

**IN THE COURT OF APPEAL  
AT NAIROBI**

**(CORAM: OKONG'O J.A. (IN CHAMBERS))**

**CIVIL APPEAL (APPLICATION) NO. E303 OF  
2021**

**BETWEEN**

**MOSES KIPLANGAT SAIKWA**

*(Suing as the personal representative of the estate of*

**ANDREW KISA SAIKWA).....APPELLANT**

**AND**

**VOMORONO LIMITED .....1<sup>ST</sup>**

**RESPONDENT AFRICAN MERCHANT ASSURANCE**

**COMPANY LTD ..... 2<sup>ND</sup>**

**RESPONDENT CHIEF LAND REGISTRAR.....3<sup>RD</sup>**

**RESPONDENT**

**JOHN MTAY SAIKWA.....INTENDED INTERESTED PARTY**

**AND**

**1. ESTHER CHEPKEMOY SAIKWA**

**2. DORCAS MUNABI SAIKWA**

**3. AMOS POTENDO SAIKWA**

**4. RACHAEL CHEPKEMOI SAIKWA.....APPLICANTS**

*(An application for substitution of the deceased  
Appellant in*

***Civil Appeal No. E303 of 2021)***

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**RULING**

1. **Moses Kiplangat Saikwa**, deceased (hereinafter referred to only as “the appellant”) instituted Civil Appeal No. E303 of 2021(hereinafter referred to only as “the appeal”) as the legal

representative of the estate of **Andrew Kisa Saikwa**,  
deceased (hereinafter referred to only as “the deceased”).

The deceased

died on 19<sup>th</sup> June 1985, and the appellant was granted probate of his estate on 5<sup>th</sup> June 2018. The appellant died on 17<sup>th</sup> February 2024 while the appeal was pending. The 4<sup>th</sup> applicant herein and one Andrew Kwemoi Saikwa were appointed as the legal representatives of the estate of the appellant on 11<sup>th</sup> July 2024, while the applicants herein were appointed as the administrators of the estate of the deceased on 6<sup>th</sup> December 2024.

2. The 4<sup>th</sup> applicant filed an application dated 14<sup>th</sup> February 2025 to be substituted as the appellant in the appeal in place of the appellant. The 4<sup>th</sup> applicant's application was dismissed by the court (**Mumbi Ngugi J.A**) on 5<sup>th</sup> June 2025. In the ruling, the court observed that the 4<sup>th</sup> applicant, who was a legal representative of the appellant, could not be substituted in the appeal as the appellant, in exclusion of the other administrators of the estate of the deceased, on whose behalf the appellant had brought the appeal. The court gave the 4<sup>th</sup> applicant and the other administrators of the estate of the deceased the liberty to file a fresh application for the substitution of the appellant in the appeal.
3. By the time the court made its orders on 5<sup>th</sup> June 2025, the appeal had abated, the appellant having died on 17<sup>th</sup>

February

2024. When the appeal came up for hearing before the full bench (**Gatembu Kairu, Mumbi Ngugi and P. Nyamweya JJ.A.**) on 29<sup>th</sup> October 2025, the Court marked the appeal as having abated.

4. What is before me is the applicants' Notice of Motion application dated 24<sup>th</sup> October 2025. In the application, the applicants, who are the administrators of the estate of the deceased pursuant to a grant of probate issued to them on 6<sup>th</sup> December 2024, have sought an order for the revival of the appeal and the substitution of themselves as the appellants in place of the deceased, appellant. The application was supported by the joint affidavit of the applicants, sworn on 24<sup>th</sup> October 2025. The applicants averred that the appellant, who brought the appeal on behalf of the estate of the deceased, died on 17<sup>th</sup> February 2024, and they were appointed as the new administrators of the said estate on 6<sup>th</sup> December 2024. The applicants averred that they were desirous of being substituted as the appellants in the appeal in place of the deceased appellant.
5. The applicants averred that the appeal had since abated, and it was necessary for it to be revived before they could be

substituted in the Appeal as appellants in place of the deceased appellant. The applicants averred that the 1<sup>st</sup> applicant had

brought a similar application for substitution before the appeal abated, but it was dismissed on 5<sup>th</sup> June 2025 for non-joinder of the other administrators of the deceased's estate. The applicants averred that, after the dismissal of the said application, they took time to file the present application due to disagreements among themselves over the distribution of the estate of the deceased. The applicants averred that it was in the wider interest of justice that the application be allowed.

6. The application was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents through grounds of opposition dated 29<sup>th</sup> October 2025. Although grounds of opposition are not provided for in the rules of this court, I will nevertheless consider them for what they are worth. The 1<sup>st</sup> and 2<sup>nd</sup> respondents contended that the applicants' application was *res judicata*, as a similar application was considered and dismissed by the court. The 1<sup>st</sup> and 2<sup>nd</sup> respondents further contended that the applicants' advocates were not properly on record in the appeal, and that the application had been brought after an inordinate delay. The 1<sup>st</sup> and 2<sup>nd</sup> respondents further contended that the application was incompetent, vexatious, and an abuse of the court's process.

7. The parties filed written submissions as directed by the court.

The applicants filed submissions and supplementary

submissions dated 12<sup>th</sup> November 2025 and 20<sup>th</sup> February 2026, respectively, in which they reiterated the averments in their affidavit in support of the application. The applicants denied that the application was *res judicata*. The applicants submitted that the delay in filing the application was well explained. The applicants urged the court to do substantive justice without undue regard to technicalities, as it was enjoined to do under Article 159 of the Constitution and Section 1 of the Appellate Jurisdiction Act.

8. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed submissions dated 19<sup>th</sup> February 2026. The 1<sup>st</sup> and 2<sup>nd</sup> respondents reiterated that the applicants' application was an abuse of the court's process, as the issue of the substitution of the deceased appellant and the entire appeal had been considered and determined by this court in a ruling delivered on 29<sup>th</sup> October 2025.
9. The Applicants' application was brought under **Rule 102(1) of the Court of Appeal Rules**, which provides as follows:

**“102. Death of party to appeal**

**(1) 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 subrule (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.**

**(4) An application under sub rule (3) may be made before a single judge.”**

10. I have considered the applicants’ application together with the supporting affidavit. I have also considered the submissions by the advocates for the parties. It is common ground that the appeal has abated. It is also not disputed that the court has the power to revive the appeal. The court’s power to revive an abated appeal is discretionary. In ***Patriotic Guards Ltd. v. James Kipchirchir Sambu, Nairobi CA No. 20 of 2016, [2018] eKLR***, this Court stated as follows:

***“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount***

***need by court to do real and substantial justice to the parties in a suit.”***

11. The court's discretion is not unfettered. Before the court can exercise its discretion in favour of the Applicants, they must demonstrate that they were prevented by sufficient cause from seeking the substitution of the deceased Appellant with a view to proceeding with the appeal before the appeal abated. In **Rebecca Mijide Mungole & another v. Kenya Power & Lighting Company Ltd & 2 others** [2017] eKLR, the Court, while commenting on Order 24 Rule 7(2) of the Civil Procedure Rules, which provides for the revival of an abated suit, stated as follows:

***“The operating phrase in rule 7(2) “sufficient cause” has been broadly and liberally defined, in order to advance substantial justice. Liberal construction should not be done with the result that one party is thereby prejudiced. When the delay is on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the applicant, the court will not revive the abated suit. If a party has been negligent or indifferent in pursuing his rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to him in law. The explanation has to be reasonable and plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but justifies exercising judicial discretion in favour of the applicant.”***

12. **In the Hon. Attorney General v. the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of**

**2011(UR), Musinga, J.A** stated as follows on the meaning of the word sufficient cause:

***“Sufficient cause” or “good cause” in law means: “.....the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused”. See BLACK’S LAW DICTIONARY, 9<sup>th</sup> Edition, page 251.***

***Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”***

**13.** In the Supreme Court of India’s case of ***Parimal v. Veena [2011] 3 SCC 545***, the court observed that:

***“sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously.”***

14. I am satisfied that the applicants have shown sufficient cause for their failure to apply for the substitution of the deceased appellant before the appeal abated. The applicants have shown that they intended to substitute the deceased appellant and to pursue the appeal. This is demonstrated by the fact that after the death of the Appellant on 17<sup>th</sup> February 2024, the 4<sup>th</sup> applicant and one Andrew Raymond Kwemai Saikwa obtained a grant of letters of administration in respect of his estate on 11<sup>th</sup> July 2024. The applicants also jointly obtained a grant of probate on 6<sup>th</sup> December 2024 in respect of the estate of the deceased, on whose behalf the appellant had filed the appeal.
15. The 4<sup>th</sup> applicant thereafter filed an application to be substituted in the appeal in place of the appellant on the mistaken belief that she could do so alone. The 4<sup>th</sup> applicant's application was filed before the appeal abated. As mentioned earlier in the ruling, the court dismissed the 4<sup>th</sup> applicants' application on 5<sup>th</sup> June 2025. The 4<sup>th</sup> applicant was advised to move the court for the substitution of the appellant, together with the other administrators of the estate of the deceased.
16. The present application was filed in October 2025, about 4

months after the dismissal of the 4<sup>th</sup> applicant's application for substitution of the appellant, and 8 months after the abatement

of the appeal. In the circumstances of this case, I do not find the delay in bringing the present application inordinate, and, if at all, the explanation given for it is reasonable. The delay, as explained by the applicants, was caused by the 4<sup>th</sup> applicant's mistaken belief that she could singly be substituted as the appellant in the appeal in place of the appellant, and upon the dismissal of her application, the disagreements that ensued between the joint administrators of the estate of the deceased, which took some time to resolve.

17. I am not persuaded that the respondents would suffer any prejudice if the appeal is revived. The respondents did not file any affidavit in response to the application. The factual averments in the applicants' affidavit in support of the application were therefore not rebutted. There is no evidence that the applicants acted in bad faith or were negligent in pursuing the appeal. I am satisfied that the applicants have made a case for the revival of the appeal.
18. On the limb of the application seeking the substitution of the appellant in the appeal with the applicants, the applicants have demonstrated that they are the administrators of the estate of the deceased, on whose behalf the appellant had

brought the appeal. They are, therefore, the proper parties to be substituted

in the appeal in place of the appellant. I therefore also find merit in this limb of the application.

19. Before concluding this ruling, I wish to comment on some of the issues that were raised by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in opposition to the application. The 1<sup>st</sup> and 2<sup>nd</sup> respondents had contended that the application is *res judicata* in that a similar application dated 14<sup>th</sup> February 2025 was heard and dismissed by this court on 5<sup>th</sup> June 2025. I find no merit in this objection to the application. As mentioned earlier, the 4<sup>th</sup> applicant's application dated 14<sup>th</sup> February 2025 was dismissed for non-joinder of parties, and not on merit. In its ruling, the court granted the administrators of the estate of the deceased the liberty to jointly apply for the substitution of the deceased appellant. The applicants' application for the revival of the suit and substitution of the deceased appellant has never been heard and determined on the merits and, as such, is not *res judicata*.

20. The 1<sup>st</sup> and 2<sup>nd</sup> respondents had also contended that the application is an abuse of the process of the court in that the entire appeal was determined by a full bench of this court in a ruling delivered on 29<sup>th</sup> October 2025. I have perused the order of the Court (**Gatembu Kairu, Mumbi Ngugi and P.**

# Nyamweya

**JJ.A.)** dated 29<sup>th</sup> October 2025. The Court merely declared the appeal to have abated, the appellant having died on 17<sup>th</sup> February 2024 and not having been substituted. I agree with the applicants that an order that an appeal has abated is not a bar to an application for its revival. This ground of opposition also lacks merit.

21. For the foregoing reasons, I find merit in the application dated 24<sup>th</sup> October 2025. The application is allowed in terms of prayers 2 and 3 thereof. Each party shall bear its costs of the application.

22. It is so ordered.

**Dated and delivered at Nairobi this 13<sup>th</sup> day of March 2026.**

**S. OKONG'O**

.....  
**JUDGE OF APPEAL**

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

***Signed***

**DEPUTY REGISTRAR.**