



**Kangangi v Iburi & another; Mwirigi & another (Intended Appellants) (Suing as Intended Legal Representatives of the Estate of Jacob Kabutu Kangangi) (Civil Appeal (Application) 258 of 2019) [2025] KECA 1491 (KLR) (19 September 2025) (Ruling)**

Neutral citation: [2025] KECA 1491 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL (APPLICATION) 258 OF 2019  
JM NGUGI, JA  
SEPTEMBER 19, 2025**

**BETWEEN**

**JACOB KABUTU KANGANGI ..... APPELLANT**

**AND**

**ERNEST M. MUGAMBI R. IBURI ..... 1<sup>ST</sup> RESPONDENT**

**JACOB HENRY KIRIMI ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**JANICE GACHERI MWIRIGI ..... INTENDED APPELLANT**

**KITHINJI KIMAITA MWIRIGI ..... INTENDED APPELLANT**

**SUING AS INTENDED LEGAL REPRESENTATIVES OF THE ESTATE OF  
JACOB KABUTU KANGANGI**

*(Being an Application to substitute JANICE GACHERI MWIRIGI & KITHINJI KIMAITA MWIRIGI as the legal representatives of the estate of the deceased JACOB KABUTU MWIRIGI in an Appeal from the Judgment of the Environment and Land Court at Meru, (Cherono, J.) dated 18th October, 2018 in ELC Case No. 61 of 2017 Formerly Civil Case No. 97 of 2004 (O.S))*

**RULING**

1. Before me is the applicant's Notice of Motion dated 17<sup>th</sup> July 2025. In its heading it cited a number of inapplicable provisions but it is clearly brought under Rule 102 of the Court of Appeal Rules, 2022 and the respondent so understood it, and responded to it as such. The applicants seek an order to revive the abated appeal herein and substitute Janice Gaceri Mwirigi and Kithinji Kimaita Mwirigi as legal representatives of the estate of the deceased appellant, Jacob Kabuto Mwirigi (also known as Jacob Kabutu Kangangi). The application is opposed by the 1<sup>st</sup> respondent. Although I will, in this ruling



where the context so requires, use 1<sup>st</sup> respondent in the singular, the 1<sup>st</sup> respondent actually constitutes of two persons namely Mary Kathure Mugambi and Ann Beatrice Kimathi who are jointly acting as legal representatives to the estate of Ernest M. Mugambi R. Iburi.

2. The applicants seek substitution under Rule 102 of the Court of Appeal Rules, 2022, following the death of the appellant, Jacob Kabuto Mwirigi. They explained that earlier attempts at substitution were defective. An application dated 31<sup>st</sup> March 2023 was withdrawn because it did not capture the substance of the relief sought. A subsequent application dated 25<sup>th</sup> March 2025 was withdrawn on 15<sup>th</sup> July 2025 after it was realized that the precise legal provision had not been cited. The applicants, therefore, filed the present motion to cure the omission.
3. It is the applicants' case that they should not be punished for mistakes of counsel. They relied on Rule 102, which provides for substitution and revival of abated appeals where sufficient cause is shown. They cited *Joseph Gachuhi Muthanji v Mary Wambui Njuguna* (Nyeri CA No. 34 of 2014), where the Court emphasized that even where delay was inordinate, it could be excused if adequately explained, especially where the dispute concerned land occupied for decades. They also invoked the overriding objective in sections 3A and 3B of the *Appellate Jurisdiction Act* and *Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, to argue that the Court should be guided by broad principles of justice and fairness.
4. Counsel cited *Issa Masudi Mwabumba v Alice Kavenya Mutunga & 4 Others* [2012] eKLR, where Koome, JA (as she then was) applied the oxygen principle to revive an abated appeal, holding that mistakes of counsel should not be visited upon the litigant. They also relied on *CMC Holdings Ltd v James Mumo Nzioka* [2004] KLR 173 and *Philip Chemowolo & Another v Augustine Kubede* (1982-88) KAR 103, where courts held that blunders, inadvertence or errors should not prevent a party from being heard on the merits.
5. The applicants, therefore, urge the Court to find that their counsel's mistakes were excusable, that they have acted in good faith, and that no prejudice would be suffered by the respondents if substitution is allowed. They submit that the pending appeal concerns ownership of land, a matter deserving determination on the merits, and that justice would be served by reviving the appeal and granting substitution.
6. The 1<sup>st</sup> respondent opposed the application through an affidavit sworn on 25<sup>th</sup> July, 2025 by Mary Kathure Mugambi and Ann Beatrice Kimathi and written submissions of even date. They argue that the application is an abuse of process, having been preceded by two earlier similar applications dated 31<sup>st</sup> March, 2023 and 25<sup>th</sup> March, 2025, both of which were withdrawn after wasting the Court's time.
7. The respondents submit that the appellant died on 10<sup>th</sup> December, 2020. Under Rule 102(2), the appeal abated on 10<sup>th</sup> December, 2021. The first substitution application was filed only on 31<sup>st</sup> March 2023, over one year and three months later. No explanation has been provided for this initial delay, which, they argue, is fatal.
8. They stressed that revival is only possible if sufficient cause is shown. In their view, none has been demonstrated. They cited *Said Sweilem Gheithan Saanum v Commissioner of Lands & 5 Others* [2015] KECA 284 (KLR), where the Court held that failure to seek substitution within a year of death leads to abatement by operation of law.
9. On the meaning of "sufficient cause," they relied on *Savings & Loan Kenya Ltd v Onyancha Bwomote* [2014] KECA 356 (KLR), where it was defined as "reason enough that explains or excuses the applicant's default." They also cited *Wilson Cheboi Yego v Samuel Kipsang Cheboi* [2019] KECA 638 (KLR),



10. The respondents argued that the unexplained delay of one year and three months before the first application was filed leaves such gaps and demonstrates indolence. They urged the Court to reject the invitation to excuse repeated blunders by counsel, noting that modern case law requires litigants to bear responsibility for their advocates' conduct. They stressed that the respondents, including an elderly widow, would be prejudiced by continued uncertainty, while the applicants had shown no diligence.
11. I have keenly considered the application, the affidavits filed, and the written submissions by the parties.
12. This application is governed by Rule 102 of the Court of Appeal Rules which provides:

“ 102. Death of party to appeal

1. An appeal shall not abate on the death of the appellant or the respondent but the Court shall, on the application of any interested person, cause the legal representative of the deceased to be made a party in place of the deceased.
2. If no application is made under sub-rule (1) within twelve months from the date of death of the appellant or respondent, the appeal shall abate.
3. The person claiming to be the legal representative of a deceased party or an interested party to an appeal may apply for an order to revive an appeal which has abated and, if it is proved that the legal representative was prevented by sufficient cause from continuing the appeal, the court shall revive the appeal upon such terms as to costs or otherwise as it deems fit.
4. An application under sub-rule (3) may be made before a single judge.”

13. In the present case, the appellant died on 10<sup>th</sup> December, 2020. No application for substitution was made within twelve months. By operation of Rule 102(2), the appeal abated on 10<sup>th</sup> December 2021. The first application to revive the appeal was filed on 31<sup>st</sup> March, 2023, more than one year and three months later.
14. The applicants have attributed subsequent delays to blunders of counsel in drafting and citing the wrong provisions. However, the most critical period — the gap between December 2021 (when the appeal abated) and March 2023 (when the first defective application was filed) — has not been explained at all. That omission is dispositive.
15. This Court has consistently held that explanation for delay is the key that unlocks the discretion of the Court both in extending time and reviving abated applications. In *Bi-Mach Engineers Ltd v James Kahoro Mwangi* [2011] eKLR, the Court held that inaction by counsel is not always an excusable mistake. Likewise, in *Wilson Cheboi Yego v Samuel Kipsang Cheboi* [2019] KECA 638 (KLR), the Court emphasized that:

“ sufficient cause must be rational, plausible, logical, convincing, reasonable and truthful...  
[and] should not leave unexplained gaps in the sequence of events.”
16. Applying these principles, I find that the applicants' reliance on counsel's blunders does not cure the unexplained delay before the first application. That delay of one year and three months remains a fatal



gap in the sequence of events. Without a coherent, candid, and truthful account of that period, the applicants have not discharged their burden to show sufficient cause. If explanation for delay is the key that unlocks the discretion of the Court, offering no explanation at all keeps the doors of judicial discretion firmly shut.

17. While courts are guided by the oxygen principle and lean towards hearing matters on the merits, that discretion must be exercised judicially. Here, the unexplained inordinate delay, coupled with repeated defective applications, demonstrates lack of diligence. The respondents are entitled to finality, and the scales of justice cannot tilt in favour of indolence.
18. For the foregoing reasons, I find no merit in the Notice of Motion dated 17<sup>th</sup> July 2025. The applicants have failed to demonstrate sufficient cause as required under Rule 102(3).
19. The application is, accordingly, dismissed with costs to the 1<sup>st</sup> respondent.

**DATED AND DELIVERED AT NYERI THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

