



REPUBLIC OF KENYA



**In Re Estate of Hussein Mwanza Etokho (Deceased) (Civil Appeal (Application)
36 of 2016) [2025] KECA 1696 (KLR) (21 October 2025) (Ruling)**

Neutral citation: [2025] KECA 1696 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) 36 OF 2016
MSA MAKHANDIA, JA
OCTOBER 21, 2025**

BETWEEN

**FELIX ETOKHO (AS ADMINISTRATOR OF THE ESTATE OF MUSA SUMBA
ETOKHO) APPELLANT**

AND

HUSSEIN MWANZA ETOKHO (DECEASED) RESPONDENT

AND

ABDALLA ANABASWA MWANZA APPLICANT

YUSUF OTOCHI MWANZA APPLICANT

*(Being an application for substitution under Section 1,1a, 1b, 3, 3a, 37(1), 63e, 95, Order
24 Rule 4 of the Civil Procedure Act 2010, Section 4 of the Appellate Jurisdiction Act,
Article 159 of the Constitution 2010 arising from the Judgment of the High Court of
Kenya at Kakamega, (Sitati, J.,) dated 29th July, 2015 in HC Succ. Cause No. 59 of 1996)*

RULING

1. The respondent in this appeal, Hussein Mwanza Etokho died on the 4th of December, 2023 hereinafter, “the deceased”.
2. By a Notice of Motion dated 10th of August 2025, the applicants, Abdalla Anabaswa Mwanza, Yusuf Otochi Mwanza and Adam Siro Mwanza, seek the following orders:
 - i. That leave be granted them to enlarge time so that they be substituted in the appeal in the place of the deceased.
 - ii. That upon granting of prayer 1 herein above, the deceased be substituted by the applicants who are the legal personal representatives of his estate.



- iii. That the costs of this application be in the cause.
- iv. Any other relief this Honourable court deems fit and just to grant.
3. According to the applicants, the appeal abated as they were trying to agree on who among the huge polygamous family the deceased left behind should petition for the grant of the letters of administration in respect of the deceased estate as well as financial constraints that were facing them. This is now something behind them since they have now agreed on the persons to administer the estate; the applicants. They also claim that before the deceased passed on, he had filed a bill of costs against the respondent that is pending taxation in this Court and the substitution is therefore to enable them proceed with taxation as that cause of action survived the deceased.
4. The application is vehemently opposed through a replying affidavit dated 30th September 2025 by the respondent.
5. The gist of the opposition is that there is no automatic right of substitution in a matter that has abated by operation of the law and that such substitution as envisaged in the instant application would serve no legal purpose. That what the applicants should have done first is to seek the revival of the abated appeal before seeking thereafter the substitution.
6. In my view, it is trite law that if no application for substitution is made within one year of the death of either party to an appeal, the appeal shall abate automatically by operation of Law, see Rule 102 (2) of the Court of Appeal Rules. In a nutshell it provides that where a party to an appeal dies, and no substitution is made within one year, the appeal abates against the surviving party or parties.
7. This Court has had occasion to consider and clarify what abatement entails. In the case of Sweilem Gheithan Vs Commissioner of Lands & 5 others [2015] eKLR, the Court held that where a party dies, the suit does not abate automatically. Abatement only occurs after one year if no substitution is made.
8. In Rebecca Mijide Mungole & another vs Kenya Power & Lighting Company Limite & 2 others [2017] eKLR, the Court reiterated that substitution must be done within one year. Failure leads to automatic abatement. The only remedy after abatement is an application for revival of the suit and or appeal if sufficient cause is shown. This is the essence of Rule 102(3) of this Court's Rules.
9. In this case no prayer for revival has been made in the application.

In the absence of such prayer, I would agree with the respondent that the application is fatally defective. In Mbaya Ngulwa Vs Kenya Power Lighting Company Limited [2018] eKLR, the Court stressed that abatement is by operation of Law and not by Judicial pronouncement. Courts have no jurisdiction to proceed with an abated suit unless it is revived. In Soni Vs Mohan Dairy [1963] EA 98, the Court explained that abatement is a matter of substantive law once the statutory period lapses.
10. Given all the foregoing, I would dismiss the application with costs to the respondent. Let the applicants seek the revival of the abated appeal first.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF OCTOBER, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR_

