



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome (CJ & P), Ibrahim, Wanjala, Njoki Ndungu, Ouko SCJJ)

PETITION (APPLICATION) NO. E029 OF 2024

BETWEEN

ELIUD MWENDIA WANDI.....PETITIONER

AND

JANE MUTHONI MUCHIRA.....RESPONDENT

(Being an application to strike out the appeal dated 5th July, 2024, and an application for leave to file a supplementary record of appeal against the judgment and order of the Court of Appeal in Nyeri Civil Appeal No. 65 of 2015 dated 5th February, 2021)

Representation:

Ms. Natocho h/b Mr. Magee for the appellant
(Magee Law LLP)

Mr. Macharia for the respondent
(Macharia, Burugu & Co Advocates)

RULING OF THE COURT

[1] Before this Court are two applications filed by both parties. Though brought separately, they are intertwined and to make good use of judicial time, we shall proceed to dispose both of them in this ruling.

[2] UPON CONSIDERING the appellant's Notice of Motion dated 13th September, 2024 filed pursuant to Sections 3A and 21(2) of the Supreme Court Act and Rules 3(5), 15(2), 17(1) and 26(2) of the Supreme Court Rules which seeks leave for the appellant to file a supplementary record of appeal to the instant Petition filed on 5th July, 2024 and for costs to abide the outcome of the appeal; and

[3] UPON FURTHER CONSIDERING the grounds in support of the application and the supporting affidavit sworn by the appellant on 13th September, 2024 as well as the written submissions dated 13th September, 2024 to the effect that the appellant had filed his record of appeal without the proceedings and orders from the Court of Appeal in ***Civil Application Sup. No. 1 of 2022*** as well as in ***Civil Appeal No. 65 of 2015*** as they had not been typed and supplied; that the time allowed for filing a supplementary record of appeal under Rule 33(6) of the Supreme Court Rules has since lapsed but the Court has power to enlarge such time; that the proceedings and order in ***Civil Application Sup. No. 1 of 2022*** were supplied on 2nd August, 2024 and the proceedings and order in ***Civil Appeal No. 65 of 2015*** were supplied on 13th September, 2024; that the unavailability of the same and the time taken to secure them is not attributed to the fault of the appellant; that the delay occasioned is not so inordinate or so great as to be inexcusable; that the documents omitted are critical and unless the Court invokes its powers under Rule 40 of the Supreme Court Rules, the appellant shall suffer great injustice; and that should the application be allowed, the respondent will not suffer any prejudice; and

[4] BEARING IN MIND the respondent did not file any pleadings in opposition to the application; and

[5] TAKING INTO ACCOUNT the respondent's Notice of Motion dated 19th February, 2025 brought under Article 159 of the Constitution, Sections 3, 3A and 23 of the Supreme Court Act, Rules 3, 12, 23 and 31 of the Supreme Court Rules and all other enabling provisions of law seeking the striking out of the Petition for

being a nullity as well as being wholly and incurably defective as it was filed against a deceased person and not the administrator ad litem;

[6] FURTHER TAKING INTO ACCOUNT the grounds on the face of the application, the supporting affidavit sworn on 19th February, 2025 by Kelvin Wanjohi Muchira, the respondent's administrator *ad litem* and submissions of even date to the effect that the respondent passed away on 20th November, 2016 whilst Nyeri **Civil Appeal No. 65 of 2015** was still pending hearing and determination; that pursuant to succession proceedings in **Kerugoya Succession Cause No. 11 of 2017**, Kelvin Wanjohi Muchira was appointed the respondent's administrator *ad litem* on 12th July, 2017; that vide a Ruling dated 19th March, 2018 in **Civil Appeal No. 65 of 2015**, the respondent was substituted with Kelvin Wanjohi Muchira; that the appellant despite being aware of this and being represented by the same firm for advocates in the Court of Appeal as well as before this Court, knowingly filed the Petition of Appeal against a deceased person instead of the administrator *ad litem*; that the Petition of Appeal is therefore a nullity, incurably and fatally defective for failing to disclose or acknowledge that the respondent was deceased and the Petition should therefore be struck out; he relies on the Court of Appeal decision in **Geeta Bharat Shah & 4 Others v Omar Said Mwatayari & Another** [2009] KECA 126 (KLR), High Court decision in **Manyange (Deceased) v TG (minor suing through her mother and next friend WMG)** (Civil Appeal E005 of 2022) [2024] KEHC 1083 (KLR) and ELC decision in **Japhet Nzila Muangi v Hamisi Juma Malee** (2022) KEELC 434 (KLR) to argue that the courts have consistently held that a suit filed against a deceased person is a nullity.

[7] BEARING IN MIND the appellant's replying affidavit sworn on 5th March, 2025 and submissions of even date contending that the instant petition is an appeal against the decision entered in **Civil Appeal 65 of 2015** and maintains the same parties; that the Petition is brought against a deceased person and there

arises no need for a second substitution of the same deceased person by the same administrator; that while rendering the Judgment in **Civil Appeal 65 of 2015** the learned Judges failed to caption that Kelvin Wanjohi Muchira was acting in the capacity of administrator of the estate of the respondent; that this was a technical typing error and in no way nullifies the substitution previously done nor does it warrant the entire petition to be tossed out without fair hearing; that the error carried over to the instant Petition; that the Petition is properly before the Court, has merit and raises a matter of general public importance that should be heard to its natural conclusion; the appellant cites Article 159(2)(d) of the Constitution and this Court's decision in **Zachariah Okoth Obado vs. Edward Akong'o Ayugi & 2 Others** (Petition 4 of 2014) [2014] KESC 22 (KLR) as well as the High Court decision in **Fran Investments Limited v G4S Security Services Limited** [2015] KEHC 8121 (KLR) to urge that the court should not allow the prescriptions of procedure and form to overshadow the primary object of dispensing substantive justice to the parties; and

[8] Having considered the totality of the applications, the responses and submissions put forth, **WE NOW OPINE AS FOLLOWS:**

- a) For good order, we shall begin with the respondent's application dated 19th February, 2025 as it is more consequential.
- b) It is uncontroverted that while **Civil Appeal No. 65 of 2015** was still pending before the Court of Appeal, the respondent passed away. Consequently, an application dated 16th March 2017 was filed seeking to substitute the respondent. By consent, the Court allowed the application, and on 19th March 2018, Kelvin Wanjohi Muchira was duly substituted as the respondent in the matter.
- c) In the present matter, the appellant contends that the omission to reflect Kelvin Wanjohi Muchira as the substituted respondent in the current proceedings is merely a technical typographical error. The appellant further

asserts that this oversight does not nullify the valid substitution previously undertaken, nor does it warrant the entire petition to be tossed out without fair hearing.

- d) We distinguish the present matter from the authorities cited by the respondent namely ***Geeta Bharat Shah & 4 Others v Omar Said Mwatayari & Another*** [2009] KECA 126 (KLR), High Court decision in ***Manyange (Deceased) v TG (minor suing through her mother and next friend WMG)*** (Civil Appeal E005 of 2022) [2024] KEHC 1083 (KLR) and ELC decision in ***Japhet Nzila Muangi v Hamisi Juma Malee*** (2022) KEELC 434 (KLR). The decisions therein concern suits instituted against deceased persons. In those cases, the core issue was that the suits had been instituted against deceased persons. By the time the suits were filed, the respective respondents were already deceased. Consequently, the suits were deemed to have been initiated against non-existent persons, rendering them fundamentally defective and void. Such a suit cannot be cured by amendment, nor can it survive for purposes of substitution.
- e) In the instant matter, however, we are of the considered view that the substitution of Kelvin Wanjohi Muchira was properly executed during the pendency of the appeal before the Court of Appeal. We are further minded to find that the omission in the title of the Record of Appeal is a procedural misstep, which, guided by Article 159(2)(d) of the Constitution, should not eclipse the Court's overriding duty to administer substantive justice. The Constitution directs that courts must not allow procedural technicalities to override the delivery of fair and substantive justice to the parties. Therefore, while we acknowledge the importance of procedural compliance, we are not persuaded that such a minor irregularity, which we find can be corrected without injustice, warrants the striking out of the appeal.
- f) Further, Kelvin Wanjohi Muchira has not demonstrated any form of prejudice arising from the typographical omission of his name in the title of

the Record of Appeal. There is no evidence before this Court that the error impeded his ability to participate in the proceedings or that it occasioned any form of injustice.

- g) Accordingly, it is this Court's finding that the oversight, being purely procedural and non-prejudicial, is not sufficient grounds to strike out the appeal. In the interests of justice and guided by the principle of substantive justice under Article 159(2)(d), we hereby dismiss the application.
- h) Concerning the appellant's application for leave to file a supplementary record of appeal, pursuant to Rule 40 of the Supreme Court Rules, 2020, the contents of a record of appeal are required to include all relevant pleadings necessary for the determination of the appeal. Under rule 40(4) where a document is omitted from the record of appeal, the appellant may, within fifteen days of lodging the record of appeal, without leave, file the document in a supplementary record.
- i) The appellant filed his record of appeal on 5th July, 2024 and subsequently filed the present application on 17th September, 2024. Evidently, this is well over the fifteen-day window prescribed under Rule 40(4). Consequently, the appellant has invoked this court's jurisdiction to extend time under Rule 15(2) of the Supreme Court Rules 2020. Upon scrutiny, the sequence of events is as follows: the Court of Appeal in **Civil Appeal No. 65 of 2015** delivered its judgment on 5th February 2021. Thereafter, the appellant filed **Civil Application Sup. 1 of 2022** before the Court of Appeal, seeking certification that the matter raised issues of general public importance. This application was determined on 7th June 2024. Following the determination, the appellant, by a letter dated 13th June 2024, requested certified copies of the proceedings and the judgment in **Civil Appeal No. 65 of 2015**.
- j) On 2nd August 2024, the appellant received the certified proceedings and order for **Civil Application Sup. 1 of 2022**, and on 12th September 2024

received the certified proceedings and order for **Civil Appeal No. 65 of 2015**. On 17th September, 2024, the appellant filed the present application seeking extension of time to file his supplementary record of appeal, a mere five (5) days after receipt of the required documents.

k) In assessing the nature of the documents sought to be introduced through the supplementary record of appeal, it is apparent that the proceedings and orders from both **Civil Application Sup. 1 of 2022**, and **Civil Appeal No. 65 of 2015** are of critical significance to the appeal; and further considering that the nature of the matter has been certified as involving matters of great public interest, coupled with the fact that the delay of five days is not inordinate and finally that the application is unopposed, we find that applicant is deserving of our exercise of discretion in his favour and no prejudice will be occasioned to the respondent.

[9] In line with our decision in **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others**, (Petition 4 of 2012) [2014] KESC 31 (KLR), we order that the costs shall abide the outcome of the appeal.

[10] Consequently, and for the reasons aforesaid, we make the following orders:

- a. **The application dated 19th February, 2025 be and is hereby dismissed.**
- b. **The appellant and respondent are hereby directed to ensure that, moving forward, all pleadings bear the correct headings, accurately reflecting Kelvin Wanjohi Muchira as the respondent's administrator ad litem.**
- c. **The application dated 13th September, 2024 be and is hereby allowed.**

d. The appellant is hereby directed to file and serve his supplementary record of appeal within 7 days from the date of this ruling.

e. The costs shall abide the outcome of the appeal.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 9th day of June 2025.

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M.K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

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

REGISTRAR
SUPREME COURT OF KENYA