



REPUBLIC OF KENYA



KENYA LAW
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**Kibage v Kenya Forest Service (Civil Appeal (Application) 80 of 2018
(199 of 2018) [2025] KECA 519 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KECA 519 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) 80 OF 2018 (199 OF 2018
PM GACHOKA, JA
MARCH 21, 2025**

BETWEEN

DANIEL MAINA KIBAGE APPLICANT

AND

KENYA FOREST SERVICE RESPONDENT

(An application for leave to amend the notice of appeal, memorandum of appeal and record of appeal from the judgment and decree of the Environment and Land Court at Nyahururu (M.C. Oundo, J.) delivered on 31st July 2018 in ELCC No. 96 of 2017)

RULING

1. By Notice of Motion dated 16th November 2022, the applicant has invoked rules 3A, 3B & 44 of the Court of Appeal Rules 2010 (sic) seeking leave of this Court to amend his notice of appeal lodged on 9th August 2018 as well as his memorandum of appeal and the record of appeal both dated 11th October 2018 as follows:

“To remove the name of Daniel Maina Kabage appearing as the appellant and amend it to read Gabriel Githaiga.”

2. The application is supported by the grounds on the face of it and the supporting affidavit of Nderitu Komu, the applicant’s Counsel. The facts giving rise to the Motion are that in March 2012, the deponent, that is Nderitu Komu, received instructions from Daniel Maina Kabage to file suit seeking to restrain the respondent from interfering with the party’s use and possession of all that parcel of land namely L.R. No. Nyandarua/Muruai/926. The said Daniel Maina Kabage, issued those instructions at the behest of Gabriel Githaiga, the applicant herein, pursuant to a power of attorney dated 26th November 2010.



3. Following those instructions, the deponent filed suit in the name of Daniel Maina Kabage, vide a plaint dated 20th March 2012, in Nyahururu ELC No. 96 of 2017. During the pendency of those proceedings, the said Daniel Maina Kabage died. Resultantly on 28th September 2017, the trial court allowed an oral application amending the name of the deceased with the name of the applicant herein.
4. The matter proceeded for full hearing wherein the trial court rendered its decision on 31st July 2018. The applicant is aggrieved by those findings. He elucidated that when drafting the notice of appeal and subsequently the memorandum of appeal and record of appeal, his advocate inadvertently retained the parties' names as they were before 28th September 2018. The error was noted when the substantive appeal was listed for hearing on 7th November 2022. The applicant thus applied for an adjournment to enable him regularize the record. The applicant continued that the application was meant to correct an excusable mistake. For that reason, no prejudice would be met by the respondent if the orders sought were granted. He prayed that the application be allowed.
5. The application was opposed. In the replying affidavit of Lauro Yego, the respondent's chief legal officer, sworn on 23rd November 2022, the respondent conceded to the facts as espoused by the applicant but deposed that the notice of appeal filed is incurably defective that cannot be cured by dint of rule 44 of this Court's Rules. It added that a notice of appeal is not a document capable of amendment. That the notice of appeal was incompetent and ought to be struck out having been lodged in the name of a deceased person. Finally, if the application is allowed, it submitted that it stood to suffer prejudice. For those reasons, it was in the interest of justice that the application be dismissed.
6. When this appeal was fixed for hearing on 5th March 2025 before a three bench of this court, learned Counsel Mr. Komu was present for the applicant and learned Counsel Mr. Mwaniki appeared for the respondent. However, on 18th March 2025, the bench directed that this is a single judge application and that it should be determined by a single judge on the basis of the submissions filed by the parties.
7. The applicant filed its written submissions and a case digest both dated 10th December 2022. He summarized the facts as set out in his application to convince this Court that it ought to exercise jurisdiction in favor of granting the application in light of rule 46 of the Court of Appeal Rules. Learned Counsel for the applicant submitted that the overriding objective set out in sections 3A and 3B urged that justice ought to be dispensed with expeditiously and proportionately bereft of technicalities. It cited several decisions of this Court praying that the application be allowed accordingly.
8. The respondent relied on its written submissions and list of authorities both dated 14th December 2022 to argue that by dint of rule 87 (1) of the Court of Appeal Rules, the notice of appeal was incompetent and incurable as a primary document for being filed in the name of a deceased person. It fortified that submission by relying on the case of Nanyuki Municipal Council vs. Ephantus Kiruhi Kinuhi [2007] eKLR. Abridging the grounds set out in the replying affidavit, learned Counsel urged this court to dismiss the application because the applicant failed to do what he ought to have done at the trial court.
9. I have considered the application, the affidavit in support and the affidavit in opposition thereto, examined the parties' diametrically opposed written submissions and analyzed the law. Rule 46 (1) of the Court of Appeal Rules 2022 makes provision for amendment of any document. It provides as follows:

“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.”
10. An application of this nature invites the exercise of this Court’s discretion. It is trite law that in the exercise of that discretion, a Court should not be guided by whims, caprice or fantasy but the same ought to be exercised judiciously. This Court in *Lekakeny vs. Ketere & another* (Civil Appeal (Application) E104 of 2023) [2024] KECA 128 (KLR) set out the threshold when considering an application of this nature as follows:
- “ 15. It is true that the Court has wide discretion in considering an application to amend any document filed in this Court. Consequently, the Court ordinarily grants leave to amend freely given when justice so requires. However, as the Court remarked in the *John Mugambi Case*, like all powers reserved for the exercise of the discretion by the Court, it must be exercised judiciously. In that case, the Court stated:
- “It is trite that the power reserved for the Court by rule 44(1) [in what is now rule 46] of the Court of Appeal Rules to amend any document is a discretionary power. Like all judicial discretion, however, it must be exercised judiciously and upon reason, rather than arbitrarily, on humour, or fancy.”
16. In the *John Mugambi Case*, while pointing out that the judicial policy is to liberally allow amendments, the Court stated some of the factors the Court considers in deciding whether to allow an amendment. They include whether the application has been brought in good faith which is, in part, determined by the timing of the application and the conduct of the applicant; whether there has been an undue delay in bringing the application; whether the amendment will cause injustice or prejudice to the respondent; whether it will unfairly redefine the dispute; and whether the amendment would be futile or superfluous.
17. While reiterating these factors, the *John Mugambi Case* held that where the effect of the amendment would be to prejudice or adversely affects the rights or vested interests of the opposing side which have already accrued, the amendment should be disallowed. The Court held that:
- “ ... [P]arties to a suit have the right to amend their pleadings at any stage of the proceedings before judgment and that courts should liberally allow such amendments. There are situations when the court will refuse to exercise its discretion to allow amendments. Such cases include where a new or inconsistent cause of action is introduced; where vested interests or accrued legal rights will be adversely affected; where prejudice or injustice which cannot be properly compensated in costs is occasioned to the respondent.”
11. In the present case, the applicant seeks to amend the notice of appeal lodged on 9th August 2018, the memorandum of appeal and record of appeal both dated 11th October 2018 to remove the name of Daniel Maina Kabage appearing as the appellant and amend it to read Gabriel Githaiga. The applicant



has explained that the insertion of the wrong name was an inadvertent mistake. I find the reasons advanced as proper grounds for allowing the application for amendment. The name being amended is not plucked from the air. The amendment was orally allowed by the trial court and the only mistake in this appeal is lack of diligence in the drafting of the notice of appeal.

12. Though the respondent has indicated that it stood to suffer prejudice, it did not demonstrate that prejudice. The respondent further relied on the pronouncements of Tunoi, JA. (as he then was), who when faced with an application to amend a notice of appeal had this to say in the case of Nanyuki Municipal Council vs. Ephantus Kiruhi Kinuhi (Supra):

“I must say that this is one of the most rare (sic) applications to be filed in this Court, because Notices of Appeal being the most basic and elementary documents in an appeal are normally termed; and indeed, deemed primary documents which are not amenable to amendment. In most cases this Court does not permit amendment of a notice of appeal. The most obvious step that should have commended itself upon the applicant was to seek leave to withdraw the erroneous notice of appeal or to have it struck out and seek leave to lodge a fresh and correct one.” (underline ours)

13. I find that the above quoted decision did not cast in stone that notices of appeal cannot be amended. The court was categorical that it was not in all cases that such applications were allowed. In any event, as set out above, it is a discretionary power that ought to only be exercised in the clearest of cases. This is one of those cases as the mistake is minor and causes no prejudice to the respondent. It is noteworthy that the respondent did not apply to strike out the notice of appeal, if it indeed believed that it was defective.
14. Accordingly, I come to the inescapable conclusion that the Notice of Motion dated 16th November 2022 is merited. However, to balance the competing interest of all parties herein, I direct the applicant to amend his notice of appeal lodged on 9th August 2018, his memorandum of appeal and the record of appeal both dated 11th October 2018 to remove the name of Daniel Maina Kabage appearing as the appellants and amend it to read Gabriel Githaiga. Those documents shall be amended within 14 days from the date of this order, failing which the order herein shall lapse automatically without any further reference to this Court.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF MARCH 2025.

M. GACHOKA C. Arb, FCI Arb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

