



**Githukurio v Mungai (The legal representative of Stephen Mungai Waita) & 3 others
(Civil Appeal (Application) 75 of 2019) [2025] KECA 435 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KECA 435 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) 75 OF 2019
PM GACHOKA, JA
MARCH 7, 2025**

BETWEEN

SAMUEL WAIYA GITHUKURIO APPLICANT

AND

**NAOMI NJOKI MUNGAI (THE LEGAL REPRESENTATIVE OF STEPHEN
MUNGAI WAITA) 1ST RESPONDENT**

LAND REGISTRAR NYANDARUA DISTRICT 2ND RESPONDENT

DISTRICT SURVEYOR NYANDARUA 3RD RESPONDENT

HON ATTORNEY GENERAL 4TH RESPONDENT

(An application for leave to amend the notice of appeal, memorandum of appeal and record of appeal from the ruling and order of the Environment and Land Court at Nyahururu (M.C. Oundo, J.) delivered on 25th June 2019 in ELC Petition No. 20 of 2017)

RULING

1. In his Notice of Motion dated 31st October 2023, the applicant seeks leave of this Court to amend his notice of appeal lodged on 4th July 2019 as well as his memorandum of appeal and the record of appeal both dated 3rd September 2019 as follows:

“To remove the name of Stephen Mungai Waita appearing as the 1st respondent and amend it to read Naomi Njoki Mungai (the legal representative of Stephen Mungai Waita).”

2. The applicant has invoked the provisions of rules 3A, 3B and 44 of the Court of Appeal Rules 2010 (sic). The application is premised on the grounds on the face of the Motion and the supporting affidavit of Nderitu Komu, the applicant’s Counsel. The gist of the Motion is that the applicant filed proceedings against Stephen Mungai Waita and others in Nyahururu ELC Petition No. 20 of 2017.



3. During the pendency of the suit, the said Stephen Mungai Waita died on 5th February 2018. On 12th July 2018, the trial court granted leave to substitute the deceased with Naomi Njoki Mungai; the administrator of the deceased's estate.
4. On 25th June 2019, the trial Judge Oundo, J. found that the 1st respondent's preliminary objection, seeking to strike out the applicant's petition, was merited. Consequently, the petition was struck out with costs.
5. The applicant is dissatisfied with the ruling of the trial court dated 25th June 2019. He explained 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 12th July 2018. He is desirous of pursuing the appeal on its merits. He pitted out that no prejudice would be met by the respondents if the orders sought are granted. He prayed that the application be allowed.
6. On 14th February 2024, the parties were directed to canvass the application through written submissions. However, as of the time of writing this ruling, I was not impressed with any of the parties' submissions. Furthermore, I also note that the respondents did not file any responses despite being served with the application. Regardless, I must consider the merits of the application before me.
7. Rule 46 (1) of the Court of Appeal Rules 2022 makes provision for amendment of any document. It provides:

“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.”
8. This Court in *Lekakeny v 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:
 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



9. In the present case, the applicant seeks to amend his notice of appeal lodged on 4th July 2019 as well as his memorandum of appeal and the record of appeal both dated 3rd September 2019 as to change the names of the 1st respondent as follows:

“To remove the name of Stephen Mungai Waita appearing as the 1st respondent and amend it to read Naomi Njoki Mungai (the legal representative of Stephen Mungai Waita).”

10. This Court takes cognizance of the fact that the amendment was filed four years after the mistake occurred. That amounts to an inordinate delay. However, this Court also finds that the application is made in good faith as it seeks to amend the name of a party. I note that the respondent had the opportunity to apply for striking out of the notice of appeal under the rules if they so wished. They did not do so and no prejudice will be occasioned if the orders sought are granted. Furthermore, I do not think that the amendment of the name of the 1st respondent will change the character of the dispute since it is a fact that has not been denied.

11. Consequently, it is my finding that the application is merited.

However, to balance the competing interest of all parties herein, I direct the applicant to amend his pleadings as proposed namely: the notice of appeal lodged 4th July 2019 as well as his memorandum of appeal and the record of appeal both dated 3rd September 2019, to replace the name of the 1st respondent from Stephen Mungai Waita to Naomi Njoki Mungai (the legal representative of Stephen Mungai Waita) within the next seven 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 7TH 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

