



**Nganga & 4 others v Kabue & 3 others (Civil Appeal (Application)  
E277 of 2022) [2025] KECA 2318 (KLR) (19 December 2025) (Ruling)**

Neutral citation: [2025] KECA 2318 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E277 OF 2022**

**J MOHAMMED, JA  
DECEMBER 19, 2025**

**BETWEEN**

**BEATRICE WANJIKU NGANGA ..... 1<sup>ST</sup> APPLICANT  
JANE MUMBI NJENGA ..... 2<sup>ND</sup> APPLICANT  
SOPHIA NJERI ..... 3<sup>RD</sup> APPLICANT  
PAULINE WANJIRU ..... 4<sup>TH</sup> APPLICANT  
NANCY WAIRIMU ..... 5<sup>TH</sup> APPLICANT**

**AND**

**JAMES KABUE (2ND HOUSE) ..... 1<sup>ST</sup> RESPONDENT  
PETER KABUE (1ST HOUSE) ..... 2<sup>ND</sup> RESPONDENT  
PETER KABUU (3RD HOUSE) ..... 3<sup>RD</sup> RESPONDENT  
PHRACIA WANJIKU ..... 4<sup>TH</sup> RESPONDENT**

*(An application for leave to amend the memorandum of appeal and to file supplementary submissions in an appeal against the Ruling and Order of the High Court at Nairobi (A. Ongeru J.) dated 26th April, 2019 in HC Succession Cause No. 634 of 2003)*

**RULING**

**Background**

1. Beatrice Wanjiku Nganga, Jane Mumbi Njenga, Sophia Njeri, Pauline Wanjiru, and Nancy Wairimu (the 1<sup>st</sup> to 5<sup>th</sup> applicants) by a Notice of Motion dated 1<sup>st</sup> August 2025, invoked the jurisdiction of this Court pursuant to Rules 44, 46 and 106 of the Court of Appeal Rules (this Court's Rules), seeking, inter alia, the following substantive orders:



- i. Leave to amend the memorandum of appeal dated 6<sup>th</sup> May 2022;
- ii. That upon grant of prayer (i), the proposed amended memorandum of appeal annexed to the application be deemed as duly filed and served;
- iii. Leave to file supplementary submissions incorporating jurisprudence from the Supreme Court, Court of Appeal, High Court and relevant common-law jurisdictions emerging since 6<sup>th</sup> May 2022;
- iv. Corresponding leave to the respondents to file supplementary submissions upon service;
- v. That the supporting affidavit and previously filed documents be deemed part of a supplementary record of appeal; and
- vi. That any replying affidavit filed by the respondents also be deemed part of the supplementary record of appeal.

James Kabue (2<sup>nd</sup> House), Peter Kabue (1<sup>st</sup> House), Peter Kabuu (3<sup>rd</sup> House) and Phracia Wanjiku are the 1<sup>st</sup> to 4<sup>th</sup> respondents respectively.

2. From the record, the 1<sup>st</sup> appellant is the widow of Edward Ng'ang'a Kabue (the deceased) while the 2<sup>nd</sup> to 5<sup>th</sup> are the daughters of the deceased while the 1<sup>st</sup> to 3<sup>rd</sup> respondents are the sons of the deceased. The motion is supported by an affidavit sworn by the 5<sup>th</sup> applicant on behalf of all applicants, detailing issues concerning disposition of the deceased's estate and alleged discrimination against the female beneficiaries.
3. The 5<sup>th</sup> applicant deposed that the deceased bequeathed all immovable property to his three sons (the 1<sup>st</sup> to 3<sup>rd</sup> respondents herein) while purporting to allocate unknown movable property to his seventeen female heirs, effectively disinheriting them.
4. The applicants further aver that several material jurisprudential developments were not included in the memorandum of appeal filed on 6<sup>th</sup> May 2022.
5. They rely on comparative common-law jurisprudence, particularly *Williams v Aucutt* (2000) NZCA 289, and submit that section 26 of the [Law of Succession Act](#) aligns with longstanding New Zealand family protection principles.
6. The applicants contend that the Court should consider both testamentary and inter vivos transfers made in January 2000.
7. They rely on *J.C. Patel v B.D. Joshi* (1952) 19 EACA 42 for the proposition that amendments should be freely allowed where no prejudice is occasioned.
8. Additional grounds of urgency were raised regarding the health and circumstances of the 1<sup>st</sup> applicant.
9. The respondents oppose the application, stating that it amounts to reopening the High Court proceedings and introducing fresh evidence not subject to cross-examination.
10. They argue that some of the new prayers such as cancellation of titles fall within the exclusive jurisdiction of the Environment and Land Court (ELC).
11. A further affidavit was filed by the applicants asserting that they were unrepresented in the High Court and could not frame the issues now sought to be included.



## Submissions by Counsel

12. The application was disposed of by way of written submissions. The applicants were represented by the firm of M/S Kamau Kuria & Company Advocates while the respondents were represented by M/S Wambugu Muriithi & Co. Advocates. Learned counsel for the applicants relied on the case of Uhuru Development Ltd v Central Bank (2002) 1 EA 314 in support of the proposition that a memorandum of appeal is amendable as it is not part of the primary record,
13. Counsel further submitted that in the instant case, the criteria for amendment, good faith, necessity, timeliness, and absence of prejudice are satisfied.
14. On jurisdiction, counsel for the applicants rely on section 47 of the *Law of Succession Act* and rule 73 of the Probate and Administration Rules, asserting that the Court can cancel titles where justice so requires.
15. On the filing of additional written submissions, counsel for the applicants rely on the principles laid down by the Supreme Court in Mohammed Abdi Mahamud v Ahmed Abdullahi Mohammed (2018) eKLR.
16. Counsel for the respondents opposed the application and submitted that amendments should not introduce new grounds or evidence not canvassed at trial, citing Uchumi Supermarket Ltd v Sidhi Investments Ltd [2018] eKLR. They maintain that the applicants' proposed amendments and evidence amount to trial by ambush.

## Determination

17. I have considered the Notice of Motion, the supporting affidavits, the written submissions filed by counsel, the authorities cited, and the applicable law. The issues for determination are whether the applicants have satisfied the threshold for: (a) amendment of the Memorandum of Appeal; and (b) admission of additional written submissions.
18. On whether this Court has jurisdiction to grant leave to amend the Memorandum of Appeal, Rule 46 of the Court of Appeal Rules vests this Court with discretion to allow amendments where the interests of justice so demand. In Uhuru Highway Development Ltd v Central Bank of Kenya [2002] 1 EA, the Court held that a Memorandum of Appeal does not form part of the primary documents constituting the record of appeal nor does it stem directly from the proceedings in the superior court, and is therefore, subject to the interests of justice, amenable to amendment at any stage. This position was reaffirmed in Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah [2010] KECA 149. .
19. The respondents oppose the proposed amendment on the ground that the prayers introduced seek annulment and cancellation of title deeds, a jurisdiction they contend lies exclusively with the ELC and not the Succession Court. However, in In Re Estate of Mbogo Muthage (Deceased) [2024] KEHC 4180 (KLR), the Court held that, in its capacity as a Succession Court, it is clothed with jurisdiction to cancel title where circumstances so warrant.
20. The respondents further contend that the applicants are impermissibly seeking to change their case at a late stage of the proceedings. From the supporting affidavit, it is evident that the applicants were unrepresented before the High Court and only instructed counsel at the stage of filing the application for stay of execution and lodging the appeal. Counsel for the applicants now seeks to introduce jurisprudence which they contend bears significantly on the issues in dispute between the parties.



21. In *J.C. Patel v B.D. Joshi* (1952) 19 EACA 42, the Court stated that however negligent or late an amendment may be, it should be allowed if it can be made without injustice to the other party, and that any inconvenience may be compensated by an award of costs.
22. In the circumstances of this case, I am satisfied that no substantial prejudice will be occasioned to the respondents, as they shall be accorded corresponding leave to file supplementary submissions in response to the applicants' amended Memorandum of Appeal and additional submissions.
23. Turning to the prayer for admission of additional evidence, the applicants seek to rely on material that was not tendered before the High Court. The Supreme Court in *Mohammed Abdi Mahamud v Ahmed Abdullahi Mohammed & 3 Others* [2018] eKLR laid down the guiding principles governing the admission of additional evidence before appellate courts.
24. The respondents oppose this prayer on the ground that they will be deprived of an opportunity to rebut the additional evidence through cross-examination. However, this Court in *Donald Oyatsi v The Disciplinary & Ethics Committee & 3 Others*, Court of Appeal, Civil Appeal (Application) No. E463 of 2020, allowed the admission of additional documents notwithstanding the absence of cross-examination, holding that the Court must bring on board all material necessary to do justice between the parties.
25. By parity of reasoning, I find that the Notice of Motion dated 1<sup>st</sup> August 2025 is merited and is hereby allowed as prayed.
26. Costs of the application shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF DECEMBER, 2025**

**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

