



**Julius Gichuki Gichuhi (By substitution and being the Legal Representative of the Estate of the Late Gichuhi Kimira(Deceased) & another v Kimotho & 2 others (Civil Appeal 326 of 2018) [2021] KECA 350 (KLR) (17 December 2021) (Ruling)**

Neutral citation: [2021] KECA 350 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 326 OF 2018  
KI LAIBUTA, JA  
DECEMBER 17, 2021**

**BETWEEN**

**JULIUS GICHUKI GICHUHI (BY SUBSTITUTION AND BEING THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE GICHUHI KIMIRA(DECEASED) ..... APPELLANT**

**AND**

**GODWIN WACHIRA GICHUHI (BY SUBSTITUTION AND BEING THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE GICHUHI KIMIRA (DECEASED) ..... APPLICANT**

**AND**

**SAMUEL NGUNU KIMOTHO ..... 1<sup>ST</sup> RESPONDENT**

**MAAKA MUKUHI MUGWERU (BY SUBSTITUTION AND BEING THE ADMINISTRATORS OF THE ESTATE OF THE LATE SAMUEL NGUNU WAIHIRWA(DECEASED) ..... 2<sup>ND</sup> RESPONDENT**

**LOISE WAIRIMU MUGWERU RUTH WANJIRU MUGWERU WINNIE WANGU MUGWERU (BY SUBSTITUTION AND BEING THE ADMINISTRATORS OF THE ESTATE OF THE LATE MAAKA MUKUHI MUGWERU (DECEASED) ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application to Substitute the Appellant and amend the Memorandum of Appeal against the Ruling and Orders of the High Court of Kenya at Nairobi (J. K. Sergon, J) delivered on 4th May 2018 in High Court Civil Case No. 880 of 1977 (as consolidated with High Court Civil Case No. 908 of 1977))*



## RULING

1. Forty-four years on, and the legal battle still rages despite the legitimate expectation that litigation comes to an end sooner. However, the matters in controversy in this appeal have continued to defy the much-cherished principle of expeditious determination of claims. I make this observation in the hope that the parties hereto will for once address the core issues in controversy to the ends of final determination. Indeed, those who pursue justice find good reason in quickening their steps to that end and avoid the tragedy of relaying disputes generation after generation as the case has been here.
2. Following Gichuhi Kimira's death on 14<sup>th</sup> October 2008, the appellant (Julius Gichuki Gichuhi) took out letters of administration Ad Litem to his estate for the purpose of defending High Court Civil Case No. 880 of 1977 – Samuel Ngunu Kimotho (the 1<sup>st</sup> plaintiff therein) and Maaka Mukuhi Mugweru by substitution and personal representative of the estate of Simon Mugweru Wathirwa (the 2<sup>nd</sup> plaintiff therein) v Gichuhi Kimira (the defendant therein). The 2<sup>nd</sup> plaintiff (suing as personal representative of the estate of Simon Mugweru Wathirwa) in that suit, which was later consolidated with High Court Civil Case No. 908 of 1977, and from which this appeal arose, has since died and is represented by Loise Wairimu Mugweru, Ruth Wanjiru Mugweru and Winnie Wangu Mugweru, who are collectively referred to as the 3<sup>rd</sup> respondent in this appeal.
3. In addition to Julius Gichuki Gichuhi's Grant, the applicant (Godwin Wachira Gichuhi) also took out a Grant of Letters of Administration Intestate to the estate of the deceased Gichuhi Kimira issued on 1<sup>st</sup> November 2011 and subsequently rectified on 11<sup>th</sup> December 2019. The purpose of the said Grant was to “administer the estate according to law and to render a just and true account thereof whenever required by law.” Accordingly, the said Julius Gichuki Gichuhi and Godwin Wachira Gichuhi are co-administrators to the estate of Gichuhi Kimira (Deceased). The two are represented by M/s. Kabue Thumi & Co. Advocates in this appeal.
4. Before me is Godwin Wachira Gichuhi's Notice of Motion dated 23<sup>rd</sup> July 2021 made under Rule 92(3) and (4) of the *Court of Appeal Rules*, relating to the filing and service of supplementary record of appeal, and in which he prays that –
  - (a) this Court be pleased to substitute Julius Gichuki Gichuhi for Godwin Wachira Gichuhi as the appellant herein (for and on behalf of the deceased appellant);
  - (b) this Court be pleased to grant the applicant leave to amend his Memorandum of Appeal;
  - (c) this Court be pleased to grant leave to the applicant to file and serve a supplementary record of appeal, and that the Supplementary Record of Appeal filed on 12<sup>th</sup> April 2019 be deemed as duly filed;
  - (d) this Court do grant leave to the applicant to “introduce new evidence or facts being new developments that arose while the ruling appealed from was still pending, and to file a further supplementary record of appeal”;
  - (e) the Court be pleased to give such further orders and directions to meet the overriding objectives of a just, expeditious, proportionate and affordable adjudication of the issues in controversy; and
  - (f) the costs of this application be provided for.



5. The applicant's Motion is supported by his annexed affidavit sworn on 23<sup>rd</sup> July 2021. It is also made on 12 grounds set out on the face of the Motion and restated in the supporting affidavit. Main among the reasons on which the application is grounded are that –
- (a) the appellant, Julius Gichuki Gichu, left Nairobi and has not been able to pursue the appeal;
  - (b) it is necessary to amend the Memorandum of Appeal on which the appellant's case is founded to facilitate final determination of the issues in contention between the parties;
  - (c) the documents contained in the Supplementary Record of Appeal filed on 12<sup>th</sup> April 2019 were inadvertently omitted from the Record of Appeal, and are vital for the proper and conclusive determination of the appeal;
  - (d) failure to seek the requisite leave to file and serve a supplementary record of appeal was an inadvertent omission on the part of the appellant's counsel; and
  - (e) there are new developments that have emerged while the Ruling, which is the subject of the appeal herein, was pending, and that it would be necessary that the new evidence be brought to the knowledge of this honourable Court to facilitate conclusive determination.
6. In her replying affidavit sworn on 29<sup>th</sup> October 2021 on behalf of the 2<sup>nd</sup> respondent (the estate of Maaka Mukuhi Mugweru, deceased), Loise Wairimu Mugweru lamented what she contended to be inordinate delay on the applicant's part to make the application before us (about two-and-a-half years since filing of the record of appeal). According to her, the appellant filed a supplementary record of appeal on 12<sup>th</sup> April 2019 without leave. She contends that the applicant has not satisfied the criteria for leave to introduce additional evidence under Rule 29 of the Court of Appeal Rules. In her opinion, the proposed amendments are designed to re-open issues already determined in the High Court, and which are of no relevance to the appeal herein. Accordingly, she urges the Court to dismiss the applicant's Motion with costs.
7. With regard to the "new developments" that are said to have emerged before delivery of the impugned Ruling, and which the applicant seeks leave to bring to the knowledge of this honourable Court, I can only say that I have no jurisdiction to admit new evidence in the appeal. That is for a 3-Judge bench to determine. The same applies to the applicant's request to submit a supplementary record of appeal in so far as the Supplementary Record of Appeal filed on 12<sup>th</sup> March 2019 introduces any document not adduced in the proceedings before the trial court. To that extent, the applicant's request in that regard falls within the jurisdiction of a 3-Judge bench to determine. Otherwise, an application under Rule 88 for leave to file a supplementary record of appeal ought to be made to the Deputy Registrar (see *Zacharia Okoth Obando v Edward Akongo Oyugi and 2 Others [2014] eKLR*), provided that the same does not seek to introduce new evidence as sought.
8. That leaves me with the application for leave to (a) substitute Julius Gichuki Gichuhi for Gibson Wachira Gichuhi as appellant, representing the estate of the said Gichuhi Kimira (Deceased); and (b) to file and serve an amended Memorandum of Appeal. The application for substitution of the appellant is, in my considered view, as of right even though not critical. That said, the applicant is entitled to actively participate in the administration of the deceased appellant's estate having obtained a full Grant as aforesaid. Section 82(1)(a) of the *Law of Succession Act*, Revised 2012 (2010) empowers the applicant "to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative." Accordingly, it is not for me to inquire into the reasons for the substitution, or to consider whether such substitution is warranted.



9. I appreciate the sentiments expressed in the replying affidavit of Loise Wairimu Mugweru. While the application before me might have the effect of delaying the final determination of the issues in contention, I am nonetheless constrained to give the appellant the opportunity to put his house in order. In doing so, I am mindful of the overriding objective stipulated in section 3A (1) of the *Appellate Jurisdiction Act* (Cap. 9) and the Rules made thereunder, namely "... to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act." The interest of justice demands that I exercise my statutory duty under section 3B (1) (a) of the Act to ensure the just determination of the proceedings.
10. With regard to the application for leave to file and serve an amended Memorandum of Appeal, I need not belabour the Court's discretionary powers under Rule 44. Suffice it to observe that that power should be exercised judiciously. In my considered view, the inordinate delay in making the proposed amendment, and the effect thereof, would unduly prejudice the respondents if the additional ground in the draft Memorandum is allowed to be introduced this late in the day (see *Mungai Njoroge and Another v Kiarie Njoroge and Another* [2019] eKLR). The additional ground sought to be introduced should have been raised more than 4 years ago in response to the respondents' Notice of Motion dated 26<sup>th</sup> September 2017. Furthermore, neither the Motion nor the reply thereto have been exhibited to enable the Court to ascertain its import. It is also noteworthy that the impugned Ruling has not been exhibited in the application before me to ascertain what issues were raised in that Motion for determination. Accordingly, I find no basis on which I can exercise my discretion otherwise than to find that the belated amendment sought would defeat the principle of expedition as enunciated in *Uchumi Supermarket Limited and Another v Sidhi Investments Ltd* [2018] eKLR and *Kyalo v Bayusuf Brothers Ltd* [1982] eKLR.
11. Having read the applicants' Notice of Motion dated 23<sup>rd</sup> July 2021 and the supporting affidavit sworn by the applicant on 23<sup>rd</sup> July 2021, the replying affidavit of Loise Wairimu Mugweru sworn on 29<sup>th</sup> October 2021, the written submissions of learned counsel for the applicant and for the 2<sup>nd</sup> respondent, I hereby order and direct that –
- (a) the applicant, Godwin Wachira Gichuhi, be substituted for Julius Gichuki Gichuhi as appellant in this appeal;
  - (b) the applicant's application for leave to amend and serve an amended memorandum of appeal is hereby dismissed; and
  - (c) the applicant's Motion dated 23<sup>rd</sup> July 2021 be placed before the Deputy Registrar for determination of his application under Rule 88 for leave to file a Supplementary Record of Appeal;
  - (d) this matter be listed before a 3-Judge bench on a priority basis for hearing and determination of the appellant's application for leave to introduce new evidence pursuant to Rule 29(1) (b); and
  - (e) the costs of this application be costs in the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF DECEMBER, 2021**

**DR. K. I. LAIBUTA**

.....

**JUDGE OF APPEAL**

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



*Signed*

DEPUTY REGISTRAR

