

**IN THE COURT OF APPEAL  
AT NYERI**  
**(CORAM: KANTAI, J.A. - IN CHAMBERS)**  
**CIVIL APPEAL (APPLICATION) NO. 170 OF**  
**2023**

**BETWEEN**

**ANTHONY KIMARU MUTAHI.....APPLICANT**

**AND**

**FIONA LOUISE ANSETT.....1<sup>ST</sup>**  
**RESPONDENT GEORGE ODINGA ORARO .....**  
**2<sup>ND</sup> RESPONDENT DAVID MORTON**  
**SILVERSTEIN.....3<sup>RD</sup> RESPONDENT CHIEF LAND**  
**REGISTRAR.....4<sup>TH</sup> RESPONDENT**

*(An application for leave to amend the citation of the appeal against the Ruling of the Environment and Land Court at Nanyuki (Kossy Bor, J.) delivered on 19<sup>th</sup> July, 2023*

*in*

**ELC Case No. 2 of  
2023 formerly  
ELC Case No. 36 of 2016.)**

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**RULING**

The applicant, **Anthony Kimaru Mutahi** applies by Motion brought under **Article 159 (2)(d)** of the **Constitution** and **rules 16, 31, 33, 43** and **46** of the **Court of Appeal Rules, 2022**, **Section 3A** and **3B** of the **Appellate Jurisdiction Act** and all other enabling provisions of the law he be granted leave to amend Memorandum of Appeal in terms of the proposed amendment; that draft Memorandum of Appeal be deemed as duly filed and served upon payment of requisite fees; that the application be heard with the one for consolidation “... of this appeal with Civil Appeal No. E087 of 2025.” I doubt that I can

grant this last prayer as a single Judge.

In grounds in support of the application and in his supporting affidavit he says amongst other things that he filed an application to consolidate this appeal with Civil Appeal No. E087 of 2025; that he had applied that the suit at the Environment and Land Court (ELC) be heard by a different Judge other than Bor, J.; that the hearing at ELC has proceeded and that prayer has been overtaken by events; that a final judgment has been delivered by ELC which is the subject of an appeal to this Court being Civil Appeal No. E087 of 2025; that the Court has power to order adduction of additional evidence and to order retrial; that the 1<sup>st</sup> respondent will not suffer any prejudice as she will be accorded a chance to respond to the application. Further, that he had applied as prayer (iii) in the appeal that another Judge heard the case at ELC; hearing having taken place that prayer has been overtaken by events; judgment has been delivered by ELC and there is need to amend the said prayer (iii). Attached to the application is a draft Amended Memorandum of Appeal.

In a replying affidavit the 1<sup>st</sup> respondent, **Fiona Louise Ansett** opposes the application stating amongst other things that the substratum of the appeal has been rendered moot as the prayers sought in the Memorandum of Appeal are incapable of being granted; that ELC delivered judgment on 24<sup>th</sup> February, 2025; that the Motion is brought about six months after judgment was delivered; that directions on filing written submissions were given on 22<sup>nd</sup> July, 2024 and the parties have complied. The deponent states at paragraphs 10-12 (inclusive) of replying affidavit:

**“10. THAT without prejudice to the foregoing, the Amended Memorandum of Appeal includes the prayer that “this Honourable Court be minded to direct that the amended Defence and Counter-claim and all additional documents and witness statements be adduced and considered in the determination of the Civil Appeal No. E087 of 2023 or if consolidation is allowed in the Consolidated Appeal”. The prayer is not precise and fails to state the exact extent of the amendment and is ambiguous. It is a fact that in the Superior Court, the Appellant sought to introduce several other documents, including those contained in a bundle dated 4th May 2023 and this was rejected.**

**11. THAT the Appellant is essentially asking the court to allow him to introduce new documents on appeal and which are not part of the record at the court of appeal. There is presently a similar application before this court in COACA/E087/2025 which is slated for ruling. He has no right to pursue the two processes in two courts at the same time with a view of obtaining victory in one of the processes or both. This is an abuse of the court process.**

**12. THAT the most logical thing would be for the Appellant to withdraw the appeal (he has already filed an appeal against the final judgment of the Superior Court. I urge this Honourable Court to dismiss the application.”**

I note from the heading of the application:

**“(Being an Appeal from the Ruling and Order of Hon. Lady Justice Kossy Bor made on 19th July 2023 in Nanyuki ELC Case No. 2 of 2023.”**

Both sides inform me that final judgment has already been

delivered by ELC and is subject of an appeal. I do not see in those

circumstances what value it would add to a process where the appellant has challenged a ruling of ELC, final judgment has already been delivered and it would thus appear that the application for leave to amend has been overtaken by events. The application has no merit and I dismiss it with costs to the 1<sup>st</sup> respondent.

**Dated and delivered at Nyeri this 28<sup>th</sup> day of November, 2025.**

**S. ole KANTAI**

.....  
**JUDGE OF APPEAL**

*I certify that this is  
a true copy of the  
original*

***Signed***  
**DEPUTY REGISTRAR**