IN THE COURT OF APPEAL
AT NAIROBI

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

CIVIL APPEAL (APPLICATION) NO. 8 OF 2002

REPUBLIC……..…….. APPLICANT

AND

THE ATTORNEY GENERAL……..……. RESPONDENT

KENYA AIRWAYS LIMITED…….…....…INTERESTED PARTY

(Appeal from the Ruling and Order of the High Court of Kenyaat Nairobi (Justice Visram) dated 7th

day of August, 2001

in

MISCELLANEOUS CIVIL APPLICATION NO. 254 OF 2001)

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R U L I N G

This Notice of Motion, brought under **Rules 16, 42 and 44** of the Court of Appeal Rules is seeking two main orders and an order that the costs of and incidental to it abide the result of the appeal. The two orders it is seeking are:

> ***"1. That this Honourable Court be pleased to grant the applicant leave to amend the Memorandum of Appeal dated 16th day of January, 2002 by inserting in the title of the document itself the name 'THE INDUSTRIAL COURT" as the respondent in place of 'THE ATTORNEY GENERAL" and name "KENYA AIRWAYS LIMITED" as a "Respondent" in place of "INTERESTED PARTY" and add one other ground of appeal.***
>
> ***2. FURTHER that leave be granted to the applicant to file a supplementary record of appeal containing the affidavit of Lewis Gacuca Kama u".***

The application is brought on grounds that the Memorandum of Appeal describes the Attorney General as the respondent in place of the Industrial Court and that the affidavit of Lewis Gacuca Kamau was left out of the record of appeal. It is also stated that further grounds were to be found in the affidavit of the Counsel of the applicant; the which affidavit was also annexed to the application. I have perused the same affidavit.

The first Respondent, the Attorney General did not oppose the entire application. The Interested Party Kenya Airways Limited did not oppose the parts of first prayer in so far as the same sought leave to amend the Memorandum of Appeal by inserting in the title of the document itself the name "THE INDUSTRIAL COURT" as the respondent in place of "THE ATTORNEY GENERAL" and name "KENYA AIRWAYS LIMITED" as a respondent in place of "INTERESTED PARTY". It also did not oppose the second prayer seeking leave to be granted to the applicant to file a supplementary record of appeal containing the affidavit of Lewis Gacuca Kamau. Thus the only matter which was argued before me by the applicant and the Interested Party was whether or not the applicant should be granted leave to add one other ground of appeal. The additional ground of appeal the applicant is seeking to be added can be discerned from the annexed Draft amended Memorandum of Appeal and it reads:

> ***"3. THAT the learned Judge erred in failing to appreciate that the awards decisions and proceedings of the Industrial Court are not exe rcised in or of the nature of civil proceedings".***

In the Replying Affidavit, sworn by Walter Amoko, the learned Counsel for Kenya Airways Ltd, the Interested Party, the main reasons put forward for opposing the application are three an these are as follows:

> ***"(a) No or no sufficient reasons have been given by the appellant to enable the Honourable Court exercise its discretion in its favour.***
>
> ***(b) The said ground was neither raised nor argued in the superior court before Justice Visram against whose ruling and order this appeal has been preferred. The only issue raised and canvassed before the learned Judge was whether leave to apply for relief by way of judicial review should have been refused by reason of the provisions of Section 17 of the Trade Disputes Act.***
>
> ***(c) The new ground now sought to be introduced is expressed at such a high level of generality that its significance to the matters in the issue in this appeal is not apparent".***

I have considered the application and the submissions by the learned counsel. I do with respect agree with Mr. Amoko, that the applicant has not availed the reasons why it failed in the first place to include the ground of appeal, it now seeks to add in the original Memorandum of Appeal. That omission has denied the Court one of the grounds that I needed to consider in order to exercise my discretion. However, that was only one ground upon which I could have exercised my discretion in favour of the applicant. It was not by any means the only ground. Further, I have carefully perused the record in respect of what transpired in the superior court and particularly the proceedings. It is true that although ***Sections 60 and 65*** of the Constitution upon which Mr. Adere relies for pressing the applicants case were mentioned during the submissions, the same were not mentioned for purposes of any submissions that would be covered by the proposed ground sought to be added by way of amendment to the Memorandum of Appeal.Thus, the ground that the applicant is seeking to add onto the Memorandum of Appeal is in respect of a matter or matters that were not canvassed in the superior court. Mr. Adere, the learned counsel for the applicant submits that as ***Sections 60 and 65*** of the Constitution were relied upon in the superior court, the matter as regards the interpretation of those sections was left to the court and as that court did not address the same, the matter can be raised in this Court on appeal. I am myself not convinced that the mere mention of ***Sections 60 and 65*** of the Constitution in the superior court for other purposes was in itself an invitation to the same court to avail all the interpretations in relation to the same sections including interpretation on matters that were not specifically made issues before the Court.

However, in my view, the main issue before me to decide and which I do deem important on point of law is as to whether at this stage when, I am hearing the application for amendment of the Memorandum of Appeal, as a single Judge, I should decide on what grounds are irrelevant and what grounds are relevant. To put it in another way can I decide on whether a new ground not canvassed in the superior court should be allowed to be argued before this Court (full Court) or not. In short, can I, sitting as a single Judge refuse an amendment to the Memorandum of Appeal that introduces a new matter not canvassed in the superior court purely on the basis that it is a new matter which was not raised in the

superior court. I do pose this question in many ways because, Mr. Amoko, the learned counsel for the respondent, in his able and forceful submission supported by several authorities, sought on the main to persuade me to accept that as the ground sought to be introduced was never canvassed in the court below, I should refuse to have it added to the Memorandum of Appeal at this stage.

He butresed that arguement by referring me to **Rule 84(1)** of the Court of Appeal Rules which states that A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided and the nature of the order which it is proposed to ask the Court to make. My understanding of Mr. Amoko's argument is that as the point being sought to be taken was not canvassed in the superior court, it would be a ground in violation of **rule 84(1)** of the Court of Appeal Rules and that being the case, I should reject it. Secondly, I do also understand Mr. Amoko to be saying that as the ground of appeal being sought to be added by way of amendment was not canvassed in the superior court, it is such a weak ground that I need not allow an amendment to introduce it as it would in the end not see the day.

In my view, whether the ground sought to be introduced was canvassed in the superior court or not and whether it would on that account be allowed to be taken before the full Court or not is not mine to decide as a single Judge. To do so would amount to usurping the powers of the full Court. In law, the appellate court (and this Court is one them) have accepted fresh grounds of appeal even on points that were not taken in the court below upon certain conditions. The authorities to which I was referred do confirm this.However, in all such matters, the decision has been made by the full Court and not by a single Judge. The cases to which I was referred i.e. ***Tanganyika Farmers Association Ltd vs. Unyamwezi Development Corporation Ltd.*** (1960) EA 62, ***Warehousing & Forw arding Co. vs. Jaffardi (***1963) EA 385 and ***Thomas Joseph Openda vs. Peter Martin Ahn*** (1982 – 88) 1 KAR 294 were all cases where the decisions to allow or not to allow new point to be taken on appeal which was not canvassed in the court below were all made by full court and in none of them did a single Judge shut out a litigant from presenting the ground to the full Court..

I do feel, that what I need to look into besides the reasons as to why the ground was not included in the first place are whether the ends of justice would be met by allowing a party to amend Memorandum of Appeal so as to include the ground sought to be included and whether the respondent would be prejudiced by allowing such an amendment. I think the principles applicable to amendments of pleading as are enshrined in the case of ***Estern Bakery vs. Casilino*** (1958) EA 461 would be proper guidelines. The second holding in that case states as follows:

> ***"(ii) Amendments to pleadings sought before the hearing should be freely allowed if they can b e made without injustice to the other side, and there is no injustice if the other side can be compensated by costs".***

In this matter the ground sought be added, if eventually allowed to be argued by the full Court, may be of public importance as the Industrial Court is dealing with the legal and general welfare of the majority of workers in this country and the status of its decision may be of importance to the country and to the legal development in the country. The Kenya Airways Ltd. has not complained that it would be prejudiced by the proposed amendment. It still has time to prepare for the appeal which has not yet been heard. It would still be in a position to challenge the admission of the same ground through a Preliminary Objection at the time of hearing the appeal before the full Court.

Having considered all the above and as the other prayers were not opposed by the Respondent/Interested Party, I do find that this is a suitable case for the exercise of my discretion in favour of allowing the entire application. It is allowed but the Applicant will pay costs of the application to the Respondent. Orders accordingly.

Dated and delivered at Nairobi this 4th day of March, 2004.

J. W. ONYANGO OTIENO

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AG. JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR