

**IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: (OMONDI, JA, (IN

CHAMBERS)) CIVIL APPLICATION NO.

E099 OF 2020 BETWEEN

JOASH ONYANGO NYIERO.....APPLICANT

AND

ZACHARY OMONDI ODONGO.....RESPONDENT

(Being an application for substitution of the respondent in an appeal from the Judgment and Decree of the High Court of Kenya at Kisumu (Maina, J.) dated 9th March, 2017

in

Succession Cause 649 of 2011)

RULING

1. The Notice of Motion dated 30th July 2025, and supported by the affidavit sworn by Isdora Anyango Owuor, is made under rules 44 & 87 of the Court of Appeal Rules, 2022 seeking leave for the name of Joash Onyango Nyiero (deceased) to be substituted with that of Isdora Anyango Owuor, the Legal Representative of the estate of the deceased. It is based on grounds that the respondent in the appeal, Joash Onyango Nyiero died in the year 2018; and the legal representative to

the estate, was granted the certificate of grant on 9th November, 2021. It is argued that in the interest of justice the proposed substitution ought to be effected, to enhance proper and effective prosecution of the appeal.

2. Isdora describes herself as the widow and legal representative of the estate of the late Joash Onyango Nyiero, who passed on 8th October, 2018, as confirmed by a copy of the death certificate. She states, that she has obtained the Grant of Letters of Administration Intestate dated 24th February, 2021, and a copy of the confirmed grant dated 9th November, 2021. It is her contention that for this matter to proceed seamlessly, it is vital that the deceased party be substituted to prevent abatement of the proceedings.
3. In a replying affidavit sworn by Zachary Omondi Odongo, this court is urged to dismiss the application which is described as a non-starter on grounds that Civil Appeal No. 50 of 2020 which had been filed, was withdrawn for having been filed out of time and without leave of the court, so there exists no appeal to warrant substitution of parties. In the same breath, the respondent states that subsequently through his current Advocate on record he filed **Kisumu**

Civil Appeal No. 248 of

2021, Zachary Omondi Odongo vs. Isdora Anyango Owuor (Suing as administrator of estate of Joash Onyango Nyiero-deceased) which is pending hearing and determination before the court. From the annexed memorandum of appeal, that appeal is in relation to the same judgment referred to as Succession cause No. 649 of 2011 at the High Court of Kenya at Kisumu (*Maina, J.*) delivered on the 9th March, 2017.

4. The applicant points out that the current appeal was filed in 2020, two years after the respondent in the matter had passed away, that the appellant had the option of filing an application for substitution, but did not do so.
5. In support of this application, the applicant refers to the decision in **Njoroge & another vs. Kamau (deceased) & another (Civil Appeal (Application) No. E051 of 2019)** [2024] KEC4806 (KLR) held as follows:

"In holding that the delay herein is not inordinate, I observe that the Court in Issa Masudi Mwabumba vs. Alice Kavenya Mutunga & 4 others [2012] eKLR revived an appeal which had abated for 2 years and 8 months."

6. Reference is also made to the Court of Appeal holding in **CKM vs. ENM & another (Civil Appeal No. 250 of 2019)(2024) KECA 293 (KLR)** that:

"It is basic that the rules of natural justice and fair play would require that where a party to a suit dies and the cause of action survives him, his estate has to be heard through the estate's legal representative before a decision can be rendered. In any case, any decision made against such an estate can only be satisfied by the legal representative"

7. The applicant points out that the current appeal was filed in 2020, two years after the respondent in the matter had passed away; so that the appeal has actually abated, however she has opted to make the application for substitution that notwithstanding. The respondent in this application does not deny that Joash Onyango Nyiero no longer inhabits this planet. Under Rule 87 (2) of the Court of Appeal Rules:

An appeal shall not be incompetent by reason only that the respondent was dead at the time when it was instituted 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 person.

8. My dilemma is that neither party has attached a copy of the contested judgment, to enable this court appreciate what the dispute in the trial court was all about and whether the cause of action would survive the deceased.
9. This lament stems from the fact that whether a court should allow revival of an abated suit and substitution of a deceased an applicant, is required to demonstrate that the cause of action in the abated suit survives the death of the plaintiff. Fortunately, this omission is not fatal as the respondent has confirmed that he has filed another appeal **Civil Appeal No. 248 of 2021, Zachary Omondi Odongo vs. Isdora Anyango Owuor (Suing as administrator of estate of Joash Onyango Nyiero-deceased)** relating to the same contested decision, so the argument that there exists no appeal, evaporates into thin air. In addition, Rule 102 (1) provides that:

An appeal shall not abate on the death of the appellant or respondent but the Court shall, on the application of any interested person, cause the legal representative of the deceased person to be made a party in place of the deceased.

8. The respondent has not clarified how he included Isdolah in that pending appeal; whether he obtained orders for substitution or whether it was just a game of substitution by default. Whatever the situation, to arrest the mischief that might result from the evident demise, the widow of the late Joash Onyango Nyiero has taken steps to ensure the estate is properly included in the pending appeal. I detect no prejudice that would be occasioned in allowing the order sought. Consequently, the application is allowed, the costs shall abide the appeal.

Dated and delivered at Kisumu this 30th day of January, 2026.

H. A. OMONDI

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR