



**Kiragu & another v Kenya National Highways Authority (Civil Appeal
(Application) 83 of 2019) [2025] KECA 650 (KLR) (9 April 2025) (Ruling)**

Neutral citation: [2025] KECA 650 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) 83 OF 2019**

WK KORIR, JA

APRIL 9, 2025

BETWEEN

STEPHEN NJUGUNA KIRAGU 1ST APPELLANT

**JANE WANDIA KIIRU (INTENDED 2ND APPELLANT) ; HERMAN NGARI
KIRIKA (DECEASED 2ND APPELLANT) 2ND APPELLANT**

AND

KENYA NATIONAL HIGHWAYS AUTHORITY RESPONDENT

*(Being an application for substitution of Herman Ngari Kirika (Deceased) with
Jane Wandia Kiiru as a legal representative of the Estate of the Deceased in the
appeal arising from the judgment and decree of the Environment and Land Court
at Nakuru (Munyao, J.) dated 15th November 2018 in ELC Case No. 73 of 2018)*

RULING

1. The applicant, Jane Wandia Kiiru, through the notice of motion dated 6th June 2022, seeks to substitute the 2nd appellant, Herman Ngari Kirika. From the averments in the affidavit sworn in support of the application, the 2nd appellant passed away on 20th December 2021, and the applicant has since obtained letters of administration ad litem allowing her to pursue the pending appeal on behalf of the estate of the deceased 2nd appellant.
2. The respondent, Kenya National Highways Authority, filed a preliminary objection dated 21st June 2023, urging the striking out of the application for being brought under the Civil Procedure Rules instead of the Court of Appeal Rules.
3. When the application came up for hearing on 6th March 2025, learned counsel Ms. Mukira was present for the applicant, while the respondent was unrepresented despite service of the hearing notice. Ms. Mukira informed the Court that she had filed two sets of submissions dated 14th February 2025; one



in support of the motion and the other in opposition to the preliminary objection, and she would be entirely relying on them. She also informed the Court that the law firm of Owiti Otieno & Ragot Advocates had filed consolidated submissions dated 3rd March 2025 in support of the preliminary objection and in opposition to the motion.

4. I have read the submissions by counsel, and I will take them into consideration in this ruling. Through the preliminary objection, it is sought that the application be “struck out with costs for being incompetent, misconceived and constituting an abuse of the due process of the law.” It is also urged that the court “as constituted, has no jurisdiction to hear and determine the said application”. A summary of the respondent’s arguments in support of the preliminary objection is that the application is defective for being brought under the Civil Procedure Rules, 2010, instead of the Court of Appeal Rules, 2022. The reasons that make the respondent hold the view that this Court lacks jurisdiction to hear the application are, however, not highlighted in the submissions.
5. In opposition to the preliminary objection, counsel for the applicant submits that the respondent has not pointed out the provision of the law which ousts this Court’s jurisdiction to hear and determine the application. Counsel does not, however, answer the pertinent question as to whether the application is defective for being brought pursuant to the wrong rules. She instead focuses on the fact that the application was filed within the time prescribed by the rules of the Court and urges that it should be allowed.
6. The respondent is indeed correct that the application is brought under rules alien to this Court, being Order 24 Rule 4 of the Civil Procedure Rules and section 3A of the *Civil Procedure Act*. It is, however, my opinion that striking out the application based on the preliminary objection would be harsh and contrary to the rallying call to the courts by Article 159 of *the Constitution* to do substantive justice and avoid termination of disputes on procedural technicalities. Indeed, proceeding along the path of technicalities as proposed by the respondent would lead to the striking out of its preliminary objection for being a pleading unknown to the rules of the Court. That dispenses with the first ground of the preliminary objection.
7. As regards the second ground of the objection, I observe that the respondent has not explained why this Court lacks jurisdiction to hear and determine the application. Rule 102 (4) of the Court of Appeal Rules, 2022, is clear that an application like the one made by the applicant may be brought before a single judge. In any event, there is no reason advanced by the respondent as to why this Court has no jurisdiction to entertain the instant application. I, therefore, find no merit in the preliminary objection in its entirety. The preliminary objection is therefore dismissed.
8. Turning to the merits of the application, it is noted that the application for substitution was brought on 6th June 2022, which was within 12 months from 20th December 2021, when the 2nd appellant passed away. The application having been made before the abatement of the deceased 2nd appellant’s appeal, this Court is required “to cause the legal representative of the deceased person to be made a party”, which I hereby do by allowing the applicant (Jane Wandia Kiiru) to substitute the deceased (Herman Ngari Kirika) as the 2nd appellant in the appeal.
9. The costs of the application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAKURU 9TH DAY OF APRIL, 2025

W. KORIR

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JUDGE OF APPEAL



I certify that this is a True copy of the original

Signed

Deputy Registrar

