



**Kimara & 2 others (Suing on Behalf of Kandara Residence Association)
v Del Monte (K) Ltd & 4 others (Civil Appeal (Application)
E163 of 2022) [2025] KECA 29 (KLR) (17 January 2025) (Ruling)**

Neutral citation: [2025] KECA 29 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) E163 OF 2022
W KARANJA, J MOHAMMED & LK KIMARU, JJA
JANUARY 17, 2025**

BETWEEN

**KARIRA KIMARA 1ST APPLICANT
GEORGE NJIGU 2ND APPLICANT
MICHAEL NJOROGE 3RD APPLICANT
SUING ON BEHALF OF KANDARA RESIDENCE ASSOCIATION**

AND

**DEL MONTE (K) LTD 1ST RESPONDENT
THE NATIONAL LAND COMMISSION 2ND RESPONDENT
THE ATTORNEY GENERAL 3RD RESPONDENT
COUNTY GOVERNMENT OF MURANG'A 4TH RESPONDENT
COUNTY GOVERNMENT OF KIAMBU 5TH RESPONDENT**

(Being an appeal from the judgment of the Environment and Land Court of Kenya at Murang'a (L. Gicheru, J.) dated 28th April, 2022 in ELC Petition No. 3 of 2020)

RULING

Background

1. Karira Kimara, Michael Njoroge and George Njigu acting on behalf of Kandara Residence Association (the applicant), has vide a notice of motion dated November 24, 2023 expressed to be brought pursuant to the provisions of Section 3, 3A, and 3B of the Appellate Jurisdiction Act, Rule 1(2), 16 &



46 of the Court of Appeal Rules, 2022 and Article 50 of the Constitution of Kenya sought the following orders:

- i. Spent.
- ii. That this Honourable Court be pleased to grant leave to amend the Notice of Appeal dated 5th May 2022 and the Memorandum of Appeal dated 7th May 2022 to change the name of the Applicant and the Association's name from Kandara Residence Association to Kandara Residents Association.
- iii. } That this Honourable Court be pleased to allow the substitution of Michael Njoroge who is not an official of the Association, with Jphn Kiarie Mahuti.
- iv. That this Honourable Court be pleased to allow the applicant herein, to amend the Notice of appeal dated 5th May 2022 and Memorandum of Appeal dated 7th May 2022 to also include Canneries Environ Association as the intended interested party.
- v. That costs of this application be in the cause.

Del Monte (K) Ltd, the National Land Commission, the Attorney General, the County Government of Murang'a and the County Government of Kiambu are the 1st, 2nd, 3rd 4th and 5th respondents respectively.

2. The motion is premised, inter alia, on the grounds that the Registrar of Societies approved the change of name from Kandara Residence Association to Kandara Residents Association on 28th May 2022; and that the delay in amending the name may have been caused by inadvertence of the previous advocate on record; that Michael Njoroge was not an official of the applicant hence the need for substitution with John Kiarie Muthoni. Further, that there was an oversight by the previous counsel on record in failing to formally include Canneries Environ Association (2nd Interested Party in ELC Petition No. 3 of 2020 at Murang'a) as parties to the appeal. That it is in the interest of justice that Canneries Environ Association be included as a party who represent members of Kiambu County whose issues may be unique to the applicant. Further, that the appeal raises triable issues; that the application is not mala fides and that there will be no prejudice to the other parties if the orders sought are granted.
3. The motion is supported by an affidavit and a further affidavit of Karira Kimara, sworn on the applicant's authority that rehashed the grounds of the application and annexed the applicant's application for change of name, minutes of the resolution for the change, certificate of registration bearing the applicant's new name and notification of change of the applicant's officers.
4. The motion was opposed vide an affidavit in reply sworn on 20th December, 2023 by Harry Odondi, the 1st respondent's Legal Officer, who denied the applicant's averment and deposed that a ruling by the High Court (C.W Meoli, J.) in Civil suit No. E275 of 2021 at Milimani restrained the applicant's representative including the said John Kiarie and Karira Kimara from conducting any business in the name of the applicant and also enjoined the applicant's change of name; That the said ruling has not been set aside and its consequence was that the named officials of the applicant cannot act on behalf of the applicant; that the appointment of Swanya & Co. advocates by the said officials is incompetent; and that Karira Kimara cannot swear an affidavit on behalf of the applicant.
5. On the issue of joinder of Canneries Environ Association, the 1st respondent deposed that the same cannot be sanctioned without Canneries Environ Association moving the court for joinder by demonstrating that it meets the threshold for joinder of an interested party noting that Canneries



Environ Association did not participate actively in the suit before the Environment and Land Court (ELC).

6. There were no replies or written submissions filed by the other

respondents.

7. When the application came up for hearing before us, Messrs. Swanya & Co Advocates represented the applicants while Messrs. Njoroge Regeru & Co Advocates represented the 1st respondent while S. Mbuthia Advocate represented the 2nd respondent. There was no representation for the 3rd and 4th respondents. Counsel had filled their written submissions, which they sought to rely on with oral highlights.

The submissions majorly reiterated the contents of the application and the reply filed.

Determination

8. We have considered the application, the replying affidavit, the submissions, the authorities cited and the law. The issues before this Court are whether the applicant should be granted leave to amend the notice of appeal and memorandum of appeal by changing the applicant's/appellant's name from Kandara Residence Association to Kandara Residents Association; to substitute a party; and to add an interested party.

9. The power of this Court invoked by the applicant is discretionary under Rule 46 of this Court's rules. This Court is mindful of the principles guiding the exercise of the discretionary power, to wit, that the power must be exercised judiciously, reasonably and not arbitrarily. (See *Kanawal Sarjit Singh Dhim v. Keshavji Jivraj Shah* [2010] eKLR).

10. Rule 46 of this Court's Rules provides that:

“ 46.

- (1) Whenever a formal application is made to the Court for leave to amend a document, the amendment for which leave is sought shall be set out in writing and—
 - a. if practicable, lodged with the Registrar and served on the respondent before the hearing of the application; or
 - b. if it is not practicable to lodge the document with the Registrar, handed to the Court and to the respondent at the time of the hearing.
- (2) Where the Court gives leave for the amendment of a document, whether on a formal or an informal application, the amendment shall be made or an amended version of the document be lodged within such time as the Court when giving leave may specify and if no time is so specified, then within forty-eight hours of the giving of leave and on failure to comply with the requirements of this sub-rule, the leave so given shall determine.”

11. The decision whether or not to allow an amendment is dependent on the nature and extent of the amendment. In the case of *Lilian Wanja Muthoni Mbogo t/a Sahara Consultants & 5 others v Assets*



Recovery Agency (Civil Appeal (Application) E221 of 2020) [2022] KECA 48 (KLR) Okwengu J.A. held that:

.... the power to amend a document under Rule 44 of the Court Rules is discretionary. This means that the Court must exercise the power of amendment judiciously by granting leave to amend only where it is in the interest of justice based on the circumstances before the Court. In particular, the Court has to take into account the nature and extent of the amendment, and whether it will assist in the just determination of the real questions in dispute between the parties. On his part the applicants must demonstrate that the application is brought in good faith and also place before the Court facts that would justify the court acting in its favour.”

12. The applicant is seeking leave to amend its notice of appeal and memorandum of appeal to reflect its change of name from Kandara Residence Association to Kandara Residents Association and to substitute Michael Njoroge with John Kiarie Mahuti. In the circumstances, we find that such an amendment would not amount to introducing a new or inconsistent cause of action or adversely affect vested interests or accrued legal rights of the other parties. The respondents have not demonstrated any prejudice or injustice that they will suffer that cannot be compensated by way of costs if the amendments are allowed. Accordingly, the applicant is granted leave to amend its notice of appeal and memorandum of appeal in terms of prayer 2 and 3 of the application.
13. Prayer 4 of the application seeks an order to amend the notice of appeal and memorandum of appeal to include Canneries Environ Association as an Interested Party. This Court in the case of Yawa & 35001 others v Chome (Suing as the administrator of the Estate of the Late Mumba Chome Ngala (Deceased) & 19 others (Civil Application 100 of 2018) [2018] KECA 35 (KLR) (6 December 2018) (Ruling) pronounced itself in the following terms:

“The rationale behind the joinder of any party to proceedings is to have on board a necessary party for purposes of determining the real issues in dispute. Perhaps, this is (sic) reason behind the general guiding principle that joinder of a party like amendment of pleadings, should be freely allowed and at any stage of the proceedings, provided that it will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs. See this Court’s decision in Nderitu Wachira Receiver (sic) & Receiver (sic) & Manager of Bulleys Tanneries Ltd. (Under Receivership) & 4 others vs. Siraji Enterprises Ltd & another [2016] eKLR...there are criteria to be met by the party intending to be joined. The criteria which are in no way exhaustive include:

1. The applicant must demonstrate that it would be desirable for him/her to be added as a new party and that his/her presence would enable court to resolve all the matters in the dispute.
 2. The joinder will not prejudice the other parties
 3. The joinder will not vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings.”
14. It is notable that Canneries Environ Association has not filed an application to be joined in the appeal in accordance with the Court of Appeal Rules. Further, Canneries Environ Association has not demonstrated that it has an identifiable stake in this matter or that it would suffer prejudice in the event



of non-joinder. Accordingly, we find that the applicant has failed to meet the threshold for grant of prayer 4 of its application.

15. The upshot is that the application dated 24th November, 2023 is allowed in terms of prayers 2 and 3. We dismiss prayer 4 of the application.
16. In the result, we make the following orders:
 - a. The application seeking leave to amend the notice of appeal dated 5th May, 2022 and the memorandum of appeal dated 7th May, 2022 to change the name of the applicant/appellant from Kandara Residence Association to Kandara Residents Association is allowed;
 - b. The application seeking leave to substitute Michael Njoroge who ceased to be an official of the Association with John Kiarie Mahuti is allowed;
 - c. The applicant's prayer for leave to amend its notice of appeal and memorandum of appeal dated 7th May, 2022 to include Canneries Environ Association as the intended Interested Party is dismissed; and
 - d. Costs of the application shall abide by the outcome of the appeal.

DATED AND DELIVERED AT NYERI THIS 17TH DAY OF JANUARY, 2025.

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

