



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 58 OF 2009

BETWEEN

KANWAL SARJIT SINGH DHIMANAPPLICANT

AND

KESHAVJI JIVRAJ SHAHRESPONDENT

(An application for leave to amend memorandum of appeal from the ruling and orders of the high Court of Kenya at Nairobi, Milimani Commercial Court (Kasango, J.) dated 18th December, 2006

in

H.C.C.C. NO. 205 OF 1999)

RULING OF THE COURT

There is a motion before us brought under **rule 44 (1)** of the rules of this Court seeking leave to amend the memorandum of appeal dated 28th February, 2007. The memorandum of appeal was filed in **Civil Appeal No. 33 of 2007** in which the applicant seeks to challenge an order by the superior court (Kasango, J.) made on 18th December, 2006. The learned Judge rejected an application to review and set aside an *ex parte* judgment obtained against the applicant in the main suit before that court. The intended amendment seeks to add one more ground of appeal and one more prayer which additions the applicant says were inadvertently omitted.

Rule 44 (1) which is invoked states as follows: -

“44. (1) Whenever 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.”

Learned counsel for the applicant Mr. Muchangi Nduati submitted that it was in the interest of justice that this Court’s discretion is exercised in the applicant’s favour because there was no prejudice to the respondent since the issues raised will be considered in the main appeal which has not yet been set down

for hearing. He further submitted that the document intended to be amended was not a primary document and therefore this Court has unfettered discretion to allow the amendment. For his part, learned counsel for the respondent Mr. Sharma objected to the admission of the motion for hearing because, in his view, the appeal was filed out of time and, consequently, there was no valid appeal on record, let alone a memorandum which was capable of amendment.

The sole objection raised by Mr. Sharma is, of course, belated and Mr. Sharma's attention was drawn to **Rule 80** and **101** of the rules of this Court. No leave was sought to raise such objection and therefore we reject that line of submission. The only issue before us is whether we ought to exercise our discretion in favour of the applicant.

Although the rule invoked donates the power to amend, it does not say how that power shall be exercised. The rule also refers to the amendment of "*any document*" but it is clear on authority that primary documents are not open to amendment in order to validate appeals which are otherwise incompetent – see for example **Chemigas v BOC (K) Ltd [2001] 1 EA 21**. Primary documents are such documents which cannot be brought into the record of appeal by way of a supplementary record. **Rule 85(1) (a) to (k)** lists all the documents which are to be included in the record of appeal, while **rule 85 (2A)** lists those documents which if left out of the record of appeal may be brought in by way of supplementary record. The primary documents are therefore the following:

(i) *Pleadings;*

(ii) *The trial judge's notes of the hearing;*

(iii) *The affidavits read and all documents put in evidence at the hearing (exhibits) or, if such documents are not in the English language, certified translations thereof.*

(iv) *The judgment or order;*

(v) *A certified copy of the decree or order; and*

(vi) *The notice of appeal.*

It is evident that a memorandum of appeal is not part of the documents listed under **rule 85 (1) (a) to (k)** nor is it among the documents listed in **rule 85 (2) (ii) to (vi)**. As Omolo JA stated in **Uhuru Highway Development Ltd v Central Bank of Kenya [2002] 1 EA 314**:

“That is not difficult to understand. The documents listed in rule 85 (1) and (2) all form part of or stem from the proceedings in the Superior Court; a memorandum of appeal does not; it is in fact a creation of the party appealing. So that a memorandum of appeal cannot be treated as a primary document in the sense I have tried to explain herein. Accordingly, a memorandum of appeal, subject to the interests of justice, is always amenable to amendment.”

The discretion to amend, like all discretions exercisable by the court, however wide or unfettered, must not be based on whim or caprice. It is a judicial process and must therefore be based on reason. We have examined the nature of the dispute between the parties which involves in excess of Shs. 17 million and a prime property in Nairobi. The judgment was obtained *ex parte* and while we express no view about the merits or otherwise of the appeal, we think the applicant ought to be given an opportunity to exhaust himself by ventilating the issues he wishes to raise before this Court, which is the final one. The intended amendment is not irrelevant to the issues raised in the appeal and we find no likely prejudice to the respondent who will have an opportunity to oppose the appeal.

For those reasons we are inclined to grant the application and now do so. The amended memorandum of appeal as shown in the draft annexed to the motion shall be filed and served within 7 days of this ruling. The applicant shall bear the costs of the motion in any event.

Dated and delivered at Nairobi this 16th day of July, 2010.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR