REPUBLIC OF KENYA IN THE COURT OF APPEAL

AT NYERI

[CORAM: KANTAI, NYAMWEYA, & ALI-ARONI, JJ. A.]

CIVIL APPEAL (APPLICATION) NO. 258 OF 2019 BETWEEN

JACOB KABUTU KANGANGI.....APPELLANT

AND

ERNEST M. MUGAMBI R. IBURI.....1ST RESPONDENT

JACOB HENRY KIRIMI.....2ND RESPONDENT

AND

JANICE GACHERI MWIRIGI &

KITHINJI KIMAITA MWIRIGI (Suing as Intended Legal Representatives of the Estate of Jacob Kabutu Kangangi)...

.....APPLICANTS

(Being an application for substitution of the appellant 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))

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RULING OF THE COURT

1. The applicants herein are dissatisfied with the decision made by a single Judge of this Court ***(J. Ngugi JA***) in a ruling delivered on 19th September 2025 and, by a letter dated 25th September 2025, have applied for a reference before a full bench of the Court under Rule 57 (1) (b) of the Court of Appeal Rules of 2022. The said ruling was on an application filed by the applicants dated 17th July 2025, seeking 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) under Rule 102 of the Court of Appeal Rules, 2022.

2. In dismissing the application, the Honourable single Judge noted that after the appellant died on 10th December, 2020, no application for substitution was made within twelve months and the appeal abated on 10th December 2021. Further, that the first application to revive the appeal filed on 31st March, 2023, more than one year and three months later. The single Judge, while relying on the principle that there must be sufficient and reasonable explanation given for any delay, held as follows:

> ***"16 …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."***

3. The applicants' advocates urged in written submissions on the reference dated 21st November 2025 that they had demonstrated sufficient cause to revive this appeal, and that the delay in filing of the application on 31st March 2023 after receipt of the *ad-litem* letters of administration on 18th November 2021 was occasioned by the misplacement of the

High Court file while being transitioned to Nkubu Registry, and after the file was found, the inadvertent mistake by their advocate in filing the application

dated 7th June 2022 for substitution before the High Court instead of the Court of Appeal. In addition, that the single Judge failed to consider the reply in support of application as well as submissions dated 28th July 2025 filed by the 2nd respondent, and the rulings delivered in favour of the 1st and 2nd respondents who also filed their applications for substitution which were allowed on the consideration of the appeal before this Court. The applicants submitted that the 1st respondent's application was filed one year and seven months upon receipt of the letters of grant of administration, while the 2nd respondent's application was filed three years and seven months upon receipt of the letters of grant of administration, and the standards being applied to all parties should be equal in the eyes of the law and justice.

4. The 1st respondent's advocates filed submissions dated 20th November 2025, in opposition to the reference, and cited various decisions of this Court to buttress the position that in considering whether or not the exercise of judicial discretion by the learned single Judge should be interfered with, the full Court does not substitute its discretion for that of the learned single Judge, but has to consider whether that discretion was exercised judicially. Accordingly, that, having considered all the material before him, the single Judge came to the conclusion in that the applicants' application was unmerited having failed to demonstrate sufficient cause as required under Rule 102 (3) of this Court's Rules, and he properly appreciated the facts

before him, took into account all the relevant facts and correctly applied the law to the facts and properly exercised his discretion.

5. ***Ms. Gikundi***, learned counsel for the applicants, and ***Mr. John Muthomi***, learned counsel for the 1st respondent, highlighted the above written submissions during the hearing of the reference held on the Court's virtual platform on 25th November 2025. ***Mr. Abuya***, learned counsel for the 2nd respondent relied on his list of authorities dated 24th November 2025 to submit that the Honourable single Judge disregarded the replying affidavit and submissions filed by the 2nd respondent in response to, and in support of the application for extension of time and thereby failed to take into account a relevant fact.

6. It is now well established that, for a full bench of this Court to interfere with the decision of a single Judge, an applicant must demonstrate that the single Judge failed to take into account a relevant matter which he/she was obliged to take into account, took into account an irrelevant matter which he/she ought not to have taken into account, applied a wrong principle of law, or misunderstood the evidence or the effect of the evidence on a particular aspect of the matter and thus reached a wrong conclusion, or, short of any of the foregoing factors, that the decision of the single Judge is plainly wrong, taking into account all the surrounding circumstances of the case.

7. This Court ***(O'kubasu, Githinji & Nyamu, JJ.A.),*** while dealing with a reference from the decision of a single judge in **John Koyi Waluke vs Moses Masika Wetangula & 2 others [2010], eKLR** stated thus:

> ***"Having considered all that has been urged before us in this Reference we would say that we have stated time without number that in exercising the unfettered discretion under Rule 4 of this Court's Rules, a single Judge of the Court is doing so on behalf of the whole Court, and the full bench of the Court would only be entitled to interfere with the exercise of discretion if it be shown that in the process of exercising the discretion, the single Judge has taken into account an irrelevant matter which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into account or that he misapprehended some aspect of the evidence and the law applicable or short of these, that his decision was plainly wrong and could not have been arrived at by a reasonable tribunal properly directing itself to the evidence and the law. It is not enough, for example, to show the full Court that had it been sitting in place of the single Judge, it would have arrived at a different result."***

8. We have perused the pleadings filed by the parties in the application giving rise to the reference before us, namely the Notice of Motion dated 17th July 2025 and its supporting affidavit, the 1st respondent's replying affidavit and written submissions both dated 25th July 2025, and the 2nd respondent's replying affidavit dated 28th July 201 and

written submissions of even date. In summary, the explanations offered by the applicants in their application dated 17th July 2025, were that after being issued with letters of administrators on 18th November 2021, they filed an application dated 7th June, 2022 for substitution before the Environment and Land Court in **ECL**

Suit No. 61 of 2017, however the said application was never heard and determined due to the fact that the file had been archived in Nkubu and had been misplaced. A copy of the said application was annexed to their supporting affidavit. Their advocates thereafter filed two applications, dated 31st March 2023 and 25th March 2025, which had to be withdrawn due to legal error made in the applications. They pleaded that the blunders of their advocate should not be visited upon them.

9. The 2nd respondent supported the application, and, while pointing out that this Court ***(L. Kimaru JA***) had allowed her to substitute the 2nd respondent in a ruling delivered on 26th July 2024, urged that the explanation offered by the applicants was plausible, and the applicants had satisfied the requirements under the Constitution as well as Rule 102(1), (2) and (3) in the Court of Appeal Rules. The application was opposed by the 1st respondent, who averred that there was an unexplained delay of one year and three months before the first application for revival and substitution was filed by the applicants on 31st March 2023, which demonstrated indolence on their part.

10. The 1st respondent on his part opposed the application and averred that there was a prolonged unexplained and inexcusable delay of about 1 year and 3 months between the abatement of the appeal on 10th December, 2021 and the filing of the said withdrawn application dated 31st March, 2023 in this Court, and that even though the applicants

alleged that they filed an application dated 7th June, 2022 in **ELC Suit No. 61of 2017**, it begged

the question as to why they would file an application meant to revive an abated appeal before this Court at the wrong forum, and termed it an “insufficient and dry composite explanation”.

11. ***J. Ngugi, JA.*** ably and duly considered the provisions of Rule 102 of the Court of Appeal Rules on the revival of abated appeals and substitution of deceased parties in the ruling dated 19th September 2025, while citing the relevant decisions of this Court in **Bi-Mach Engineers Ltd vs James Kahoro Mwangi [2011] eKLR,** and **Wilson Cheboi Yego vs Samuel Kipsang Cheboi [2019] KECA 638 (KLR)**. Rule 102 in this respect requires that an application for substitution of a deceased appellant or respondent needs to be lodged by their legal representative within 12 months from the date of death, failing which the appeal will abate. The Rule also grants a single Judge of this Court discretion to revive the appeal if the legal representative demonstrates that they were prevented by a sufficient cause from making the application within the 12 months window. ***J. Ngugi JA*** in addition noted that the appellant died on 10th December 2020, and no application for substitution was made within twelve months. Accordingly, the single Judge found that by operation of Rule 102(2), the appeal abated on 10th December 2021.

12. The main factor that influenced the single Judge’s decision to dismiss the

applicants’ application was that the first application to revive

the appeal was filed on 31st March, 2023, more than one year and three months later, and that the " *the most critical period — the gap between December 2021*

(when the appeal abated) and March 2023 (when the first defective application was filed) — had not been explained at all", and which omission was described as dispositive of the application. Further, that the applicants' reliance on counsel's blunders does not cure the unexplained delay before the first application. However, the applicants did demonstrate that they filed an earlier application dated 7th June, 2022 for revival of the appeal and substitution before the Environment and Land Court, and explained that the reason for the delay in prosecuting the application was because the file was missing. The filing of the application in the ELC was not controverted by the respondents, but it appears that it may have been overlooked by the single Judge.

13. Therefore, the "*first defective application*" referred to by the single Judge in his ruling was in actual fact the second defective application filed by the applicants, the first defective application having been filed in the ELC before 31st March 2023, and which was offered by the applicants as the explanation for the delay during the period between December 2021 and March 2023. It is also notable that the single Judge did not refer to, nor consider the averments and submissions made by the 2nd respondent in support of the application, including the fact that the 2nd respondent had also been substituted in an earlier ruling delivered by a single Judge of this Court. We are consequently persuaded that had the above facts been considered by the single

Judge, they may have impacted differently on the exercise of his discretion.

14. In the circumstances, we are satisfied that there are sufficient grounds to interfere with the Honourable single Judge's exercise of discretion, and the applicants' reference dated 25th September 2025 is found to have merit and therefore succeeds. We accordingly allow the applicants' application dated 17th July 2025 and revive **NYR Civil Appeal No. 258 of 2019** which had abated, and in addition substitute Janice Gaceri Mwirigi & Kithinji Kimaita Mwirigi as the legal representatives of the estate of the deceased Jacob Kabutu Mwirigi, the appellant in the said appeal. Lastly, as this is a family related dispute, we make no order as regards the costs of the application dated 17th July 2025, or of the reference dated 25th September 2025.
15. Orders accordingly.

Dated and delivered at Nyeri this 13th day of February, 2026.

S. ole KANTAI
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..... JUDGE OF APPEAL

P. NYAMWEYA
.....
..... JUDGE OF APPEAL

ALI – ARONI
.....
..... JUDGE OF APPEAL

I certify that this is a true copy of the

original
Signed
DEPUTY REGISTRAR