



Kinyanjui (Suing on Behalf of the Estate of James Nyanjui Joseph - Deceased) v Kathangichu (Environment and Land Appeal E016 of 2023) [2025] KEELC 5885 (KLR) (17 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5885 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL E016 OF 2023**

**AK BOR, J
JULY 17, 2025**

BETWEEN

PURITY NJERI KINYANJUI (SUING ON BEHALF OF THE ESTATE OF JAMES NYANJUI JOSEPH - DECEASED) APPELLANT

AND

NYAGA KATHANGICHU RESPONDENT

RULING

1. The Appellant brought the application dated 22/4/2024 seeking leave to amend the memorandum of appeal dated 28/8/2023 and for the draft memorandum of appeal to be deemed as duly filed upon payment of the requisite court fees. She also sought to have the draft memorandum of appeal substituted in place of the memorandum of appeal dated 28/8/2023.
2. The application was made on the grounds that the memorandum of appeal lodged failed to indicate that the Appellant was representing her deceased father in the proceedings before the magistrate's court. Further, that some of the orders sought in the appeal were inadvertently left out when the appeal was lodged through an honest mistake. It was urged that the intended amendment was necessary to enable the court determine all the issues raised in the appeal and pronounce itself with finality and on merit.
3. Purity Njeri Kinyanjui swore the affidavit in support of the application and attached a copy of the draft amended memorandum of appeal.
4. The Respondent opposed the application through the replying affidavit where he deponed that the application was incompetent, fatally defective, vexatious, misconceived, an abuse of the court process and a non-starter. He averred that the appeal was fatally defective for having been instituted in the name of a dead person and that it could not be cured through amendment and was therefore a nullity. He averred that the application had been brought under the wrong provisions of law. That it was brought



under the Court of Appeal Rules, 2010 which have been repealed and in any event they do not apply in this court. In addition, that the draft memorandum of appeal did not comply with the rules on amendment of pleadings.

5. The court directed the parties to file and exchange written submissions. The Appellant was given 7 days to file her submissions on 10/3/2025 but as at 8/5/2025 when the court set a ruling date, the Appellant had not filed her submissions and the court directed that only the Respondent's submissions would be considered.
6. The Respondent submitted that the applicable law is Order 42 Rule 3 of the Civil Procedure Rules which grants the court power to allow an Appellant to amend his memorandum of appeal and not the Court of Appeal Rules which are not applicable in this court and which were repealed anyway. It was submitted that the institution of an appeal in the name of a deceased person meant that there was no appeal before the court because a dead person cannot institute an appeal. It was urged that the annexed draft memorandum of appeal did not conform to Order 8 Rule 7 of the Civil Procedure Rules as it does not show by underlining which words the Appellant seeks to add. Further, it was submitted that Order 42 Rule 3 of the Civil Procedure Rules provides for amendment of a memorandum of appeal and not substitution of a memorandum of appeal with another and therefore prayer 2 of the Appellant's application was not tenable. It was urged that the substitution of the memorandum of appeal amounted to lodging a fresh appeal out of time. The court was urged to strike out the application and the appeal with costs to the Respondent.
7. The issue for determination is whether the application has merit. The application is said to be brought under rule 31 and 44(1) of the Court of Appeal Rules which do not apply to this court. The court agrees with the Respondents that that was erroneous, the proper provision is Order 42 Rule 3 of the Civil Procedure Rules, which allows amendment of a memorandum of appeal on application to court. Citing the wrong provisions of law is not fatal to the application as courts are encouraged to consider the substance of the application and not pay undue regard to procedural technicalities in line with Article 159(2) (d) of the *Constitution*.
8. Order 42 rule 3 of the Civil Procedure Rules gives the court the discretion to consider an application for amendment of a memorandum of appeal. The memorandum of appeal that was initially filed bore the name of a deceased person even though the Appellant had already been substituted in the proceedings before the magistrate's court in place of the late James Nyanjui Joseph. The substitution gave her the requisite legal capacity to prosecute the appeal on behalf of the estate of the late James Nyanjui. The failure to include her name as the legal representative in the appeal can be cured by amendment.
9. The court allows the application dated 22/4/2024 pursuant to Order 42 Rule 3 of the Civil Procedure Rules and directs the Appellant to file and serve the amended memorandum of appeal.

The costs of the application will be in the cause.

DELIVERED VIRTUALLY AT EMBU THIS 17TH DAY OF JULY 2025.

K. BOR

JUDGE

In the presence of:

Ms. M. Nyaga holding brief for Ms. M. Boore for the Respondent

Diana Kemboi- Court Assistant

No appearance for the Appellant

