



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OWUOR, J.A (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. 289 OF 2001

BETWEEN

KAPA OIL REFINERIES LIMITED) SPENCON (K) LIMITED).....APPLICANTS

AND

1. VISOY DEVELOPMENT LIMITED

2. MAVOKO MUNICIPAL COUNCILRESPONDENTS

(Application for leave to amend a memorandum of appeal in an intended appeal

from the ruling and order of the High Court of Kenya at Nairobi

(Mr. Justice Mitei) dated 27th October, 1999

in

H.C.C.C No. 1360 of 1999)

R U L I N G.

This is an application brought by the applicants, Kapa Oil Refineries Limited and Spenco (K) Ltd. against the respondents, Visoy Development Ltd and Mavoko Municipal Council, under the provisions of substantially rule 4 of the Rules of this Court (the Rules) seeking for leave to amend a memorandum of appeal filed in Civil Appeal No. 289 of 2001. Thereafter the Court to specify the time for the filing of a supplementary record of appeal including the so amended memorandum of appeal and the time for the same to be served upon the respondent.

The grounds upon which the application is made being that the amendment sought is necessary so as to give effect to the true intention of the appellant in appealing and furthermore that the omission to include the words,

"It is proposed to ask the Court for an order that the appeal be allowed and the ruling and order of the Honourable Mr. Justice Johnson Mitei be set aside and substituted with an order dismissing the 1st Respondent's application for injunction dated 7th and 11th August, 1999"

was an error arising from an accidental slip. This amendment, according to the applicants is necessary for the ends of justice and to prevent abuse of the process of the Court, moreso when the respondents will not be prejudiced in any manner by the amendment sought.

In his submission based on his affidavit sworn and filed by him in support of the application, Mr. Nderitu, Counsel for the applicants has urged me to exercise my discretion in favour of the applicants and grant the amendment sought because the omission to include the stated words was a mistake which was drawn to his attention when the respondent filed a Notice of motion in this Court on 11th March, 2002 seeking to strike out the applicants' appeal.

The replying affidavit filed in opposition to the Notice of Motion by one Bedan Mbugua, a director of the 1st respondent to my mind puts the issue in this application more clearly in that:

"4That I verily believe that the applicants are not being candid with the Court and discretion ought not to be exercised in their favour for the following reasons.

- (a) An application to strike out the appeal herein dated 8th March, 2002 was served upon the applicants' advocates and the 2nd respondent's advocate on 14th March, 2002 (see annexure "BMI")
- (b) By a copy of a letter dated 16th day of April, 2002 and copied to all advocates herein the Court invited us to fix a hearing date for the application dated 8th March, 2002 (see annexure "BM2")
- (c) A date for hearing was taken by consent on 22nd April 2002 and the application was fixed for hearing on 16th July, 2002
- (d) By a letter dated 3rd June, 2002 the Court informed all the parties of the hearing date. The letter was received by us on 14th June, 2002 (see annexure BM3)
- (e) On 8th July, only (7) days before the hearing date of 16th July, 2002, the present application was presented to court.

5. That the applicants presented this application four (4) months after being served with the application to strike out the appeal and there has been no explanation for the delay" (emphasis is mine).

I fully agree with counsel for the applicant that in proper circumstances the applicant is indeed entitled to amend its memorandum so as to comply with rule 84 of the Rules. Moreso when the omission is only to include the nature of the order which it proposed to ask the court. Consequently, the discretion of this court would be exercised in favour of the applicant in terms of rule (4) and extend the time to amend and file a supplimently record, and serve the same to the other parties.

But before this is done this Court must be satisfied that there was a laudable reason for the delay on the part of the applicant for not complying with the procedural steps in accordance with the Rules.

As indicated in the affidavit sworn in opposition of the Notice of motion and as conceded to by the counsel for the applicants, it took the applicants four clear months from the time that the omission or mistake was drawn to his attention to the time he eventually filed this application to amend their memorandum of appeal. This was notwithstanding the fact that a hearing date for the application by the respondent to strike out the appeal had been fixed by consent. Even after that, the applicants waited and came to court only seven days to the hearing of the application for striking out of the appeal.

There is no explanation as to why the present application was not filed earlier, the applicants knew after the service of the striking out application that they needed to have their memorandum of appeal amended, in order to avoid the appeal being struck out and yet one more time. No reason was given to me either in their own affidavit, sworn in support of the application or counsel's submission before me as to why it

took four months to have the application filed. As repeatedly stated by this Court where there is no explanation there can be no indulgence. The delay here was inordinate. In the circumstances of this case, I am unable to exercise my discretion in favour of the applicants with the result that the application fails and the same is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 2nd day of May, 2003.

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR