



REPUBLIC OF KENYA



KENYA LAW
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**Auko v Osoi (Environment and Land Appeal 2 of 2022)
[2025] KEELC 6319 (KLR) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6319 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 2 OF 2022
FO NYAGAKA, J
SEPTEMBER 25, 2025**

BETWEEN

GEORGE OPIYO AUKO APPELLANT

AND

MOSES OTIENO OSOTI RESPONDENT

RULING

1. Before this court is the Notice of Motion dated 3rd March, 2025 seeking the following orders;
 1. That this Honourable court be pleased to extend time for substitution of the deceased.
 2. That upon prayer (1) being granted, this honourable court be pleased to revive the instant appeal.
 3. That upon grant of prayer (1) and (2) above being granted the appellant/applicant one George Sila Opiyo be substituted with his wife one Emmaculate Awuor Owade.
 4. That costs of this application be provided for.
2. The Application is expressed to be brought under Section 1A, 1B and 3A of the *Civil Procedure Act* as read with Order 24 Rule 4 and 7 (2) of the Civil Procedure Rules and Article 159 of *the Constitution*. Additionally, it is premised on the grounds on the face of it and the averments in the Affidavit sworn by Emmaculate Awuor Owade.
3. In her affidavit, the deponent stated that she was the Appellant's wife and the Appellant, the deceased, passed away 11th May, 2020. She stated that the Appellant had filed the present appeal which survived him.



4. She stated further that before she was to be substituted in the suit, she needed to obtain an Ad Litem Grant. She added that owing to the differences among the deceased's beneficiaries, they failed to agree in time on who was to be chosen to handle the appeal in place of the deceased.
5. She went on to state that it took the intervention of the Area Chief after which she obtained a Grant of Letters Ad Litem to enable her defend the case. She further stated that she wishes for the suit to be first revived after which she be then substituted to enable her proceed with the case.
6. In response, the Respondent filed his grounds of opposition dated 25th April, 2025. He raised the following grounds:
 1. The instant Notice of Motion Application is Pre-mature, Mischievous, Misconceived and otherwise bad in law.
 2. The Applicant herein has not shown and/or established sufficient cause and/or basis, to warrant the orders being sought, whatsoever and/or howsoever.
 3. Besides, the Appellant having died on the 11 May 2020, the Appeal herein abated in May 2020 upon the lapse of the 12 Months with no attempts and/or steps whatsoever having been taken to substitute the deceased Appellant in line with the provisions of Order 24 Rule 3(2) of the Civil Procedure Rules, 2010 and consequently, the Application does not lie.
 4. Additionally, the Applicant on the other hand has not shown and/or established sufficient cause in line with Order 24 Rule 7 1 and 2 of the Civil Procedure Rules 2010 and/or basis to warrant the Orders of the revival of the suit whatsoever and howsoever.
 5. Besides, no plausible reason(s) has been placed on record before the Honourable Court to warrant granting the Orders sought, whatsoever and howsoever.
 6. Besides, the Applicant has not shown, demonstrated and/or established any evidence of prejudice has been occasioned, whatsoever and howsoever to warrant injustice and or granting the Orders of revival of the Appeal herein and by extension enlargement of time for substitution for coherence, same went into a deep slumber upon the death of the Appellant.
 7. Hitherto, the instant Application has been lodged and/or mounted with unreasonable delay, for clarity the instant Application has been brought 4 years and 9 months after the abatement of the Appeal herein, therefore, Appellant/Applicant is guilty of laches and equity do not aid the indolent whatsoever.
 8. Moreover, the Applicant has not shown and/or established any evidence of Substantial loss, whatsoever and/or howsoever, to warrant granting the Orders of revival of the Appeal and by extension the enlargement of time for substitution.
 9. Be that as it may, the instant Application has been brought to Court with unclean hands and hence same is mala-fides. In any event, the Appellant/Applicant is devoid of candor, hence undeserving of Equitable Discretion of the Honourable Court.
 10. Besides, the instant Application constitutes and/or amounts to an abuse of the Due process of Court.
 11. Consequently, there does not exist any special and/or peculiar circumstances to warrant granting the Orders being sought, whatsoever and/or howsoever.
 12. In the circumstances, the instant Application is otherwise devoid of merits, whatsoever.



Submissions

7. Counsel for the Appellant filed his submissions dated 29th April, 2025. Counsel for the Respondent on the other hand filed his submissions dated 19th May, 2025 where he identified two issues for determination. The first issue was whether the application herein is merited and/or tenable while the second was whether the application meets the threshold to warrant the prayers being sought.
8. He submits that the case commenced in 2015 vide Kisii ELC No. 355 of 2015 (sic) and that the Appellant passed on the 11th May, 2020 after the Memorandum of Appeal was filed on 22nd August, 2019. He relied on Order 24 Rule 3(1) of the Civil Procedure Rules and submits that the suit abated since there was no substitution upon the lapse of 12 months.
9. He further submits that substitution was only done on 3rd March, 2025 vide the present application that is 4 years 9 months after abatement of the appeal. Counsel submits that the delay was unreasonable and the same ought to be dismissed.
10. It was his submission that the extension of time was the court's discretion and upon fulfilment of the threshold set out in the case of Nicholas Kiptoo Korir Arap Salat V Independent Electoral & Boundaries Commission & 7 Others [2014] eKLR.
11. He submits that the instant application did not disclose any plausible reasons to warrant grant of the prayers sought. He added that the reason alluded to by the Appellant that resulted in the delay caused by family feuds was never substantiated.
12. He submits that the Appellant ought to have known that equity aids the vigilant. He also submits that by virtue of the suit having abated, it rendered the application an exercise in futility.
13. Counsel submits that the suit was long concluded and the Respondent ought to be allowed to enjoy the fruits of his successful litigation. He cited the case of Aggrey Swaka Waswa V Patrick Omonge Khaemba; Thomas Omonge & 3 Others (Proposed Respondents) [2020] eKLR.
14. In conclusion, he submits that there was inordinate delay on the Appellant's part and that he failed to give sufficient reasons for the delay to warrant extension of time. He urged the court to dismiss the application with costs.

Analysis and Determination

15. I have considered the pleadings, the grounds of opposition and the submissions of the parties. The issue that arises for determination is whether the application is merited.
16. It is not in dispute that the Appellant is deceased and that he died on 11th May, 2020 as evidenced by the annexed certificate of death. Under Order 24 Rule 3(1) of the Civil Procedure Rules it provides that if a party is not substituted within 12 months the suit automatically abates.
17. It is not in dispute that the Appellant had filed an appeal on 22nd August, 2019 but substitution was never done after the appellant died. It is also not in dispute that the appeal abated one year after the death of the appellant, that is to say, abatement occurred on 11th May 2021.
18. It is trite law that the proposed representative ought to first apply for revival of the suit or appeal after which an application for substitution is thereafter made. It is this court's view that it is procedurally improper to apply for both revival and substitution at the same time as done in the instant suit.
19. Be that as it may, this court shall proceed to determine whether the reasons for revival of the suit is sufficient to warrant extension of time. The instant application is premised on the grounds that the,



deceased, who was the Appellant, passed away during the pendency of the appeal. Further, that due to family wrangles it took time before they could agree on who was to substitute him resulting in delay of issuance of the grant ad litem.

20. In the case of *Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] KESC 12 (KLR) the court held as follows:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;
2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents if extension is granted;
6. whether the application has been brought without undue delay; and
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time”

21. I have carefully considered the court records, specifically, the proceedings. It is a fact that the Appellant had filed the suit on 22nd August, 2019 while the present application filed on 3rd March, 2025. It is also a fact that the suit having abated on 11th May 2021, the difference in time between then and when the instant application was brought was two (2) months shy of about 4 years when the Applicant did not take any steps advancing the case.

22. The deceased’s wife alleges that the delay was caused by family wrangles on who was to substitute the deceased but she failed to avail any evidence to prove any of her assertions. For instance, she did not provide any documentary evidence of meetings held by the family, the local administration or even a mediator to confirm that indeed there were family wrangles during the period. Moreover, I have perused the Court file. The record bears that the applicant filed an earlier application dated 25th October, 2025 in which she sought the revival of the Appeal and the substitution of her name, Emmaculae Awuor Owade. Further, prior to that she had filed another one dated 8th April 2024 in which she sought substitution of her name without applying for the revival of the suit but she withdrew the same on 25th October 2024. The previous application was also withdrawn on 2nd April 2025, without much explanation.

23. Consequently, this court is of the view that the period of almost 4 years is quite long or inordinate and the reasons advanced for the delay are not sufficient to warrant exercise of this court’s discretion



to extend time. The upshot of the foregoing is that I find that the Application is without merit and I hereby dismiss it with no order as to costs.

24. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM
THIS 25TH THE SEPTEMBER 2025.**

HON. DR. IUR NYAGAKA

JUDGE

From 3:34 PM, in the presence of

Court Assistant: Mr. Terence

Ms. Anyango Advocate for the Appellant

Mr. Mulisa Advocate for the Respondent

