



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT KITALE**

**ELC APPEAL NO. 3 OF 2017**

**CHRISTOPHER WAFULA MUTORO.....APPELLANT**

**VERSUS**

**RICHARD LORDIA LOKERE.....RESPONDENT**

**RULING**

1. By a Notice of Motion dated the 22/11/2018, the appellant brought under **Order 42 Rule 3** of the **Civil Procedure Rules, 2010; Section 1A, 1B and 3A** of the **Civil Procedure Act**, seeking the following orders;

**(1) That this Honourable court be pleased to grant leave to the applicant to amend his Memorandum of Appeal.**

**(2) That costs be in the cause.**

2. The application is based on the grounds that:-

**(a) That the amendments is necessary for the real issue in controversy between the parties herein to be determined by this court.**

**(b) That the amendment shall not prejudice the respondent.**

3. The application is supported by the supporting affidavit of Christopher Wafula Mutoro the appellant herein. He deposes that the amendment is necessary for the real question in controversy between the respondent and himself to be determined by this Honourable court.

4. The application was opposed by the respondent vide a replying affidavit sworn on 29/1/2019. He deposes that the application is frivolous, baseless, and vexatious and lacks merits and stands to be struck. That the memorandum of appeal sought to be amended was filed and lodged at the then, Provincial Appeals Committee at Nakuru and this Honourable Court did not order that the same be placed before it for its hearing and determination. That the only remedy for this Honourable court is to hear and determine the issues at hand and the court does not have jurisdiction to amend the memorandum of appeal as sought by the applicant. It is the respondent's contention that this is a matter that emanated from Land Disputes Tribunal and which does not need any amendments whatsoever. That the said amendments made to the said memorandum of appeal have brought new matters /issues which were never canvassed at the Kwanza Lands Disputes Tribunal. It is further deponed that the grounds of appeal before this Honourable Court which was transferred from the Provincial Appeals Committee are the real issues canvassed in the Tribunal and nothing else to be added and by allowing the amendments will amount to hearing the dispute afresh.

5. I have carefully considered the application, submission by the parties and the law governing the application. Under **Order 42 rule (3) (1)** an appellant may amend his memorandum of appeal without leave at any time before the court gives directions under **rule 13**. The issue I have to consider is whether the amendment sought is merited. The applicants filed their memorandum of appeal on the 9/5/2011. He has deposed that it took long to make this application because of the history of the case as per the court record.

6. **Order 42 rules (3) (2)** provides that:

**“After the time limited by sub-rule (1) the court may, on application, permit the appellant to amend his memorandum of appeal.”**

7. Under **sub rule 2** the court has the discretion to consider the applicant's application. A memorandum of appeal is a pleading in the appeal. In seeking an amendment of a memorandum of appeal the principles to be considered are those applicable to amendment of pleadings. The principles which guide the exercise of discretion in amendment of pleadings were set out in the case of **Central Kenya Ltd vs. Trust Bank**

Ltd & Others Appeal No 222 OF 1998 which case the appellant has cited in their submissions.

8. These principles can be summarized as follows, that the amendment;

- (i) **Should be necessary for purposes of determining the real question or issue which has been raised by parties;**
- (ii) **to avoid multiplicity of suits provided there has been no undue delay;**
- (iii) **Does not introduce new or inconsistent cause of action;**
- (iv) **Does not take away or affect any vested interest or accrued legal rights; and**
- (v) **Does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.**

9. In **Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] eKLR**, it was observed that;

**“It is trite that the power reserved for the Court by rule 44(1) of the Court of Appeal Rules to amend any document is a discretionary power. Like all judicial discretion however, it must be exercised judiciously and upon reason, rather than arbitrarily, on humour, or fancy. (See Kanawal Sarjit Singh Dhim v. Keshavji Jivraj Shah [2010] eKLR). A memorandum of appeal, such as the one that the applicant seeks to amend is a document that is rightly amenable to amendment. (See Uhuru Highway Development Ltd v. Central Bank of Kenya [2002] 1 EA 314).”**

10. The ground of appeal the applicant seek to introduce at **paragraph 10** of the annexed amended Memorandum of Appeal is to the effect that the Kwanza Land Disputes Tribunal erred in law and fact in handling a matter it had no jurisdiction to hear and determine.

11. At **paragraph 11**, the amendment is to the effect that the award as adopted by the Kitale Chief Magistrate’s Court is null and void *ab initio* and the same should be set aside. The generality of those grounds of appeal are apparent or cannot be ignored.

12. In the **Kenya Hotels Ltd** case (supra), the court went on to observe;

**“Whether or not to allow an amendment will also depend on the nature and extent of the amendment. If the applicant is merely introducing a ground of appeal that is properly founded on the evidence that was adduced and canvassed before the trial court, which it is alleged the trial judge ignored or misapplied, the Court will more readily allow the amendment. Different considerations will however apply if the applicant is seeking to introduce a totally new ground of appeal that was not pleaded, evidence adduced, canvassed and determined by the trial court.”**

13. The applicants state that the proposed amendments are intended to bring before the court the real matters in controversy between the parties herein. They have satisfactorily explained the reasons for the amendment.

14. In case of **Nathan Muhatia Pala t/a Muhatia Pala Auctioneers and another vs. Joseph Nyaga Karingi** (supra) Justice Odek (as he then was) held that;

**“A duty now imposed on the Court under Sections 3A and 3B of the Appellate Jurisdiction Act is to ensure that justice is dispensed in consonance with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.”**

15. It is clear therefore that the discretion that the court may exercise in respect of appeals filed before it may in deserving cases be extended to appeals transferred to it from the Provincial Land Disputes Tribunal. There is no plausible ground advanced by the respondent herein as to why the memorandum can be deemed to be not amenable to amendment simply because it was originally filed in the Provincial Land Disputes Appeals Committee. Upon being brought to this court, it becomes part of the record of this court and must be handled in the manner other appeals are handled.

16. In my view the applicant deserves the orders sought for the above mentioned reasons. It is also observed that the respondent will suffer no prejudice by the granting of those orders.

17. I order that the applicant shall have leave to amend his Memorandum of Appeal dated 5/5/2011 as per the contents of the draft marked **CWM1** in the application dated 22/11/2018, and that he shall subsequently file and serve the amended Memorandum of Appeal within **7 days** from the date hereof.

18. The costs of the application shall abide the outcome of the appeal.

**Dated, signed and delivered at Kitale on this 21<sup>st</sup> day of March, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**21/03/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Munialo for appellant

Respondent in person

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**21/03/2019**