



**Mburu v Kariuki (Civil Appeal (Application) 15 of 2020)  
[2024] KECA 1741 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1741 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 15 OF 2020  
M NGUGI, JA  
DECEMBER 6, 2024**

**BETWEEN**

**GEORGE MWAI MBURU ..... APPLICANT**

**AND**

**JOSEPH GATUBI KARIUKI ..... RESPONDENT**

*(Being an application for leave to amend the  
memorandum of appeal in Civil Appeal No. 15 of 2020)*

**RULING**

1. In his application dated 30<sup>th</sup> July, 2024, the applicant asks this Court to grant him leave to amend his memorandum of appeal dated 20<sup>th</sup> January 2020 to bring on board, as the 2<sup>nd</sup> respondent, the Kikuyu Sub County (formerly Town Council of Kikuyu), which was named as the 1<sup>st</sup> defendant before the trial court.
2. The application is brought under rule 44 (1) of the Court of Appeal Rules. (The correct rule under the 2022 Rules of this Court, which are now in force, is rule 46(1))
3. The application is based on the grounds set out on its face and is supported by an affidavit sworn on 30<sup>th</sup> July 2024 by Stanley Kingara, the applicant's Advocate. It is averred on behalf of the applicant that Kikuyu Sub County was the 1<sup>st</sup> defendant before the trial court and participated fully in the trial. On 8<sup>th</sup> April, 2019, the applicant served the firm of Jesse Kariuki & Co. Advocates, who acted for Kikuyu Sub County before the trial court, with the notice of appeal dated 29<sup>th</sup> March, 2019 and the application for proceedings. It is averred further that the record of appeal was also served upon the said firm. The applicant avers that due to inadvertence, Kikuyu Sub-County was not named as a respondent in the appeal, but it was at all times intended that it should be a respondent. He avers further that the memorandum of appeal was served on the advocates for Kikuyu Sub-County in accordance with rule 77 of the Rules of this Court as it was directly affected by the appeal. That the applicant only realized



that Kikuyu Sub-County had not been named as a party when the appeal came up for directions before the Deputy Registrar on 25<sup>th</sup> July 2024.

4. The application is not opposed.
5. I have considered the application, the affidavit in support and the applicant's submissions dated 22<sup>nd</sup> October 2024. Rule 46(1) of the Rules of this Court vests in the Court discretion to grant leave to amend pleadings filed before it. Such discretion, as with all discretionary power, is to be exercised judiciously, and is dependent on the facts and circumstances of each case.
6. This Court will allow an amendment to pleadings in the circumstances so succinctly captured by M'Inoti JA in *Kenya Hotels Limited v Oriental Commercial Bank Limited (Civil Appeal 252 of 2009)* [2018] KECA 692 (KLR) (Civ) (23 February 2018) (Ruling):

“Whether or not to allow an amendment will also depend on the nature and extent of the introducing a ground of appeal that is properly founded on the evidence that was adduced and canvassed before the trial court, which it is alleged the trial judge ignored or misapplied, the Court will more readily allow the amendment. Different considerations will however apply if the applicant is seeking to introduce a totally new ground of appeal that was not pleaded, evidence adduced, canvassed and determined by the trial court.

... the overriding concern is to avoid prejudicing a party who is made to meet an entirely different case late in the day at the appeal stage, without the opportunity of adducing evidence that may be necessary to counter or dispel the new point.”

7. In this matter, the applicant seeks to amend his memorandum of appeal to add, as a respondent, a party who actively participated before the trial court, but whose name was inadvertently omitted from the memorandum and record of appeal. The applicant has averred that all the documents relevant to the appeal have been served on the advocates who were representing Kikuyu Sub-County, the party that the applicant seeks, with the intended amendment, to include in the memorandum of appeal.
8. I accordingly find that the application dated 30<sup>th</sup> July 2024 is merited. It is hereby allowed, with no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF DECEMBER, 2024**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

