

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

(CORAM: NDERI, JA (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. E082 OF 2025

BETWEEN

**HUDSON MAISITIS1ST
APPELLANT CELLO THERMOWARE LIMITED.....2ND
APPELLANT**

AND

JOHN NJOROGE NDUNG’U.....RESPONDENT

(Being an application to amend the Memorandum of Appeal filed in the appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (A. Ongeru. J) delivered on 19th October 2023

in

Nairobi HCC No. 35 of 2017)

RULING

1. The application before Court is dated 7th July 2025 and is brought under Rules 44 and 46 of this Court Rules and **Article 159(2)(d)** of the Constitution. The applicants, **Hudson Maisitis** and **Cello Thermoware Limited**, seek in the main that they be

granted leave to amend their Memorandum of Appeal dated 19th December 2024.

2. It is their case that the amendment is necessary to include a fundamental ground relating to loss of future earnings which was inadvertently omitted, and that the omission is prejudicial as it denies them the opportunity to challenge the award of loss of earning capacity granted by the trial court without foundation in the pleadings.
3. The applicants further argue that the amendment is properly founded on evidence adduced before the trial court and captured in the judgment delivered on 19th October 2023 in Nairobi HCC No. 35 of 2017.
4. In support of the application, the applicants rely on the affidavit of Sarah Weru, Company Secretary of MUA Insurance, sworn on 7th July 2025, who deposes that MUA Insurance is the insurer of the 2nd applicant and has an interest in the matter as it will ultimately be called upon to settle the judgment sum.
5. The respondent, John Njoroge Ndung'u, in opposition to the application filed a Replying Affidavit sworn on 16th February

2026. He contends that the application is fatally defective as
it

is supported by an affidavit sworn by a stranger to the proceedings. He submits that MUA Insurance was not a party to **Nairobi HCCC No. 35 of 2017** nor to the present appeal, and therefore has no authority to swear documents on behalf of the applicants.

6. The respondent urges that the applicants themselves ought to have sworn the affidavit, and that the involvement of MUA Insurance, which is embroiled in a separate declaratory suit with the 2nd applicant in **HCCC No. E196 of 2023**, amounts to an attempt to hijack the proceedings. He therefore prays that the application be dismissed with costs.
7. The court has carefully considered the matter and has delineated the issues for determination as follows-
 - (a) whether the Court as a single Judge has jurisdiction to entertain the application;
 - (b) whether the application to amend the Memorandum of Appeal is competent;
 - (c) and whether the supporting affidavit is properly sworn.
8. On jurisdiction, Rule 55(1) of the Court of Appeal Rules has empowered a single Judge to hear applications save where the Rules or statute expressly require a full bench. The

application

before the Court is one seeking leave to amend the Memorandum of Appeal, which is an interlocutory matter properly falling within the jurisdiction of a single Judge. The Court is therefore properly seized of jurisdiction.

9. On the competence of the application, it is trite law that amendments may be allowed at any stage of proceedings to enable the Court to determine the real issues in controversy, as long as they are sought in compliance with the rules and supported by proper affidavits sworn by parties with authority.
10. In **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others** [2014] eKLR, this Court emphasized that parties are bound by their pleadings and affidavits must be sworn by persons with authority.
11. Further, in **Francis Karioko Muruatetu & Another v Republic & 5 Others** [2016] eKLR, while dealing with joinder of parties, the Court emphasized that a person who is not a party to the proceedings cannot file affidavits or submissions unless properly admitted through the prescribed

procedure.

12. In the present case, the supporting affidavit is sworn by Sarah Weru of MUA Insurance, which is not a party to the appeal. The

applicants have not demonstrated why they could not swear the affidavit themselves. The Court is of the considered finding that the respondent's objection has merit in that the affidavit is sworn by a stranger, and that MUA Insurance, being embroiled in separate proceedings with the 2nd applicant, cannot purport to prosecute or amend pleadings in this appeal. Consequently, the application is defective for want of a proper supporting affidavit.

13. Having so found, this Court has no alternative but to decline the prayers sought, the application being devoid of merit and fatally defective. In the result, the application dated 7th July 2025 is hereby dismissed for incompetence. The costs of the application shall abide the outcome of the Appeal.

It is so ordered.

Dated and delivered at Nairobi this 27th day of February 2026.

NDUMA NDERI

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.