



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: OMOLO, J.A. (IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI 455 OF 2001 (242/01 UR)**

**BETWEEN**

**UHURU HIGHWAY DEVELOPMENT LIMITED ..... APPLICANT**

**AND**

**CENTRAL BANK OF KENYA**

**DEPOSIT FUND PROTECTION BOARD**

**JOSEPH KITTONY**

**GEORGE ORARO**

**MESSRS ORARO & COMPANY**

**KAMLESH MANSUKHLAL DAMJI PATTNI**

**PANSAL INVESTMENTS LIMITED**

**GRAND HOTELS MANAGEMENT LIMITED ..... RESPONDENTS**

**(An application to amend memorandum of appeal from a ruling of the**

**High Court of Kenya at Nairobi (Aganyanya J) dated 12th July, 2001**

**in**

**H.C.C.C. NO. 589 OF 1999)**

**\*\*\*\*\***

**R U L I N G:**

The application I have before me is a somewhat intriguing one and understandably it was vigorously opposed by Mr Oraro and Mr Ojiambo. Mr Oraro himself is a respondent in the matter while Mr Ojiambo acts for the law firm of Oraro & Company Advocates. When the motion dated and lodged in court on 24th December, 2001, was argued before me, Mr Ojiambo also held the brief of Mr Gatonye who acts for the Central Bank of Kenya in the matter. There is only one substantive prayer in the motion, namely that:

"The Applicant [Uhuru Highway Development Limited] be given leave to amend the memorandum of appeal filed on 9th November, 2001 in Civil Appeal No 286 of 2001 in ANNEXURE A hereto so as to transpose the names of Kamlesh Mansukhlal Damji Pattni, Pansal Investments Ltd, and Grand Hotels Management Ltd from being Appellants to Respondents."

There is another prayer that the costs of and incidental to the motion abide the result of the appeal but that prayer must itself be subject to my decision in the motion. I shall hereinafter refer to Kamlesh Mansukhlal Damji Pattni, Pansal Investments Ltd, and Grand Hotels Management Ltd simply as Pattni, Pansal and Grand Hotels respectively. Because the applicant's motion simply seeks the amendment of a memorandum of appeal, it is brought under **rules 44, 16, 42 and 47 of the Court's rules**, "the rules" hereinafter.

The provisions in **rule 16** merely deal with the consequences which follow when the Court has given leave to a party to amend a document; rule 42 deals with the manner or procedure of making applications to the Court while **rule 47** deals with the making of urgent applications. It is **rule 44** which deals with the actual process of amendment though the rule does not state what the Court has to consider before granting an amendment. Why does the applicant wish to amend the memorandum of appeal in Civil Appeal No. 286 of 2001?

The notorious and seemingly eternal Civil Case No. 589 of 1999 is pending before the High Court. The parties to that case are the applicant, Pattni, Pansal and Grand Hotels on the one hand as plaintiffs and Central Bank of Kenya, the Deposit Protection Fund Board and Joseph Kittony on the other hand as defendants. High Court Civil Case No 589 of 1999 was apparently due for hearing before Aganyanya J on 6th June, 2001.

But by a notice on motion dated and lodged in the High Court on 5th June, 2001, the applicant Pansal and Grand Hotels sought the disqualification of Mr George Oraro as counsel and that of Oraro & Company Advocates from further representing Central Bank of Kenya and the Deposit Protection Fund Board. It is that motion which was heard before Aganyanya J between 6th and 13th June, 2001. The learned Judge dismissed the motion with costs. Leave to appeal was then sought and was granted. Pattni filed his notice of appeal on 19th July, 2001; the said notice of appeal showed on its face that it was to be served and was actually served upon Oraro & Company Advocates, George Oraro Esquire, Central Bank of Kenya, Deposit Protection Fund Board, Joseph Kittony, Uhuru Highway Development Ltd, [the Applicant], Pansal and Grand Hotels. There can be no doubt but that this notice was properly served pursuant to the provisions of **rule 76 (1) of the rules** :

*"An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal."*

All the persons named in Pattni's notice of appeal were parties directly affected by the appeal and as Pattni did not want the Court to dispense with service of the notice of appeal on any of them, he was bound by the rules of the court to serve them with his notice of appeal. I was told that pursuant to Pattni's notice of appeal, which, it is admitted, was lodged and served on time, Pattni has now lodged Civil Appeal No. 15 of 2002 on 30th January, 2002. Whether that appeal was lodged in time or out of time, whether it was lodged in good faith or in bad faith are matters over which I cannot, sitting as a single Judge, adjudicate.

For my purpose in this ruling, it is enough simply to say that Pattni appears to have filed and served a notice of appeal and pursuant to that notice, an appeal has been lodged. Who else filed a notice of appeal from the decision of Aganyanya J rendered on 12th July, 2001? The applicant also did so on 19th July, 2001. The notice of appeal lodged by the applicant also shows that it was to be served and was in fact served upon Oraro & Company Advocates, George Oraro, Esquire, Central Bank of Kenya, Deposit Protection Fund Board, Joseph Kittony, Pansal and Grand Hotels and Pattni. Once again, the notice of appeal by the applicant and its service upon all the parties directly affected appears to be sound on its face.

The notice on motion upon which Aganyanya J ruled on 12th July, 2001 was brought by four parties, but out of those four, only the applicant and Pattni lodged and served notices of appeal. Pansal and Grand Hotels did not file or serve any notices of appeal and consequently, they could only be respondents. But when the applicant lodged its memorandum of appeal in Civil Appeal No. 286 of 2001, the applicant purported to include Pattni, Pansal and Grand Hotels as appellants.

I have pointed out that Pattni has lodged his own appeal, Civil Appeal No. 15 of 2002; Pansal and Grand Hotels never gave any notice of their intention to appeal from the decision made by Aganyanya J on 12th July, 2002. Indeed, these two having not given any notice of their intention to appeal, could not possibly lodge a competent appeal. It is under these circumstances that the applicant asks me to allow it to amend its memorandum of appeal so that Pattni who has his own appeal, Pansal and Grand Hotels who never filed any notices of appeal are removed as appellants and put as respondents.

Mr Oraro submitted that Pattni in fact has always wanted to be an appellant and not a respondent; that is in fact correct. Pattni has always wanted to be an appellant and not a respondent because he lodged a notice of appeal and has in fact appealed. So as respects the applicant's appeal, Pattni could only be a respondent in the same way the applicant could only be a respondent in the appeal filed by Pattni. Otherwise Pattni would have filed two appeals from the same decision while he in fact gave only one notice of appeal.

Pansal and Grand Hotels, however, could not have been appellants because none of them lodged a notice of appeal. The applicant could not drag them in as appellants when the two had not indicated in a lawfully recognized manner that they wanted to appeal. Mr Ojiambo, for his part submitted before me that no mistake or inadvertence was shown before me and Mr Ojiambo drew my attention to certain passages in Earl Jowitt's "Dictionary of English Law" at page 717 which deal with various types of "Error" as understood in English law.

The truth of the matter is that even if the applicant made no error, it [the applicant] was not entitled, in law either to appeal on behalf of its co-litigants, or to drag them in its appeal as appellants. Pattni, as I have said, has filed his appeal. Pansal and Grand Hotels never indicated to anyone that they wanted to appeal. In these circumstances, I do not think it is unreasonable for the applicant to want to make its co-litigants respondents to its appeal.

Have I got the jurisdiction to grant the amendments sought? What is sought to be amended is the memorandum of appeal. This Court has repeatedly ruled that primary documents cannot be amended and primary documents, as far as I understand the position, 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 a record of appeal. Rule 85 (2A) then lists those documents which, if left out of the record of appeal, may be brought in by way of a supplementary record. The documents which may not be brought in by way of a supplementary record and are, therefore, primary documents are:

- (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.

These documents are "primary" in the sense that once they are omitted from the record of appeal, they cannot be brought into the record by the filing of a supplementary record.

This must be what my learned brother Kwach JA meant in **ATTORNEY GENERAL VS KAMLESH MANSUKHLAL DAMJI PATTNI, Civil Application No. NAI 59 of 1999 (unreported)** when he said:

"The Notice of Appeal which the applicant wishes to correct seems to me on the face of it to be incurably defective. The decision against which the applicant desires to appeal was given on 11th February, 1999 but on the notice of appeal it stated that it was given on 11th February, 1998. The applicant who should be the appellant in the intended appeal is referred to as the respondents (sic). These are not the sort of errors that can properly be cured by an application under rule 44 of the Rules. They are serious mistakes which render the notice of appeal itself invalid. A notice of appeal is a primary document within the meaning of rule 85 (1) of the Rules and unless a record of appeal contains a valid copy of such notice the appeal is liable to be struck out as incompetent either at the instance of the respondent or by the Court pursuant to rule 101 (b) of the Rules.

As a single Judge I have no power to validate an invalid notice of appeal. Nor do I have jurisdiction to strike it out even if it is patently defective as in the present case. Like the weather and the English, I can only talk about it but I cannot alter it. The errors the applicant wishes to correct are fundamental and I decline to do so, because if I do, the result would be to render a notice of appeal which for all practical purposes is defective."

There, Kwach JA was asked to allow certain amendments to the notice of appeal. He declined to do so because an amended notice of appeal would then have to be included in a supplementary record and that is not allowed under the rules. I am, however, not asked to amend a primary document. It is to be noted that a memorandum of appeal is not included among the documents listed in rule **85 (1) (a) to (k)**; nor is it included among the documents listed in rule **85 (2) (i) to (vi)**. 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 issue of whether this motion was properly filed in the Court was also raised and that issue arose due to the order of this Court in one of the earlier appeals in this perennial matter where the Court ordered that no new appeal, application or other proceedings shall be lodged in this Court except with the written leave of the Chief Justice. It was, however, agreed before me that the Chief Justice did give written leave for the filing of Civil Appeal No. 286 of 2001.

That being so it would really not be necessary for leave to be obtained for the filing of applications which are necessarily incidental to the filing of the appeal. The motion before me is incidental to the filing of Civil Appeal No. 286 of 2001 for which written leave was granted and I do not think this point is really valid. I have said enough, I think to show that I should exercise my discretion and allow the applicant to amend its memorandum of appeal in the manner sought. Obviously the amended memorandum of appeal will have to be served on all the respondents.

There will also be the question of representation of the respondents such as Pattni, Pansal and Grand Hotels but those are matters which I cannot deal with in this ruling. I am certain the applicant and its legal advisers will know how best to deal with them. My final orders shall be as follows:

(i) I allow the notice of motion dated and lodged in Court on 24th December, 2001 and order that the applicant shall file an amended memorandum of appeal showing only the applicant as the appellant and Pattni, Pansal and Grand Hotels as respondents in addition to the other respondents in Civil Appeal No. 286 of 2001.

(ii) I also allow the applicant to amend its prayers in Paragraphs B and C by the deletion of the letter "s" in the word "Appellants" in those paragraphs. (iii) The amended memorandum of appeal must be lodged within seven days of the date hereof, and served upon all the respondents, including the new three, within seven days from the date of its lodgment.

(iv) On costs, the applicant is getting the benefit of the exercise of my discretion on a matter which ought not to have arisen in the first place. The applicant must accordingly bear the costs of the motion before me in any event and I accordingly order that the applicant shall pay the costs of the motion but only to the Central Bank of Kenya, Deposit Protection Fund Board, George Oraro and M/s Oraro & Company Advocates who were the parties represented before me during the motion.

Those shall be my orders in the matter.

Dated and delivered at Nairobi this 8th day of March, 2002.

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**