from the judgment and decree of the High Court of Kenya at Mombasa (Sergon, J.) dated 24th July 2009
in*

H.C.C.C. NO. 170 OF 2007)

RULING

I have before me a notice of motion dated 30th June 2010 and filed on 9th July 2010; brought pursuant to **section 3A and 3B** of the Appellate Jurisdiction Act, Chapter 9 Laws of Kenya and under **rules 4, 16, 42, 43, 44 and 89** of the Court of Appeal Rules, in which seven applicants namely **Musamarini Limited, Paradise Mombasa Limited, Holiday Owners (Trustee) Limited, Free Holiday Limited, Hannan Adoni Callassina Muvihaki Ngambi and Yoseh Gunzi** are seeking four orders of the Court as follows:-

“1. That this motion be certified urgent.

2. That leave be granted to the applicants to amend the title of the record of appeal dated 2nd March, 2010 and the same be deemed to include Sandalwood Hotels & Resort Limited – 2nd respondent, Eiden Enterprises Limited – 3rd respondent, Yavon Abraham – 4th respondent, Yaron

Yehudit – 5th respondent and Sulami Yehuda – 6th respondent.

- 3. That leave be granted to the applicants to lodge and serve a supplementary record of appeal.**
- 4. That the costs of incidental (sic) to this application abide the result of the Civil Appeal No. 43 of 2010.”**

The first prayer is spent as the matter was not certified urgent by a single Judge. The grounds in support of the application are to be found in two affidavits – one sworn by one Modechi Norty Strokovsky whose status *vis a vis* the application is not clear as his affidavit does not state in what capacity he did swear it, and the other sworn by Joseph Manzi Munyithya, the learned counsel for the applicants. Mr. Strokovsky’s affidavit states in brief that the superior court delivered judgment in HCCC No. 170 of 2007 on 24th July 2009 in favour of the respondent A.D.M. Ltd; that after the judgment was entered, parties entered into negotiations to settle the dispute between the parties; that pursuant to the negotiations, an agreement was reached by the parties. This was after the applicants had moved to this Court and filed notice of appeal as they intended to challenge that judgment. I note that the record before me does not contain any notice of appeal; one of the lawyers for one party and who had an interest in the matter did not approve of the agreement to compromise the case and the parties agreed to appoint another lawyer in place of M/s Havi & Company, who did not know and did not support the issue of compromising the case. A new lawyer was thus appointed to represent the respondent in place of Havi & Company, Advocates but that was only in relation to the appeal that was to be filed in this Court; Civil Appeal No. 43 of 2010 was filed into this Court purely to enable the parties who had entered agreement to get a consent order compromising the suit in the superior court and in this Court. A consent order was thereafter lodged on 15th March 2010 only thirteen days after the appeal was filed. He says at paragraph 11 as follows:-

“That we had assured our advocates that the Civil Appeal Number 43 of 2010 had fully been compromised and all we needed was a record of appeal to enable us record the consent.”

Thus Civil Appeal No. 43 of 2010 was filed solely for purposes of this Court recording a consent order compromising the suit in the superior court and compromising the appeal in this Court. When it became clear that that attempt to compromise the appeal would not see the light of the day, the applicant realized that the appeal would proceed the need to have a proper record loomed and at paragraphs 3, 4, 5 and part of paragraph 6 of affidavit in support of urgency sworn by Mr. Munyithya, he says:-

“3. That my clients requested me to file a record of appeal for purposes of having a consent recorded.

4. That since the issue had been resolved, I proceeded and lodged the record of appeal dated 2nd March 2010 in Civil Appeal No. 43 of 2010.

5. That it has now turned out that within the plaintiff company, there are members who are not agreeable to the compromise marked JMM – 1 above. As a result, there is need to bring on board all the necessary as well as affected parties and all the materials which make it possible for the court to determine the issues in dispute conclusively.

6. That in the meantime, the plaintiff has applied to strike out the record of appeal dated 2nd March 2010.”

Mr. Munyithya claims in his affidavit that, the names of 6th respondent was left out through inadvertence. They conclude those affidavits by stating that there are several documents they find important to include in the supplementary record of appeal. These include entire pleadings in HCCC Number 8 of 2006, together, with copies of several applications in this case made after the judgment, as well as copies of agreements between the parties and other documents.

The application was opposed. In a lengthy replying affidavit sworn by the first respondent’s learned

counsel Mr. Nelson Havi, the first respondent says there is a pending application being Civil Application No. NAI. 69 of 2010 filed in this Court which seeks to strike out Civil Appeal No. 43 of 2010, the record of which is sought to be amended. At paragraphs 6 & 7 of the same affidavit the deponent says:-

***“It is clear from the affidavit of Joseph Manzi Munyithya that the record of appeal in Civil Appeal No. 43 of 2010, was filed solely for the purpose of recording a compromise of the judgment in HCCC No. 170 of 2007 A.D.M Limited vs. Musamarini Limited and 7 others, to the detriment of the 1st respondent and myself and that the compromise has hit a snag.*”**

7. *The applicants now want to use the court process to conceal or remedy their otherwise unlawful attempt to compromise the judgment in HCCC No. 170 of 2007.*”

Mr. Havi further deponed in that affidavit, that the respondents had been restrained from compromising the judgment in HCCC No. 170 of 2007 by a court order issued on 26th May 2010; that one of the signatures to the agreement dated 20th January, 2010 which was compromising the judgment of the superior court admitted in another affidavit that he was coerced, deceived and misled into signing of the claimed agreement; that Civil Appeal No. 43 of 2010 is a dummy record of appeal that was filed only for purposes of recording a compromise of the judgment to the detriment of the first respondent and the deponent; that the filing of supplementary record of appeal cannot cure the defects in the Civil Appeal No. 43 of 2010 such as failure to include the 2nd, 3rd, 4th, 5th, and 6th respondents in the record as persons directly affected despite their participation in the proceedings in the superior court; that applicants’ failure to file record of appeal in time, without an order for extension of time and without certificate of delay and further without any leave having been sought for extension of time to file record of appeal, is fatal to the entire application. Lastly Mr. Havi maintained in that replying affidavit that the applicants do not deserve equitable orders of the court because, the record sought to be amended was filed so as to steal a match on the first respondent and that was abuse of the court process; that the 6th respondent has filed an application in the superior court seeking a review of the judgment appealed from which means that omission of his name in the record of appeal was not inadvertent as claimed by Mr. Munyithya but intentional.

In his submission to me, Mr. Munyithya, reiterated and highlighted the contents of the two affidavits in support of the application adding that the main reasons why certain parties and certain documents were left out of the record of appeal was that although soon after the judgment was delivered on 24th July 2009, the applicants filed notice of appeal, one month thereafter the parties on their own reached agreement which was to compromise the decision of the superior court. However, that agreement could not be recorded by the courts as one of the Directors of the first respondent and who was an advocate, objected. On 20th January 2010 a further comprehensive settlement agreement was again prepared and that was between majority shareholders of the first respondent. Based on belief that the matter was fully settled, the applicants filed the record of appeal purely to facilitate the recording of settlement. The applicants did not expect that the appeal would proceed to full hearing. That, according to Mr. Munyithya, is the main reason why the record omitted names of some parties and some interested parties and also omitted many important documents. He stated further that as the settlement is now opposed, there is now need to have them added so as to have everything on board. The supplementary record the applicants want to introduce, though not annexed, is voluminous and is covering almost eight (8) volumes. The sixth respondent has all along been the agent of the first respondent and gave evidence as such in the superior court. Third respondent is in the physical possession of the suit property. He wanted to be joined as a party soon after the judgment in the superior court was pronounced. The second, fourth and 5th respondents were not parties in the superior court but their lawyer appeared for them without filing pleadings as in another case in the superior court HCCC No. 8 of 2006 they were plaintiffs. Mr. Munyithya urged me to proceed under **rule 44, 87 and 88** together with the recently introduced provisions of **sections 3A and 3B** of the Appellate Jurisdiction Act and allow the application notwithstanding that some of the documents are primary documents as rules now allow their admission later in the record of appeal.

On behalf of the first respondent, Kwach opposed the application raising on the main five grounds

in his submissions. These were, first that the Civil Appeal No. 43 of 2010 which the applicants seek to amend was filed way out of time and without any leave for extension of time to lodge it having been obtained from Court. Thus there is no competent appeal to be amended or in respect of which a supplementary record can be filed. Second, the applicants admit that the Civil Appeal No. 43 of 2010 was no more than a dummy meant to obtain an order of the Court marking the appeal as compromised. The documents left out are close to 95 documents which appellants knew should have formed part of the record. Thus the court process was abused and the Court is being asked to help put right what applicants knew was wrong but deliberately did. Thirdly the intended amendment must be annexed to the application. In this application, there is nothing to show what document is to be amended and how it is intended to be amended. That is the requirement of **rule 44** of this Court's Rules. In this application, there is no draft proposed amendment for which leave can be given to be filed. Fourthly it cannot be true that one respondent was left out inadvertently whereas that respondent was the prime mover in the entire case in the superior court and he also lodged notice of appeal in the superior court. That respondent is Yehuda. He also filed application for review under **Order 44** of the Civil Procedure Rules which has not been prosecuted and lastly, Mr. Kwach contended that the application is brought to forestall another application which has been taken out by the first respondent seeking to strike out Civil Appeal No. 43 of 2010. That application is part-heard in this Court. He also added that there is no explanation for delay in filing this application other than to forestall the other application for striking out the appeal. On points of law, he referred me to several legal authorities and submitted that the overriding objectives introduced recently do not and were not meant to sweep away the rules of engagement in the courts. He urged me to dismiss the application.

Dr. Khaminwa, the learned counsel for the third respondent echoed Mr. Kwach's submissions adding that the application raises serious issues of professional ethics as the record that was filed was a dummy and thus was not for fair play and the Court would be giving stamp to the fact that a dummy record can be filed and later Court can cleanse it. New rules were not intended to accommodate irregularities but to ensure fairness and justice. As the record to be amended was filed out of time and is a dummy, Dr. Khaminwa submits it is not properly before Court and so no order can be given to amend it. Mr. Mogaka who represented 6th respondent and held brief for Mr. Nyachoti, for the second, 4th and 5th respondents did not oppose the application in respect of 2nd, 4th and 5th respondents saying that the second, fourth and fifth respondents would not suffer prejudice if in the interest of justice they are joined in the Civil Appeal No. 43 of 2010 as in any event, because they were parties in HCCC No. 8 of 2006, which has some bearing on HCCC No. 170 of 2007 they were all the time made aware of the matter. They have withdrawn HCCC No. 8 of 2006. He referred me to Chapter 10 Article 159D of the Constitution and **sections 3A** and **3B** of the Appellate Jurisdiction Act and submitted that the spirit of those provisions is that matters before Court be determined on merit. As to the sixth respondent. Mr. Mogaka submitted that although he filed notice of appeal and later opted for a review application, that was within his rights in law. He submitted that as to whether the sixth respondent should be allowed to participate in this appeal or not was within the court's discretion but he felt the sixth respondent should not be included in this appeal. In reply Mr. Muniyithya conceded that the record that contains draft amendments was not annexed and he agreed the applicants had not complied with the provisions of **rule 44** of this Court's Rules. He suggested that the Court could allow the application and thereafter the other parties would be served with the draft proposed amendments and the supplementary record.

I have given detailed background of the matters before me and lengthy summary of the submissions that were advanced before me because, I do feel these are necessary for full understanding of the entire saga.

In law, the principles that guide courts when considering an application for amendment of a pleading are clear and these are that amendments to pleadings sought before hearing, should be freely allowed so long as they do not cause injustice to the other side. The predecessor to this Court held in the case of ***Eastern Bakery vs. Castelino (1958) EA 461*** as follows:-

“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 side can be compensated by costs.”

Further, the provisions of the recently introduced **sections 3A** and **3B** of the Appellate Jurisdiction Act are also in favour of facilitating the just, expeditious, proportionate and affordable resolution of matters governed by the act and in handling matters before it, it should ensure:-

- “(a) the just determination of the proceedings**
- (b) the efficient use of the available judicial and administrative resources;**
- (c) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties; and**
- (d) the use of available technology.”**

Added to the above, I am aware that I have discretionary jurisdiction in the motion before me and that the same discretion like all other judicial discretions, must be exercised upon reason and not on any whims of the court nor capriciously.

It is upon the above principles that I now proceed to consider this notice of motion. First, Mr. Kwach submitted that in this application, there is no draft proposed amendment availed to the Court for which I can grant leave to be filed. In his reply, Mr. Muniyithya conceded this contention and admitted that that requirement had not been complied with by him and his clients – the applicants. The application is brought pursuant to among others, **rule 44** of this Court’s Rules, provides for applications for leave to amend. **Rule 44 (1)** states:-

“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 the Court and to the respondent at the time of the hearing.”

This is a rule Mr. Muniyithya agrees he did not comply with. The effect is that, I would not be in a position to know amendment for which leave is being sought and that makes it difficult for me to exercise my discretion on the matter. I did raise this omission with the applicants’ learned counsel during the hearing of the notice of motion but he suggested that I can allow the application and thereafter, he would serve the respondents with the document. I do not think that would be proper. I think the rule is to enable the Court to know what new thing it is being asked to give leave to introduce and consider whether indeed the amendment for which leave is sought would be within the requirements of the law or whether for instance it would introduce a completely new matter into the case and thus would be irrelevant. To do what Mr. Muniyithya suggests would be tantamount to acting in the dark. A court of law must be aware of its actions and the effects thereof. The title of the record of appeal I am being asked to give leave to be amended is not before me, nor is its draft together with the suggested amendment before me to enable me to know what the applicants want to be amended and how they suggest it be amended. In my mind this omission is fatal and cannot be cured by the application of the provisions of **section 3A** and **3B** of the Appellate Jurisdiction Act. I agree with Mr. Kwach, that these provisions were not meant and could not have been meant to sweep away the basic rules of engagement in a court of law. If that were to be so, there would be no need for the rules to regulate the procedure in courts and it would be impossible to access justice as without proper order in doing things in the courts, none would be able to identify and to deal with issues before parties effectively and exercise his discretionary powers justly and fairly. I agree with Omolo JA, in his ruling in the case of **James Njuguna vs. Francis Ngambi Rukomia & three others (2010) e KLR** where he stated in relying on the **City Chemist (NRB) & another vs. Oriental Commercial Bank Ltd, Civil Application No. NAI 302 of 2008 (Ur) 99/2008:-**

“The new thinking brought in by sections 3A and 3B, does not

“totally uproot well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies

the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.”

In the case of *MSK vs SNK Civil Appeal (Application) 277 of 2005* this Court stated in agreeing with Australian case of *Peruse Pty Limited vs. Council of the City of Sydney (2007) NSWLEC 163* as follows:-

“The Court in exercising the power to give effect to the principle, it must do so judicially and with proper and applicable factual foundation. The overriding principles will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its (sic) judicially ascertained.”

In this case, the document sought to be amended and the draft of the intended amendment were not availed and the applicants’ counsel admitted breach of **rule 44 (1)** of these Rules. That situation does not provide a proper factual foundation for the exercise of my discretionary jurisdiction on the matter.

Secondly, and also related, is the fact that according to the applicants affidavit part of which I have reproduced above, the record of appeal, the title of which is sought to be amended and in respect of which a supplementary record is sought to be filed, deliberately left out what Mr. Munyithya says was the bulk of what would have been a proper record, all because it was filed only for purposes of securing a settlement compromising the judgment in the superior court and the appeal. That was done notwithstanding that the consent of all parties had not been obtained and it was after one party lodged objection and even went to the superior court to challenge the action and it became apparent that the entire appeal would proceed to hearing that the applicants now seek to amend its title to add more respondents one of whom was indeed an active party in the superior court, and to add the bulky part of the record hitherto deliberately left out in the original record of appeal. Mr. Kwach and Dr. Khaminwa call the record sought to be amended a dummy and they cannot in my view be faulted on that. In short, it would appear to me that the application set out originally to hoodwink the Court into allowing the appeal to be compromised upon a record of appeal that applicants knew was not a complete record of appeal; a record that they knew left out some names of parties that were necessary parties to the appeal; a record that they knew did not have all documents necessary and indeed left out most documents. In my view, in filing that record of appeal knowing that it was not a proper record, and attempting to get court’s approval of a settlement order compromising the appeal, based on it, the applicant did not act in good faith as it attempted to abuse court process, and in coming before me seeking to put right all that, they are not coming with clean hands. He who comes for equity must do so with clean hands. I cannot, in the situation obtaining, use my discretionary powers in favour of the applicants for to do so will be lending judicial stamp of authority to and rectifying what was an attempt to steal a match on at least one respondent who never wanted the appeal compromised.

There was also the issue of whether the record of appeal I am being asked to amend and to which a supplementary record would be filed was properly before the court. It was filed late, without leave of the court and without certificate of delay. I would not go into that as I think the question as to whether or not the record is valid belongs to another forum although if it were true, the courts do not act in vain. I do not however want to deal with that aspect here. All in all, from what I have stated above, although applications for leave to amend documents should ordinarily be granted without much ado so long as granting them do not prejudice the other side, and although I have discretionary jurisdiction to grant the same upon reasons and the overriding objective would also prompt me to look favourably upon such applications, in this particular matter, the reasons set out above militate against my exercise of the discretionary powers and I do decline to do so with the net result that both prayers are refused. The application is dismissed with costs to the 1st, 3rd, and 6th respondents. Orders accordingly.

Dated and delivered at Mombasa this 4th day of March, 2011.

J. W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR