Case Number:	Civil Appeal 252 of 2009
Date Delivered:	23 Feb 2018
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Ruling
Judge:	Kathurima M'inoti
Citation:	Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	Civil Case 195 of 2005(OS)
Case Outcome:	Application dismissed
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. 252 OF 2009

BETWEEN

KENYA HOTELS LIMITED.....APPLICANT

AND

ORIENTAL COMMERCIAL BANK LIMITED ..... RESPONDENT

(An application for leave to amend the memorandum of appeal against the judgment of the High Court of Kenya at Nairobi (Kimaru, J.) dated 28th August 2009

in

HCCC No. 195 of 2005(OS))

****

RULING

The Motion on Notice to which this ruling relates seeks leave to amend the Memorandum of Appeal filed by the ***applicant, Kenya Hotels Limited***, some eight years ago, on 22nd October 2009. The dispute in the High Court, which resulted in the appeal by the appellant, started way back in 2004, and the judgment, the subject of the appeal, was rendered on 28th August 2009.

By way of background, in or about 2004, ***the respondent, Oriental Commercial Bank Limited***, filed against the applicant, ***HCCC No. 1179 of 2004 (OS)*** which subsequently became ***HCCC No. 195 of 2005 (OS).*** In the suit the respondent sought leave to sell two parcels of land known as ***LR No. 6291/1*** and ***LR No.6901 (the suit properties)***, registered in the name of the applicant, to recover a sum of Kshs ***69,112,319.17*** owed to it by the applicant under a memorandum of equitable mortgage. The applicant opposed the suit, first by denying that it had received the money secured by the equitable mortgage, and secondly on technical grounds regarding the competence of the originating summons and the validity of the equitable mortgage.

After hearing the summons, ***Kimaru J.*** found that the applicant was well and truly indebted to the respondent, entered judgment in favour of the respondent and allowed it to sell the suit properties in exercise of the rights conferred on it by the memorandum of equitable mortgage. Aggrieved by the judgment, the applicant, through the firm of ***Messrs. Ochieng, Onyango, Kibet & Ohaga Advocate***s, filed ***Civil Appeal No. 252 of 2009*** on 22nd October 2009 with an elaborate memorandum of appeal containing a total of 30 grounds of appeal.

Somewhere along the line the applicant changed its advocates to ***Messrs. Nyiha Mukoma & Company Advocates*** who on 17th July 2015 filed the current motion on notice seeking to amend the memorandum of appeal and include the 31st ground of appeal, worded as follows:

"31. The learned judge (Mr. Justice Kimaru) erred in failing to appreciate that the transaction the subject matter of the suit was tainted with illegality in that by Legal Notice published in the Kenya Gazette Supplement No 36 dated 19th May 1989 the suit property was declared to be agricultural land falling within the jurisdiction of the Land Control Act. Consequently thereto, any transaction by way of transfer, charge, (or) mortgage required consent of the relevant Land Control Board and the absence of such consent made the transaction void and illegal."

It is common ground between the parties that the question of the equitable mortgage being vitiated by lack of Land Control Board was never pleaded before the High Court, was never raised or addressed by any of the parties, and did not feature at all in the judgment of the High Court.

Prosecuting the application for amendment, ***Mr. Nyiha,*** learned counsel submitted that the issue of the consent of the Land Control Board was not included by the applicant's former advocates due to "inadvertence"; that the applicant had raised the issue in this Court in his application for stay of execution of the judgment of the High Court; that it is necessary, just, expedient, and desirable to allow the amendment so as to meet the ends of justice; that it was also necessary to allow the amendment for full and fair determination of all the issues in dispute between the parties. Counsel also urged me to allow the application on the basis that the proposed amendment raised a question of law, which the trial court should have considered even on its own motion; did not raise any disputes of fact; and was supported by the evidence on record. On the authority of ***Nyangau v. Nyakwara [1986] KLR 712*** and ***Securicor (Kenya) Ltd v. EA Drapers Ltd & Another [1987] KLR 338***, it was submitted that the power to admit a new point on appeal was discretionary and that whenever a question of law is raised for the first time at appeal, the Court has a duty to entertain the plea and decide upon it.

The respondent opposed the application vide a replying affidavit sworn on 29th January 2016 by ***Wilfred Machini***, its Credit Manager. The substance of the respondent's response was that the applicant had not demonstrated any inadvertence as regards failure to plead or raise the issue of consent of the Land Control Board; that the issue was not pleaded before the High Court as required; that it was raised belatedly in a second application for stay of execution in this Court; that it was a red herring and a mere afterthought to avoid paying moneys advanced to the applicant, which it had refused to repay; and that the proposed amendment, having not been raised before or determined by the High, was highly prejudicial and violative of all principles of a fair trial because the respondent, which did not admit that the transaction was a controlled transaction, would be denied the opportunity to adduce further evidence in this Court.

Advancing the case against the motion, ***Mr. Khagram***, learned counsel for the respondent, submitted that although the applicant had disguised the application as one for leave to amend the memorandum of appeal, it was for all intents and purposes an application for adduction of new evidence because the issue of consent of the land board was not pleaded, raised or determined by the High Court. Relying on ***Openda v. Ahn [1983] KLR 165***, ***Kenya Commercial Bank Ltd v Osebe [1982] KLR 292*** and ***Stallion Insurance Company Ltd v. Ignazzio Messina & CSpA [2007] eKLR***, the respondent submitted that this Court will not consider or deal with issues that were not canvassed, pleaded and or raised at the lower court and that for a matter to be a ground of appeal, it has to have been sufficiently raised and succinctly made an issue at trial. On the authority of ***Securicor (Kenya) Ltd v. EA Drapers Limited & Another [1987] KLR 338,*** I was urged to find that although the Court has discretion to admit a new point on appeal, the discretion is exercised sparingly and when the point is not at variance with the facts of the case as decided.

Lastly, the respondent submitted that not only was the evidence that the applicant was relying on to support the new ground of appeal not produced before the High Court, but also it did not prove that the suit properties were agricultural lands within the meaning of the Land Control Act.

Having set out the respective positions adopted by the parties, I now turn to consider the merits of this application,

the crux of the matter being whether in the circumstances of this application I should allow the applicant to amend its memorandum of appeal and introduce the proposed new ground of appeal No 31. 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 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)***.

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. Thus for example, in exercising its discretion in the former type of case involving an amendment that did not entail introduction of an entirely new point, 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.

Where the applicant seeks to introduce an entirely new point, there are well known strictures that seek to ensure firstly, that an appellate court does not, in disguise, metamorphose into a trial court and make first-instance determinations without the benefit of the input of the court from which the appeal arises. This concern was well articulated by ***Lord Birkenhead LC*** as follows in ***North Staffordshire Railway Co v. Edge [1920] AC 254***:

"The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods....The efficiency and the authority of a Court of Appeal, are increased and strengthened by the opinions of the learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decision which may be of the highest importance without having received any assistance at all from the judges in the courts below."

Secondly is the overriding concern to avoid prejudicing a party who is made to meet an entirely different case late in the day at the appeal stage, without the opportunity of adducing evidence that may be necessary to counter or dispel the new point. On this consideration, ***Lord Evershed M.R***. expressed himself thus in ***United Dominion Trust Ltd v. Bycroft [1954] All ER 455:***

"As a matter of principle the Court of Appeal has always been strict in applying the rule than an appellant from a county court, unless he other party consents, cannot be allowed in this court to raise a new point of law not raised below....It is not in accordance with public interest that a party who has fought a case in a county court and been defeated should then raise in this court a new point and put his case in an entirely different way as a matter of law and so make the other party, hitherto successful, litigate the matter again at the risk of having to pay costs not only below, but in this court."

Due to these fundamental concerns, the Courts has developed fairly elaborate principles that guide it in determining whether or not to allow a new point on appeal. In ***Openda v. Ahn,*** (supra) this Court identified some of the principles to include that all grounds of appeal must arise from issues that were sufficiently pleaded, canvassed,

raised or succinctly made issues at the trial; that the point sought to be introduced must be consistent with the applicant's case as conducted in the trial court, not changing it into a totally different case; the matter must have be properly pleaded and the facts in support of the new point must have come out in the trial court; a new point which has not been pleaded or canvassed in the trial court should not be allowed to be taken on appeal, unless the evidence establishes beyond reasonable doubt that the facts before the trial court, if fully investigated, would support the point; where the question is one of law turning on the construction of a document, the new point may be allowed but only if the facts when fully investigated support the new plea.

In ***Nyangau v. Nyakwara*** (supra) this Court allowed a new point to be taken on appeal because the new point raised an issue of jurisdiction. And in ***Attorney General v. Faroe Atlantic Co Ltd [2005-2006] SCGLR 271***, a decision of the Supreme Court of Ghana which was quoted with approval by this Court in ***DEN v. PNN [2015] eKLR***, it was accepted that in addition to a matter going to jurisdiction, a new point may be taken on appeal where an act or contract is made illegal by a statute. However, even then there is a qualification that the legal question sought to be raised for the first time must be substantial and one that can be disposed of without the need for further evidence.

In ***Securicor (Kenya) Ltd v. EA Drapers Ltd & Another (supra)*** the Court, after reviewing a line of decided cases, reiterated that although it has discretion to admit a new point at appeal:

"Certainly the cases show that the discretion must be exercised sparingly. The evidence must all be on record and the new point must not raise disputes of fact. The new point must not be at variance to the facts or case decided in the court below."

(See also ***Kenya Commercial Bank Ltd v. Osebe (supra)).***

Turning to the matter at hand, it is common ground that the applicant's intended new ground of appeal was not pleaded before the High Court, no evidence was led on it, the parties did not address the court on the matter, and the learned judge did not pronounce himself on the issue. I think in light of that observation, the applicant is being less than candid when it claims that the new ground of appeal is supported by the evidence on record and does not raise any dispute of fact. No evidence was on record before the learned judge on the status of the suit properties as agricultural lands and the respondent vehemently denies that those properties, being the grounds on which the Naivasha Country Club stands, are indeed agricultural lands within the meaning of the Land Control Act.

As I earlier stated, the dispute in the High Court was fought on the grounds whether the applicant had received the money secured by the equitable mortgage, whether the equitable mortgage was valid (on grounds other than lack of consent from the Land Control Board) and whether the originating summons was competent. The issue of consent from the land control board was never raised by any of the parties and was not considered by the learned judge. In a surprising submission, the applicant claims that the learned judge ought to have raised the issue of the land board consent on his own motion. It is however not lost to be me that since it is the applicant who claims that the transaction was contrary to the provisions of a statute; it was its duty under the rules of pleadings to specially plead the alleged illegality. It did not do so and as a result there is no evidence on record on the basis of which this Court can decide whether the suit properties are commercial or agricultural.

I have pointed out that one of the considerations before allowing a new point to be taken on appeal is that the evidence before the trial court must establish beyond reasonable doubt that, if fully investigated, the facts would support the new point. In this case, there is absolutely no evidence, which would support the new point. On the contrary, the ***Kenya Gazette Notice No 174*** of ***9th May 1989*** that the applicant seeks to rely on to prove the new point does not identify the suit properties as agricultural land. The notice is worded as follows:

THE LAND CONTROL ACT

(Cap. 302)

DECLARATION OF AGRICULTURAL LAND

IN EXERCISE of the powers conferred by section 2 of the Land Control Act, the Minister for Lands and Housing declares the areas of land delineated in the Survey Boundary Plans specified in the second column of the Schedule excluding the areas of land delineated in the survey Boundary Plans specified in the third column, within the municipalities or township specified in the first column shall be agricultural land.....”

As regards the former Naivasha township where the suit properties are situate, the second column with the survey boundary plan for agricultural land were indicated as ***499/A/112***, whilst the third column with survey boundary plan excluded from agricultural land was indicated as ***279***. It is worth reiterating what this Court stated in ***Securicor (Kenya) Ltd v. EA Drapers Ltd & Another (supra)*** that the evidence must all be on record and the new point must not raise disputes of fact.

There is a fundamental dispute whether the suit properties fall in second column of agricultural land or in the third column of excluded lands. The respondent does not agree that the suit properties are agricultural land, contending instead that they are commercial lands on which stands a four star hotel. The bottom line is that there is no clear evidence on record or elsewhere to support the applicant’s plea, and the new point is in fact based on strongly contested evidence. In such a case, I do not have any basis for allowing the new point to be take so late in the day. It is not only contrary to the applicant’s case as presented in and determined by the High Court, but is also founded on highly disputed and contested evidence.

In light of the foregoing, I am not persuaded that I can allow this application on the basis of the overriding objective in sections 3A and 3B of the Appellate Jurisdiction Act which requires us to dispense justice so as to realize just, expeditious, proportionate and affordable resolution of disputes or ***Article 159(2) (d)*** of the Constitution which prohibits undue regard to procedural technicalities. Those provisions cannot be invoked as a matter of course and clear basis for their invocation must be established. (See ***Westmont Power (K) Ltd v. Commissioner of Income Tax, CA No. 128 of 2006).*** The proposed amendment, other than not being a mere issue of procedural technicality, is not consistent with the overriding objective to the extent that it requires this Court to act as a trial court or to introduce new matters that one of the parties will be handicapped to respond to. That cannot amount to fostering expeditious, just, fair and affordable resolution of disputes.

In the event, I do not find any merit in this application. The same is hereby dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 23rd day of February, 2018.

K. M’INOTI

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR