IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: APALOO JA)

CIVIL APPLICATION NO. 147 OF 1986

MWAKIO……APPLICANT

VERSUS

KENYA COMMERCIAL BANK LTD…….RESPONDENT

RULING

The respondent, as its name implies, is a banking institution. I shall hereafter refer to it as the bank. At sometime prior to 1977, it granted the applicant a loan. This was secured by a charge on the landed property of the applicant. It would seem the bank thought the applicant made default

in repaying the loan and appears to have threatened to exercise its statutory power of sale over the charged property. The applicant seems to have disputed the accuracy of the accounts prepared by the bank. Apparently, to prevent the bank exercising its power of sale, the applicant, on November 13, 1984 brought a plaint in the High Court against the bank and sought certain declaratory reliefs and damages.

It was a home-made plaint which was heard and determined by Porter, J on April 14, 1986. In a judgment which ran into more than 30 pages of typescript, the learned judge declined to grant the applicant any of the reliefs claimed. The court dismissed the suit and condemned the applicant to pay the costs of the bank. It is this conclusion that the applicant seeks to contest by this appeal.

In apparent compliance with rule 84 of the Court of Appeal Rules, the applicant lodged a memorandum of appeal. These contain no fewer than 33 grounds of appeal.

It would seem that since lodging the memorandum of appeal, the applicant conceived of further grounds. They are nineteen. At the hearing, he would not be heard to present argument on them unless they were formally and properly made part of the record. So he seeks leave to amend his memorandum of appeal by adding these grounds to those already included in that document. It was a formal application apparently made under rule 44 of this Court's Rules. At the hearing, he handed copies of the additional grounds to the court and counsel for the respondent.

Whether I should grant leave for this formal amendment to be made or not, is entirely a matter for the exercise of my discretion. And on general principles, leave to make amendment of this sort would normally not be declined unless it would occasion injustice to the other side. It was objected for the respondent, that leave should be refused, if I understand counsel aright, for two main reasons, namely,

first, the applicant has not produced a proper record, second, the proposed additional grounds are either irrelevant or incomprehensible.

On the first ground, it was said, the applicant failed to include in the record important exhibits. Some documents involving bank charges and accounts were given as an instance of this. It was therefore urged that as the applicant has not produced a proper record, he ought not to be permitted to amend.

On the second ground, counsel took me through the proposed additional grounds seriatim and submitted that they were either irrelevant or incomprehensible.

As to the inadequacy of the record, I can only say that there is as at present insufficient material on which I can hold that the record produced by the applicant is defective. It is a rather bulky and voluminous record, in which matters which are not normally included in appeal records were incorporated. I am accordingly not satisfied that the charge of presenting a defective record has been established or that it affords me sufficient reason to decline the leave sought.

As to the second ground, there is something to be said for the argument that many of the proposed additional grounds do not relate directly to the judgment complained against. It is probable that at the hearing, many of these grounds may be found to be faulty. But I do not think I can sit in judgment on the relevancy or otherwise of those grounds now. Rightly or wrongly, the applicant puts them forward as sound basis for contesting the judgment of the court below. I think whether these grounds have or lack merit or are unsustainable, is for the court to say at the hearing.

It seems to me that argument on these additional grounds may well prolong the hearing of the appeal thereby increase costs. The applicant has made no secret of the fact that he is not particularly well-off financially. For this reason, the court granted him some indulgence in relation to the deposit for costs. If this amendment is allowed and the applicant should be unsuccessful in this appeal, would he be in a position to pay the costs that would ordinarily be awarded to the respondent" If he could not, I can see some injustice to the respondent in granting an application which would enhance costs which the applicant would be unable to meet.

On the other side of the picture. I bear in mind that there is charged to the respondent as security for the loan, what is said to be substantial property, the proceeds from the sale of which could not only recoup its principal and interest, but probably costs. And the applicant expressly drew my attention to this factor in the case. There is also the fact that although somewhat handicapped by his lack of legal training, the applicant produced to the court, material which contains such wealth of detail, that it is reasonable to conclude that he strongly and genuinely believes, even if erroneously, that the judgment of the court below occasioned grave injustice to him. To refuse to allow him put forward and agitate grounds which he believes will enable him to be relieved of that judgment, will leave him with a rankling sense of injustice. That, in my judgment, would not be right.

In *Tidesley v Harper,* 10 ch D 396, Bramwell LJ said:-

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that by his blunder, he had one some injury to his opponent which could not be compensated for by costs or otherwise.”

That dictum, I think, typifies the normal judicial approach if a court is prayed to grant leave to amend. On the facts of this case, there is, in my opinion, no basis for saying that in seeking to amend, the applicant is acting *mala fide,* or that his omission to include these additional grounds in the memorandum of

appeal in the first instance caused any injury to the respondent, still less any that cannot be compensated in costs.

Bearing that statement of principle in mind and taking into consideration all the other factors of this case, I think this is a proper case to exercise my discretion in the applicant's favour. I accordingly grant the motion and order that the additional grounds of appeal handed to the court and counsel for the respondent during the hearing of this motion shall be admitted and be deemed to be part of the memorandum of appeal.

In all the circumstances of this matter, I think I would be doing right if I ask each party to bear his own costs of this application and I so order.

Dated and Delivered at Nairobi this 12th Day of May, 1987

F.K. APALOO

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JUDGE OF APPEAL