



**Young Traders Limited v Gumchem (K) Limited & another (Civil Appeal
(Application) E532 of 2020) [2024] KECA 1633 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1633 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E532 OF 2020
M NGUGI, JA
NOVEMBER 8, 2024**

BETWEEN

YOUNG TRADERS LIMITED APPLICANT

AND

GUMCHEM (K) LIMITED 1ST RESPONDENT

STEPHEN KINUTHIA WAITHAKA 2ND RESPONDENT

(Being an application for leave to amend the Memorandum of Appeal and Record of Appeal in Civil Appeal No. E532 of 2020, being a Memorandum of Appeal and Record of Appeal from the judgment of the Hon. Justice Sergon delivered on 6th November 2020 in Civil Suit No. 804 of 2000)

RULING

1. The applicant, Young Traders Limited, has filed the application dated 24th May 2024 seeking leave to amend its memorandum of appeal dated 29th December 2020 and the record of appeal dated 29th December 2020 in Civil Appeal No. E532 of 2022. The applicant also seeks leave to amend its submissions filed in support of its appeal. The application is brought under section 3 and 3A of the [Appellate Jurisdiction Act](#) and rules 46 and 87 of this [Court's Rules](#).
2. The application is based on the grounds set out on its face and is supported by an affidavit sworn by Monica Wambui Kinuthia on 24th May, 2024. The applicant avers that the person named as the 2nd respondent, Stephen Kinuthia Waithaka, died on 11th July 2000, even before the filing of Civil Suit No. 1260 of 2004- [Gumchem \(K\) Limited v Young Traders Limited and Stephen Kinuthia Waithaka](#). She further avers that on 22nd March 2010, Sitati J. directed that the suit against the said Stephen Kinuthia Waithaka had abated and he thus ceased to be a party in the suit by law. The suit was concluded through a judgment delivered by Sergon J. on 6th November, 2020. The applicant avers that it was aggrieved by the judgment and instituted an appeal on 30th December, 2020, naming Stephen Kinuthia Waithaka as



- the 2nd respondent. The applicant avers that although the appeal may not be rendered incompetent by the inclusion of the name of a person who has since died, it is imperative that the name of the deceased be removed or deleted from the memorandum of appeal.
3. The appellant further avers that the Court has unfettered discretion to grant a party leave to amend its pleadings any time before judgment; and that it is in the interest of justice that the intended amendments be allowed in order to allow Civil Appeal No. E532 of 2020 proceed to hearing and determination on its merits.
 4. The respondent opposes the application and has filed a replying affidavit sworn by John Peter Kamau Ruhangi on 28th June, 2024. Mr. Ruhangi deposes that Stephen Kinuthia Waithaka was alive at the time the 1st respondent filed HCCC No. 804 of 2000 and that he was served with summons and a copy of the plaint. He further deposes that the firm of M/S Kahari & Kiai Advocates filed the 1st and 2nd defendant's defence dated 8th June, 2020, and would not have done so if Stephen Kinuthia Waithaka had died before the suit was filed.
 5. It is his averment further that Stephen Kinuthia Waithaka is not a party to the proceedings before this Court, and neither was he a party before the High Court. He contends that the applicant has shown considerable disinterest in proceeding expeditiously with the matter, noting that while this Court issued the applicant's advocates with an order on 4th March, 2024 to substitute the 2nd respondent, the applicant instead filed an application for leave to amend the memorandum and record of appeal on 30th May, 2024. In the respondent's view, the application is misguided and ought to be dismissed.
 6. In submissions dated 1st July 2024, the applicant submits that the deletion of the name of Stephen Kinuthia Waithaka is in good faith and in the interest of justice; that the appeal does not affect him as the suit against him had long abated; and that the amendment will not in any way prejudice the 1st respondent nor will it be an obstacle to the swift conduct of the appeal.
 7. The respondent has not filed submissions with respect to its position on the application.
 8. Under rule 46 (1) of the Rules of this Court, a party seeking to amend a document lodged before the Court is required to set out in writing and lodge before the Court the document sought to be amended. The document must also be served on the opposing party. Rule 87(2) provides that an appeal shall not be incompetent by reason only that a respondent is dead. It gives the Court discretion, upon an application being made, to cause the legal representative of the deceased to be made a party.
 9. In the case before me, this is what the applicant appears to have intended to do initially as the order of the Court issued on 4th March 2024 indicates. However, the applicant appears to have addressed its mind properly to the matter. It therefore seeks, not substitution of the deceased with his personal representative, but removal of his name from the memorandum and record of appeal entirely as the suit against the 2nd respondent had abated even before the judgment of the High Court.
 10. The jurisprudence of this Court is that the Court will exercise discretion to allow an amendment depending on the nature and extent of the amendment-see *Kenya Hotels Limited v Oriental Commercial Bank Limited* (Civil Appeal 252 of 2009) [2018] KECA 692 (KLR) (Civ) (23 February 2018) (Ruling);
 11. In this case, the amendment sought by the applicant is fairly simple and straightforward: it seeks to remove the name of the 2nd respondent, who was deceased even prior to the decision of the High Court. It is not an amendment that will affect the substance of the appeal, nor will it cause any prejudice to the 1st respondent. Indeed, the 1st respondent's somewhat lackluster opposition to the application attests to this.



12. It is my finding, therefore, that the application dated 24th May 2024 is merited, and it is hereby allowed with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2024

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

