



REPUBLIC OF KENYA



**Gachuhi & another v Maingi & 2 others (Environment and Land
Appeal 30 of 2023) [2025] KEELC 4431 (KLR) (10 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4431 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 30 OF 2023**

FM NJOROGE, J

JUNE 10, 2025

BETWEEN

PETER MBUTHIA GACHUHI 1ST APPLICANT

LUCY WAITHERA MBUTHIA 2ND APPLICANT

AND

GEORGE MASAKU MAINGI 1ST RESPONDENT

EX GUOZHEN 2ND RESPONDENT

INTUR SAFARI LIMITED 3RD RESPONDENT

RULING

1. The application that is before this court for determination is dated 11/2/2025. It has been filed by the appellants. In that application the following orders have been sought, namely:
 1. That the Applicants herein be granted leave to amend the Memorandum of Appeal dated 22nd June, 2023 in the terms of the draft attached herein;
 2. That the costs of the Application be awarded to the Applicants.
2. The application is premised on the following grounds:
 - a. The Magistrates Court delivered its judgment on 14th October 2024 wherein it expressly recognized the Applicants' interest in the suit apartment at line 30 on page 2 and line 10 on page 3 of the Judgment;
 - b. Despite this clear demonstration of the Applicants' interest, the Magistrates' Court failed to accord the Applicants an opportunity to be heard;



- c. The amendment sought herein seeks to crystallize the pleading of this outcome of the Judgment and is necessary for the resolution of the issues in controversy;
 - d. The respondents will suffer no prejudice if leave to amend is granted to the Applicants;
 - e. It is in the interest of justice that the application herein be allowed as prayed.
3. The replying affidavit to the application was sworn by Geoffrey Kilonzo, advocate who has conduct of the matter on behalf of the first and second respondents. The respondent's response as contained in that affidavit is that the application is unmerited and brought in bad faith.
 4. The respondents also aver that the amendment seeks to introduce new issues and the court ought to dismiss the application. It is stated that the original appeal is against the ruling of the court delivered on 25th May 2023 dismissing the appellant's application which filed before that court seeking to be joined as defendant whereas the current amendments aim at appealing against the judgment of the same court; that the appellants were not parties to the suit and they are thus not entitled to appeal against the said court's judgment.
 5. Also it is stated that the statutory period for filing an appeal, if any could be filed by the appellants against that judgment, lapsed on 14th November 2024 and the amendments sought are time barred yet the applicants have not sought leave of court to appeal out of time.
 6. At the same time, it is stated that the applicants are not entitled to appeal against the judgment of the trial court and thus the amendment sought are bad in law. The respondents add that the applicants have no legal or equitable interest in the suit property since all that the first applicant has done is to indicate his interest to purchase it. The respondents aver that the provisions of Order 42 Rule 3 of the Civil Procedure Rules require a court to exercise discretionally power in a judicious and not in an arbitrary manner.
 7. The application was disposed of by way of written submissions. The submissions of the parties reiterated the contents of their respective affidavits. I have considered the contents of the filed submissions.
 8. The main issues for determination in the instant application are as follows:
 - a. Whether or not the applicants are entitled to amend their memorandum of appeal without leave of court at the present stage of the appeal proceedings;
 - b. Whether, if leave is required, the proposed amendments should be allowed by this court;
 - c. Who ought to bear the costs of the application.
 9. It is correct that the original appeal was filed against the whole of the decision or ruling and order of the Chief Magistrate delivered on 23rd May 2023 in the lower court case. That decision declined to join the appellants as defendants to the proceedings in the lower Court. The magistrate held that the appellants did not have *locus standi* as they were yet to purchase the suit apartment. Consequently, the appellants were not made parties to the suit, and the suit proceeded with the parties on record and judgment was eventually delivered on 14th of October 2024. It is that judgment that is said to have recognized the applicants interest in the suit apartment and which is said to have prompted the overtures towards amendments of the memorandum of appeal herein. It is stated that the amendments sought herein are necessary for the resolution of the issues in controversy.
 10. It is averred by the appellant that the appeal came up for directions on several days while the suit at the Magistrate's court was still pending including 19th June 2024 and 24th September 2024, and that



despite an order made by this court directing that the lower court file be availed for the purpose of the admission of the present appeal to hearing, that file was never available and the suit before the magistrates' court proceeded without the joinder of the appellants thus culminating in a judgement delivered on 14th October 2024.

11. In their submissions the applicants state that they are entitled under Order 42 Rule 3 CPR to amend the memorandum of appeal without leave at any time before the court issues directions on their appeal, and at any time thereafter with leave of Court. They state that the present application has been brought simply out of abundance of caution because the court may not have issued the substantive directions as envisaged by Order 42 Rule 3 of the Civil Procedure Rules.
12. Order 42 Rule 3 (1) states as follows:
13. The appellant may amend his memorandum of appeal without leave at any time before the court gives directions under rule 13."
14. Having perused the court record in this appeal, I find that no directions under Order 43 Rule 13 have been issued. The application before me is therefore superfluous and this court does not need to delve into the substantive merits or demerits of the arguments raised by both sides regarding principles of amendments. The applicants are still entitled to amend their Memorandum of Appeal once without leave of this court. Consequently, the application is hereby dismissed. The costs of the application shall be in the cause. Mention on 7/10/2025 for directions as to hearing.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 10TH DAY OF JUNE 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

