



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE, RAWAL, J.J.A.)

CIVIL APPEAL NO. 4 OF 2006

BETWEEN

WILLIAM NGARE.....1ST APPELLANT

DAVID MIANO.....2ND APPELLANT

WINNIE ROSE WANGU.....3RD APPELLANT

EPHRAIM GIKANDI4TH APPELLANT

JANE GATHIGIA5TH APPELLANT

AND

THE PUBLIC TRUSTEE.....1ST RESPONDENT

MARGARET WANGUI MURIUKI.....2ND RESPONDENT

PETER WANDERI MURIUKI.....3RD RESPONDENT

BEATRICE WAITHERA.....4TH RESPONDENT

MARY NYAWIRA.....5TH RESPONDENT

ELIZABETH WAITHEYA MURIUKI.....6TH RESPONDENT

BENSON WANDERI7TH RESPONDENT

JOHN MIANO KAGUNYA.....8TH RESPONDENT

DAVID GITHUI KAGUNYA.....9TH RESPONDENT

MARGARET WAITHERA.....10TH RESPONDENT

MARY GATHONI MUGO

(Appeal from the Ruling and Order of the High Court of Kenya (Githinji, J.) dated 29th April, 2004

in

HCSC. No. 1401 of 1190)

RULING OF THE COURT

The Notice of Motion dated 30th July, 2010 (filed on 3rd May, 2010) is premised under **Rule 44 (1)** and **(2)** of this **Court's Rules**.

It seeks the leave to amend Notice of Appeal, Record of Appeal, Supplementary Record of Appeal and Memorandum of Appeal as hereunder:-

1. ***That this Honourable Court be pleased to grant leave to the Appellants to amend Notice of Appeal filed on 7th May, 2004;***
 - a. ***To remove the name of Mary Gathoni Wanderas per the amended Notice of Appeal,***
 - b. ***To correct the name of Daniel Miano to David Miano as per the Amended Notice of Appeal,***
 - c. ***To correct the name of Winnie Rose Wangari to Winnie Rose Wangu as per the amended Notice of Appeal.***
2. ***That this Honourable Court be pleased to grant leave to the Appellants to amend the Record of Appeal filed on 16th January, 2006;***
 - a. ***To remove the name of Jackson (Mugo) Wanderi as an appellant as per the amended Record of Appeal.***
3. ***That this Honourable Court be pleased to grant leave to the Appellant to amend the Supplementary record of Appeal filed on 19th March, 2008;***
 - a. ***To remove the name of Jackson (Mugo) Wanderi as an appellant as per the amended supplementary Record of Appeal***
4. ***That this Honourable Court be pleased to grant leave to the appellants to amend the Amended Memorandum of Appeal amended on 7th March, 2008;***
 - a. ***To remove the name Mary Gathoni Wanderi as per the further amended Memorandum of Appeal.***
 - b. ***To correct the name of Winnie Rose Wangu as per the further Amended Memorandum of Appeal***

The application is supported by grounds set forth on the face thereof along with supporting affidavit of **William Ngare** who was the 2nd appellant in unamended record of appeal. The Notice of Appeal was filed in the superior court on 7th May, 2004 and Record of Appeal and Supplementary Record of Appeal were filed on 16th January, 2006 and 19th March, 2008 respectively. On 26th April, 2010 when the appeal earlier came up for hearing, the variance in names of some of the parties as shown in Notice of Appeal and Record and Memorandum of Appeal was noticed by the Court and the Court directed the appellants to regularize the documents filed in this Court.

Reiterating the facts stated above, **Mr. Kairaria**, the learned counsel for the appellants submitted that the amendments sought are innocuous and necessary to regularize the record before the court so that the appeal could proceed for hearing. He added that no one shall be prejudiced by the grant of these amendments. In support of the application, it was submitted that the names of two appellants namely, **Daniel Miano** and **Winnie Rose Wangari** as described in the Notice of Appeal and Amended Memorandum of Appeal are not correct and need to be amended to read **David Miano** and **Winnie Rose Wangu**. These names correctly appear in the Record of Appeal.

Mary Gathoni Wanderi is a wife of **Jackson Mugo Wanderi** who predeceased the deceased, whose estate was dealt with in **H.C. Succession Cause No. 1401 of 1990**. She has, through her counsel **Dr. Khaminwa**, made known her wish not to be included as an appellant in this appeal. Accordingly, her name as a representative of the estate of the late Jackson Mugo needs to be included as 11th respondent in the Memorandum and Record of Appeal to be amended. It was averred that the inclusion of the name of the late Jackson Mugo Wanderi was inadvertently inserted as an appellant and therefore ought to be removed.

The application was not opposed by **Mr. Malombo** the learned counsel for the 1st respondent. However, the learned counsel for other respondents raised some issues in opposition. **Mr. Kimani Muhoro**, the learned counsel for the 2nd, 3rd, 4th, 5th and 10th respondent contended that when the names of parties were included in the Notice of Appeal, it is deemed that the instructions from each of them were received and their names ought to be within the knowledge of the counsel filing the Notice of Appeal. He submitted that the application, apart from describing Mary Gathoni Wanderi as a wife (widow) of late Jackson Mugo Wanderi, fails to substantiate that she is, in fact and in law, the representative of the estate of her deceased husband. **Dr. Khaminwa**, the learned counsel for 6th, 7th, 8th and 9th respondents submitted that the appeal is not arguable and the application ought to be struck out. It was further urged that the Notice of Appeal having been filed in the High Court, this Court does not have jurisdiction to amend the same.

We have considered the submissions made before us.

We shall first deal with the issue whether this court can allow the amendment of Notice of Appeal which is filed in the High Court. **Rule 44 (1)** of this Courts' Rules provides:-

“Whenever a formal application is made to the Court for leave to amend any document, the amendment for which leave is sought shall be set out in writing and if practicable, lodged with the Registrar and served on the respondent before the hearing of the application or, if that is not practicable, handed to the Court and to the respondent at the time of the hearing. (Emphasis added)

In our considered view, the Notice of Appeal is filed in the High Court for expediency for in law, it is the document that sets in motion the jurisdiction to this Court to hear and determine any application or appeal. Indeed, it is the first document in the record of appeal and may well be described as an “*anchor*” to the Appeal. Thus it is one of the documents emphasized in **Rule 44 (1)** which is amenable to amendment. We reject the submission that the Notice of Appeal is incapable of amendment before this Court.

While finding as aforesaid, we are adequately fortified by the provision of **Section 3 (2)** of the Appellate Jurisdiction Act which reads;

“For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.”

Furthermore, the **Appellate and Jurisdiction Act in Sections 3A and 3B**, has conferred a duty on this Court to facilitate the just, expeditious, proportionate and affordable determination of proceedings before this Court. The rules thereunder have also been amended to mitigate the rigidity hitherto associated with primary documents.

As to whether the appeal is arguable or not, we leave that to the bench seized of the main appeal to determine if and when it is raised.

The upshot is that the Notice of Motion dated 30th July, 2010 is hereby allowed. The amendments as prayed therein shall be made in the Notice of Appeal, Record of Appeal and Memorandum of Appeal. We also allow the applicants to enjoin Mary Gathoni Wanderi as the 11th respondent simply because any order made by this court in the Appeal may affect her and the estate of her deceased husband. However, we direct that she should be served with this order and the amended records as ordered herein.

The costs of this application shall be born by the applicants in any event.

Dated and delivered at Nairobi this 17th day of February, 2012.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

K. H. RAWAL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR