Case Number:	Civil Appeal 261 of 2014
Date Delivered:	16 Feb 2018
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Ruling
Judge:	Kathurima M'inoti
Citation:	Governors Ballon Safaris Limited v Skyship Company Limited & another [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	Civil Case 461 of 2008
Case Outcome:	Application allowed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: M'INOTI, J.A. (IN CHAMBERS)

CIVIL APPEAL NO. 261 OF 2014

BETWEEN

GOVERNORS BALLON SAFARIS LIMITED…… APPLICANT

AND

SKYSHIP COMPANY LIMITED…….....…....… 1ST RESPONDENT

COUNTY COUNCIL OF TRANSMARA..... 2ND RESPONDENT

(An application for leave to amend the memorandum of appeal against the judgment of the High Court of Kenya at Nairobi (Mabeya, J.) dated 22nd November 2013

in

HCCC No. 461 of 2008)

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RULING

The Motion on Notice before me is taken out by ***the appellant, Governors Ballon Safaris Limited (the applicant)*** and craves leave to amend the memorandum of appeal dated 12th September 2014 in ***Civil Appeal No. 261 of 2014***. The ***1st respondent, Skyship Company*** Ltd and the ***2nd respondent, County Council of Transmara,*** the predecessor in title of the ***Narok County***, did not file any grounds of opposition to the application or replying affidavit. Nevertheless, with the consent of ***Mr. Oyatsi***, learned counsel for the applicant, I heard ***Ms. Ogonjo***, learned counsel, who held brief for ***Mr. Luseno*** and ***Mr. Kemboy***, respectively learned counsel for the 1st and 2nd respondents.

The short background to the application is as follows: On or about 14th August 2008, the applicant filed in the High Court at Nairobi ***Civil Suit No. 461 of 2008*** seeking relief against the 1st respondent for inducing and procuring the 2nd respondent to breach a contract between the applicant and the 2nd respondent under which the appellant enjoyed exclusive rights to operate hot air balloon services in specified parts of the ***Masai Mara***. The respondents duly filed their defences together with a counter-claim by the 2nd respondent.

On 31st March 2010, the 1st respondent applied for the dismissal of the applicant's suit for want of prosecution. By a ruling dated 22nd November 2013 and the subject of Civil Appeal No. 261 of 2014 in this Court, ***Mabeya, J.*** granted the application and struck out the suit. Aggrieved by the ruling, the applicant filed the Civil Appeal aforesaid on 12th September 2014 with a memorandum of appeal containing 8 grounds of appeal. In the motion before me, the applicant seeks leave to amend that memorandum of appeal.

The application is based on the grounds that the appeal was listed for hearing 25th April 2017 and as the applicant's counsel was getting up for the appeal, he realized that the memorandum of appeal did not raise all the points of fact and law on the basis of which the applicant intended to impugn the ruling of the High Court. Mr. Oyasi added that he took full responsibility for the inadvertent failure to notice those points at the time of preparing the memorandum of appeal, but nevertheless urged that the amendment was necessary for the proper determination of all the issues in the appeal. He submitted further that the intended

amendment did not seek introduce any new points and that the respondents would suffer no prejudice.

Ms. Ogonjo submitted that there was inordinate delay in bringing the application and that the applicant and its counsel were guilty of delay and lack of vigilance. She contended that the respondents would suffer prejudice if the application was allowed and urged me not to exercise my discretion in favour of the applicant.

I have carefully considered the application and the submissions by learned counsel. The power donated by ***rule 44(1)*** of the ***Court of Appeal Rules*** to amend any document is a discretionary power, which must be exercised judiciously, on the basis of reason rather than arbitrarily, and subject to the interests and dictates of justice. (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 amenable to amendment. (See ***Uhuru Highway Development Ltd v. Central Bank of Kenya [2002] 1 EA 314)***.

In exercising its discretion, the Court in ***Kanawal Sarjit Singh Dhim v.***

Keshavji Jivraj Shah (supra) took into account a number of considerations such as that the dispute involved a prime and valuable property in Nairobi, the judgment the subject of appeal had been obtained *ex parte*; the need to afford the applicant an opportunity to ventilate all the issues that he wished to raise on appeal; the fact that the intended amendment was not irrelevant to the appeal; and that the respondent stood to suffer no prejudice as he had the opportunity to oppose the appeal. And in ***Nathan Muhatia Pala t/a Muhatia Pala Auctioneers & Another v Joseph Nyaga Karingi [2013] eKLR***, the Court also took into account the duty imposed by ***sections 3A*** and ***3B*** of the ***Appellate Jurisdiction Act*** to ensure that justice is dispensed in consonance with the overriding objective so as to realize just, expeditious, proportionate and affordable resolution of disputes.

In ***Securicor (Kenya) Limited v. EA Drapers Ltd & Another [1987] KLR 338*** this Court, while considering an application to amend a memorandum of appeal, held that it has a discretion to admit a new point at appeal but the discretion must be exercised sparingly, the evidence must be on record, the new point must not raise disputes of fact and it must not be at variance with the facts or case decided by the court below. In this case, it is common ground that the amendments that the applicant intends to introduce do not entail any new points that were not before the High Court. The applicant seeks to argue that the learned judge erred in the exercise of his discretion and in evaluation of the evidence on record, in the computation of time, and by concluding that the applicant had delayed for over one year without taking any steps to prosecute the suit. It further seeks to impeach the conclusion of the learned judge that its delay in taking steps to prosecute the suit was inordinate and inexcusable and in failing to find that the respondent stood to suffer no prejudice. The other amendment seeks to fault the learned judge for dismissing the suit as against the 2nd respondent when that respondent had not applied for dismissal of the suit.

I am satisfied that the application is made in good faith and the applicant's counsel has candidly admitted that he inadvertently failed to include those grounds in the memorandum of appeal. As I have stated, the proposed amendments do not introduce any new point, they only impugn the manner in which the learned judge evaluated the evidence before him exercised his discretion. I am not persuaded that the proposed amendments will occasion the respondents any prejudice, as they will have a fully opportunity to respond to the appeal. I also bear in mind that the applicant's suit was not heard on merit, but was dismissed for want of prosecution and it is important to afford it the opportunity to agitate all its grievances against a decision that terminated its suit before it was heard on merit.

Even a consideration of the overriding objective pursuant to section sections 3A and 3B of the Appellate Jurisdiction Act leans in favour of grant of the application. Under those provisions the Court is required to take a broad view of justice and take into account all the necessary circumstances, factors, and principles and be satisfied at the end of the exercise that we have acted justly. (See ***Douglas Mbugua Mungai v. Harrison Munyi, CA. No. Nai. 167 of 2010)*** and ***E. Muriu Kamau & Another v. National Bank of Kenya Ltd. [2009] eKLR.***

I am also not persuaded that the delay in making the application for amendment is inordinate or unreasonable. The appeal was first listed for hearing on 25th April 2017 and the applicant's learned counsel has explained, which explanation I have accepted, that he realized the need for the amendments when he was getting up for the appeal, and promptly made the application on 30th March 2017, two weeks before the scheduled date of the appeal. I would accordingly not consider the delay as inordinate or unexplained.

I find that this application has merit. I allow the motion dated 30th March 2017 and direct that the applicant's memorandum of appeal be and is hereby amended accordingly. Costs of this application shall be in the appeal.

Dated and Delivered at Nairobi this 16th day of February, 2018.

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR