



**Lekamario v African Wildlife Foundation & another (Civil Appeal  
(Application) 181 of 2017) [2025] KECA 1106 (KLR) (5 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1106 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL (APPLICATION) 181 OF 2017  
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA  
JUNE 5, 2025**

**BETWEEN**

**JOSEPH LEKAMARIO & 248 OTHERS ..... APPLICANT**

**AND**

**AFRICAN WILDLIFE FOUNDATION ..... 1<sup>ST</sup> RESPONDENT**

**H.E. DANIEL TOROITICH ARAP MOI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for leave to amend the Memorandum  
of Appeal dated and lodged on 21st December 2017)*

**RULING**

1. There was confusion in regard to this application because whereas it indicates that it was brought under Rule 31 of the Court of Appeal Rules, the prayer is for leave to amend the memorandum of appeal. An application under Rule 31 of this Court's Rules is for leave to adduce further evidence which is supposed to be heard by a 3-judge bench. On the other hand, an application for amendment of the memorandum of appeal is a single Judge application. This mix-up, unfortunately, led to the misplacement of the application, hence the delay, which is much regretted.
2. In the application, Mr. Lempaa Suiyanka seeks leave to amend ground No. 7 of the memorandum of appeal which reads as follows:-

“The learned Judge erred in law and fact in failing to give due consideration to the values, principles and objects of the 2010 Constitution to reach a fair determination of the suit.”

The proposed amendment is as follows:

“The learned Judge erred in law and in fact by failing to give due consideration to the values, principles and objects of the 2010 Constitution, to reach a fair determination of the suit. In



particular, the learned Judge failed to duly consider the principle of security of land rights while addressing historical injustices.” (Emphasis added).

3. The application is opposed through the replying affidavit sworn by Jenipher Catherine Ombonya, counsel on record for the 3<sup>rd</sup> respondent. Learned counsel deposes that if allowed, the proposed amendment will have the effect of altering the claim that was prosecuted by the appellants before the trial court which was purely based on adverse possession. According to counsel, the claim before the trial court was by specific complainants (the appellants herein) and they were not representing their community and nowhere did they claim the land as ancestral land.
4. The claim would also affect a 3<sup>rd</sup> party “Ol-Pajeta Ranching Limited” the registered owner of the land who was not a party to the proceedings before the trial court, and this might result in condemning the party unheard. Counsel concluded that the application was made in bad faith and it ought to be dismissed.
5. The 1<sup>st</sup> respondent, Africa Wildlife Foundation filed grounds of opposition dated 30<sup>th</sup> November 2023. Their opposition is based on the facts that the application was filed unreasonably late; the amendment will introduce a cause of action that was never pleaded and hence never canvassed or determined before the trial court. The 3<sup>rd</sup> respondent maintains that it would be prejudiced by the amendment, if the same is allowed, and urges the Court to dismiss the application with costs.
6. There was no response by the 4<sup>th</sup> and 5<sup>th</sup> respondents but during the plenary hearing of the application on 5<sup>th</sup> December 2023 the Court was informed that the 4<sup>th</sup> and 5<sup>th</sup> respondents were supporting the application. Parties filed submissions in support of their rival positions, which submissions we have considered and which we need not paraphrase for purposes of this ruling.
7. Ms. Imbosa, learned counsel who appeared with Mr. Lempaa for the applicant asserted that a party has a right to amend pleadings any time before judgment. She denied the respondent’s claim that the application is meant to delay the hearing of the appeal. She also stated that the respondents would not be prejudiced if the application is allowed as the parties would be allowed to amend their submissions, if necessary.
8. On his part, Mr. Oyoo, learned counsel for the 1<sup>st</sup> respondent submitted that the application is incompetent, having been brought under the wrong rules; and that the application was being brought 6 years late and no reasons for the inordinate delay had been given. Counsel reiterated that the applicants intend to introduce a fresh cause of action at this stage and that is not acceptable. He pointed out that the claim before the trial court was based on adverse possession and the applicants are now introducing a claim of historical injustices. He urged us to dismiss the application.
9. The same sentiments were expressed by Mrs. Wachira, learned counsel for the 3<sup>rd</sup> respondent. She emphasized that the applicants are introducing a new cause of action and that a claim of communal land and historical injustices is outside the jurisdiction of this Court as the jurisdiction lies with the National Land Commission, which was not a party before the trial court. She maintained that if the amendment is allowed, her client would suffer grave prejudice and hence urged us to dismiss the application.
10. We have considered the application, the replying affidavit, grounds of opposition, the submissions which were also highlighted before us and the law. As stated earlier, the application was on its face one that was mixed up and omnibus. The Court would have struck it out on that basis only, but in view of the age of the appeal and the accusations of intentional delay in prosecuting the appeal, we decided to determine the same on merit.



11. Having considered the application and all the documents placed before us, we will apply the guidelines followed by this Court in cases of amendment of a memorandum of appeal. One of the basic considerations is that in determining whether or not to allow a new point on appeal the ground of appeal must arise from issues that were sufficiently pleaded, canvassed or succinctly made issues at the trial. The points ought to be introduced must be consistent with the applicant's case as conducted in the trial court and it should not be the introduction of a totally different cause of action. Courts have also held that the points ought to be introduced for the first time must be substantial and one that can be disposed of without the need of adducing further evidence.
12. This Court in *Securicor (Kenya Limited) -vs- EA Drapers and Another* [1987]KLR 338 after reviewing several cases, while acknowledging that the Court has discretion to allow amendment of a memorandum of appeal pronounced itself as follows:

“Certainly, the cases show that the discretion must be exercised sparingly. The evidence must all be on record and the new point must not raise disputes of fact. The point must not be at variance to the facts or case decided in the court below.”

In *Kenya Commercial Bank Limited -vs- Osebe* (1982) KLR 292, the Court reiterated that the court should not consider or deal with issues that were not canvassed, pleaded and or raised at the lower court and that for a matter to be a ground of appeal it has to have been sufficiently raised and succinctly made an issue at trial.
13. The bone of contention in this application is whether the amendment sought to be made is in consonant with the suit as it was canvassed before the trial court, or is the applicant attempting to introduce a new cause of action at appeal level; a cause of action that will need adducing of further evidence; a cause of action that affects parties or persons that were not parties before the trial court? Is the amendment in question going to clarify issues and assist in the fair determination of the appeal or is it going to mask or obscure issues? Is it likely to cause prejudice and possibly trample on other peoples' constitutional right to be heard before a decision is made against them or their property?
14. Ultimately, our finding is that the intended amendment is intended to introduce a totally different cause of action. The issue of historical injustices was not before the trial court. In any event, it is a claim that ought to be separately and distinctly pleaded and thus responded to by the other party. Introducing this claim would also affect other parties like the Ol-Pajeta Farm Limited and the National Land Commission who were not parties before the trial court.
15. We need to emphasize that this is not a trial court and a fresh claim cannot be canvassed before this Court as it would necessarily call for filing of affidavits with the attendant cross-examination of the deponents. It is not as simple as learned counsel for the appellant/applicant puts it; that is, amendment of submissions. A shortcut as the one proposed by the applicant would definitely prejudice parties who were not heard before the trial court and it would amount to a travesty of justice.
16. We need not say more. The application before us lacks merit and we dismiss it. Costs will abide the appeal.

**DATED AND DELIVERED AT NYERI THIS 5<sup>TH</sup> DAY OF JUNE 2025**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**JAMILA MOHAMMED**



.....  
**JUDGE OF APPEAL**

**A.O. MUCHELULE**

.....  
**JUDGE OF APPEAL**

I certify that this is a the true copy of the original.

Signed

**DEPUTY REGISTRAR**

