

**IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: OMONDI, JA, (IN CHAMBERS))

**CIVIL APPEAL (APPLICATION) NO. E248 OF
2022**

BETWEEN

JOSEPH OSUNDWA OTIPA.....APPELLANT

AND

**KUNANI WAKUNGWI alias
MWANAISHA KUNANI AKUNGWI.....1ST RESPONDENT
ASMAN OSUNDWA AKUNGWI.....2ND RESPONDENT
ISMAEL WESONGA ESHIRERE 3RD
RESPONDENT
MOHAMED MAKOKHA OMAR.....4TH RESPONDENT
PATRICK WASWA OTIPA 5TH**

RESPONDENT AND

JUSTINE OTIPA OFISI.....INTERESTED PARTY/APPLICANT

***(Being an application for substitution of the appellant in
an appeal from the High Court of Kenya at Kakamega***

in

**Civil Appeal No. 248 of
2022)**

RULING

1. The late Joseph Osundwa Otipa had been involved in a of burial dispute which begun in the magistrate’s court in Civil Case No. E042 of 2024; this was followed by High Court

Appeal Civil No. E153 of 2024 and the judgement issued on
6th November 2024 upholding the lower court judgement;
and

barring interment of a body on the disputed parcel L.R. No. East/Wanga/Eluche/2286, and further requiring the appellant to vacate the suit land.

2. The appellant, Joseph Osundwa Otipa passed away on 27th April 2024, while the appeal was still pending. This fact of death is supported by the annexed death certificate. Justine Otipa Ofisi the son to the appellant intends to substitute his late father in Civil Appeal No. E248 of 2022, and proceed with the said appeal, as he has obtained a limited grant of letter of administration vide case No. E074 of 2025 permitting him to substitute the deceased in all the cases pending in courts. The applicant is apprehensive that if the deceased is not substituted by his legal representative, then his family which has survived him will suffer irreparable loss. This is what has led to filing the Notice of Motion dated 30th November 2025, which date he seeks to amend to read 30th October 2025 seeking substitution of the late appellant.
3. The respondents by a replying affidavit dated 26th November, 2025, sworn by Asman Osundwa concede the death of the appellant as well as issuance of limited grant to the applicant. The respondents point out that the limited

grant was issued on 25th September 2025; and the present application filed on

30th October 2025, to argue that it is over a year since the death of the appellant and since no application for substitution was made within that year, then the appeal abated by operation of the law, so technically, there is no appeal pending; and this application ought to be dismissed with costs. In support of their submissions the respondent refers to the case of **Said Swellem Gheithan Saanum vs. the Attorney General and 5 Others Malindi CA No. 16 of 2015.**

4. The crux of the appeal is whether the applicant's family ought to vacate the land which they have occupied over the years. In my view that is not an idle argument.
5. Rule 102(1) of the Court of Appeal Rules 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.

(2) If no application is made under sub-rule (1) within twelve months from the date of the 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.

6. To this extent, the respondents are right that as relates the appeal has abated. Yet that should not be the final nail as sub-

rule (3) offers a window of refuge. This is fortified by the pronouncements in **CKM vs. ENM & another (Civil Appeal 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. How long is the delay in this matter? A year and 5 months. Is this inordinate? In **Njoroge & another vs. Kamau (Deceased) & another (Civil Appeal (Application) E051 of 2019) [2024] KECA 806 (KLR)** this Court 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. Similarly, in Elizabeth Wanjiru Njenga & another [supra], the Court, sitting on a reference, revived an appeal that had abated for a period of 1 year 7 months. I am also aware that the applicants have invoked the provisions of sections 3A and 3B of the Appellate Jurisdiction Act which requires that courts to be guided by the interests of justice and fairness in order to facilitate a just, expeditious and proportionate resolution of appeals."

8. In the present instance, the suit abated in April 2025, the limited grant was only issued in September 2025 and a

month later, the application was filed, I of course take note of the respondent's lament regarding what a defect in the date

reading November instead of October. It is not far-fetched to infer that the delay was as a result of waiting to obtain a recognised legal status before filing the application. I am satisfied that the applicant has demonstrated his legal status in relation to the estate of the deceased. Consequently, the application be and is hereby allowed. The late Joseph Osundwa Otipa shall be substituted with Justine Otipa Ofisi as the appellant. The costs shall be in the cause.

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