

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
HCP&A APPEAL NO. E002 OF 2020

IN THE MATTER OF THE ESTATE OF HUDSON
KAGOTHO MACHARIA (DECEASED)

ESTHER WAMBUI KAGOTHO APPELLANT
(DECEASED)

VERSUS

**EMILY WANGUI KAGOTHO
RESPONDENT**

AND

**CHRISTOPHER MWANGI KAGOTHO
APPLICANT**

RULING

1. This is a ruling in respect of the application dated 1.04.2025. The applicant sought the following orders:
 - a. THAT this honorable court be pleased to enlarge the time within which the Applicant may substitute the deceased Appellant.
 - b. THAT the honourable court be pleased to substitute the deceased Appellant, Esther Wambui Kagotho, with the applicant, Christopher Mwangi Kagotho.
 - c. THAT leave be granted to the Applicant to revive this appeal against the Respondent.

2. The application was opposed through a preliminary objection dated 27.05.2025. Leave was granted to file a replying affidavit. However, none was filed. I have seen some pieces of paper annexed to submissions. I do not know what kind of documents these are, as only authorities can be annexed to the submissions.

3. A party cannot found or defend a claim in submissions. They are neither evidence nor pleadings. Mwera J posited as follows when postulating on the role of submissions. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim. In the case of **Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993** it was held that:

“Indeed, and strictly speaking, submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.”

4. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. Their

presence or absence does not in any way prejudice a case as held in **Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749**, where the Court held that:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”

5. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR**:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' *“marketing language”*, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all.

Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

6. The respondent filed submissions dated 13.02.2026 stating that the applicant was served with an order to bar burial way back in 2021. Burial took place in the parcel given to the deceased appellant’s designated parcel. No action was taken until 2023, when the respondent moved the court to have the appeal marked as revised. Transmission for the Respondent’s share has taken place.
7. The applicant filed submissions and raised the following 4 issues:
 - a. Whether the time for substituting the deceased Appellant should be enlarged?
 - b. Whether the deceased Appellant should be substituted with the Applicant?
 - c. Whether the appeal should be revived?
 - d. Whether the Respondent’s objection is sustainable?
8. They stated that the court has discretion to extend time. Reliance was placed on the proviso to Order 24 Rule 3 of the Civil Procedure Rules, which grants the court the discretion to extend the time for substituting a deceased appellant, for good reason and upon application by a party. They posited that the principles that guide the court are set out in the case of *Issa Masudi Mwabumba v Alice Kavenya Mutunga & 4 Others [2012] KECA 248 (KLR)*, as follows:

- (a) The length of the delay;
- (b) The reason for the delay;
- (c) The chances of the appeal succeeding if the application is granted; and
- (d) The degree of prejudice to the respondent if the application is granted.

9. It was contended that the length of the delay in substituting the deceased Appellant in this matter is 3 years and 1 month, for the appeal abated on 26th March 2022, following the Appellant's death a year before, on 25th March 2021. Reliance was placed on the case of **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] KECA 701 (KLR)**, where the Court of Appeal, while determining an application for extension of time, observed that the law does not set out any minimum or maximum period of delay. All that it states is that any delay should be satisfactorily explained. The court further noted that a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretion.

10. Further reliance was placed on the fact that the only qualification is for the applicant to give a good reason for the delay. They relied on the case of **Kishor Kumar Dhanji Varsani v Amolak Singh & 4 others [2016] KECA 58 (KLR)**. They stated that the Court of Appeal upheld the High Court's decision, which excused a delay of 3 years and allowed the substitution of a deceased Plaintiff and revival of the suit.

11. It was stated that in this case, the delay was occasioned by familial disagreements following her death, which threw her family into disarray and prevented her dependents from agreeing upon the person best suited to substitute her. Reliance was placed in the case of In the case of ***Newton Kagira Mukuha v Simon Gashwe Mukuha (Sued in his capacity as an administrator of the estate of Peter Mukuha Kago - Deceased) [2025] KECA 500 (KLR)***. In the aforesaid matter, it was submitted that the Court of Appeal found that the beneficiaries' inability to reach a consensus on the administration of the deceased's estate was an adequate ground to justify an order for revival of the abated appeal, despite there having been a delay of 4 years.
12. It was further submitted that the Respondent, on the other hand, has not demonstrated any prejudice that she may suffer if the application is allowed. In the case of ***Mary Omollo Odongo & Another v Hellen Auma Ojuok [2021] KECA 434 (KLR)***, the Court of Appeal, presented with an application for extension of time, found that since the respondent had failed to demonstrate the degree of prejudice they would suffer if an application for extension of time is allowed, the weight tilts in favour of the applicant.
13. He stated that from Order 24 Rule 9 and 3(1) of the Civil Procedure Rules, a person wishing to substitute a deceased appellant must be a legal representative of the deceased. The Applicant obtained the limited grant ad litem dated

28th January 2025, to enable him to substitute the deceased Appellant and prosecute the present appeal on behalf of her estate. Reliance was placed on the case of **Elijah Njiru Kirombi & Another v Andrew Mburia Njiru [2022] KEHC 16320 (KLR)**.

14. The High Court held that the holder of a limited grant of administration specified to be limited for purposes of pursuing an appeal on behalf of a deceased appellant can be entertained by the court as a substitute for that deceased appellant. They also relied on the cases of ***Newton Kagira Mukuha v Simon Gashwe Mukuha (Sued in his capacity as an administrator of the estate of Peter Mukuha Kago - Deceased) [2025] KECA 500 (KLR) and John Mwangi King'ori (Deceased) v Humphrey Njuru Karanja & Another [2023] KECA 739 (KLR)***.

15. On the preliminary objection, he submitted that the effectuation of the confirmed grant is not the subject of the present application, for it is a far-reaching issue that goes to the root of the appeal, and as such, it cannot be determined by the court at this stage. Reliance was placed on the case of **Newton Kagira Mukuha v Simon Gashwe Mukuha (Sued in his capacity as an administrator of the estate of Peter Mukuha Kago - Deceased)** (Supra).

16. With regard to the Respondent's second ground of objection, that the court *is functus officio*, they submitted that the court is not *functus officio*, for it has not yet

rendered its final decision on the appeal. In the case of ***Kenya Deposit Insurance Corporation (as Liquidator of Dubai Bank Kenya Limited) v Rapid Communications Limited & 2 others; Bank of Africa Kenya Limited & 2 others (Interested Party) [2019] KECA 410 (KLR)***, the Court of Appeal observed that finality is at the core of the doctrine of *functus officio* and that this finality is achieved when the judgment or order has been perfected or drawn up, issued and entered.

Analysis

17. The appeal abated on 25.3.2022. The court declared the matter abated on 24.04.2023. The response was a preliminary objection. It has two grounds: that the same is overtaken by events, and that the court is *functus officio*. Regarding *functus officio*, it is unknown how the matter could be *functus officio*. In the cases of *Ochanda (Suing on his Behalf and on Behalf of 996 Former Employees of Telkom Limited) v Telkom Kenya Limited (Motion 24 of 2014) [2014] KESC 7 (KLR) (25 November 2014) (Ruling)*, the court of appeal [EM Githinji, W Karanja & PO Kiage, JJ] held as follows:

21. *Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of *Chandler Vs Alberta Association of Architects*

[1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);

22. The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal *In re St. Nazaire Co.*, (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

23. Where there had been a slip in drawing it up, and, Where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. vs. J.O. Rose Engineering Corp.*, [1934] S.C.R. 186. The Supreme Court in *Raila Odinga v IEBC* cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "The Origins of the *Functus Officio* Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832 in which the learned author stated;...

"The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

24. The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in *Jersey Evening Post Ltd Vs Ai Thani* [2002] JLR 542 at 550, also cited and applied by the Supreme Court;

18. The appeal has not been heard and as such it cannot be *functus officio*. The issue of *functus officio*, therefore, is otiose. The principle was addressed in the case of **Menginya Salim Murgani v Kenya Revenue Authority** [2014] eKLR on *functus officio*, where the Supreme Court posited as follows:

It is a general principle of law that a Court after passing Judgment, becomes *functus officio* and cannot revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law. In *Lakhamshi Brothers v. Raja & Sons* [1966] EA 313 the then Court of Appeal held as follows:

“ This court is now the final Court of Appeal and when this court delivers its judgement, that judgement is, so far as the particular proceedings are concerned, the end of the litigation. It determines in respect of the parties to the particular proceedings their final legal position, subject as I have said to the limited application of the slip rule.

19. This was further addressed in the Supreme Court decision of **Odinga v Independent Electoral & Boundaries Commission & 3 others** [2013] KESC 8 (KLR) which cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “*The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law*” (2005) 122 SALJ 832 which reads: -

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

21. Section 99 of the Civil Procedure Act provides exceptions to the doctrine of functus officio in the following terms-

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

20. The matter was not *functus officio*. The next question is whether the preliminary objection is merited. This is a preliminary objection without any point of law. This was discussed in the case of **D.T. Dobie & Company (Kenya)**

Limited v Joseph Mbaria Muchina & another
[1980] KECA 3 (KLR). In that case the court of appeal [CB Madan, CHE Miller, KD Potter] posited as follows:

per Lord Pearson in Drummond-Jackson V.B.M.A. (1970) 1 W.L.R. 688 at p. 696.

"A cause of action is an act on the part of the defendant which gives the plaintiff his cause of complaint."

Words and Phrases, Vol, 1 p. 228.

There is some difficulty in affixing a precise meaning to the term reasonable cause of action..... In point of law, and consequently in the view of a Court of justice, every cause of action is a reasonable cause. But; obviously some meaning must be assigned to the term 'reasonable'..... a pleading will not be struck out unless it is demurrable and something worse than demurrable."

per Chitty J. in Republic of Peru v. Peruvian Guano Company, 36 Ch.Div. 489 at pp. 495 and 496.

"It has been said more than once that the rule is only to be acted upon in plain and obvious cases, and, in my opinion, the jurisdiction should be exercised with extreme caution."

per Swinfen Eady, L.J. in Moore v. Lawson and Another, 31 ff.L.lf. 418 at p. 419... 31 T.L.R. 418 at p. 419.

"It is a very strong power indeed. It is a power which, if it not be most carefully exercised, might conceivably lead a court to set aside an action in which there might really, after all, be a right, and in which the conduct of the defendant might be very wrong, and that of the plaintiff might be explicable in a reasonable way. Unless it is a very clear case indeed, I think the rule ought not to be acted upon....."

Therefore, unless the case be absolutely clear, I do not think the statement of claim ought to be set aside as not showing a reasonable cause of action.

21. A preliminary objection proceeds on an understanding that what is pleaded is true. The question whether the grant has been affected is a question of fact. Further, it is not germane to the determination of the extension of time. It is what the English common law used to call a demurrer. The locus classicus case of **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd [1969] E.A. 696.** made this pertinent observation. It said: -

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop".

22. In a Tanzanian case of **Hammers Incorporation Co. Ltd Versus The Board Of Trustees Of The Cashewnut Industry Development Trust Fund**, the Court of Appeal, (Rutakangwa, N. P. Kimaro and S. S. Kadage JJA), sitting in Dar es salaam in their decision given on 17/9/2015 regretted that the practice of raising preliminary objection that was frowned upon by the court of appeal in Kampala in the Mukisa biscuit case (Supra) still persists. They stated as doth: -

“It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the "improper practice" never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in *Karata Ernest & Others V The Attorney General*, Civil Revision No. 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the *MUKISA BISCUIT* case (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate.”

23. In the case of **Martha Akinyi Migwambo v Susan Ongoro Ogenda** [2022] eKLR, Justice Kiarie Waweru Kiarie, summarized the preliminary objection nicely as seen from two of the judges in *Mukisa Biscuit Manufacturing Co. Ltd*(supra): -

“A preliminary objection must be on a point of law. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969]EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

At page701 paragraph B-C Sir Charles Newbold, P. added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which

is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....”

24. A Tanzania Court of Appeal sitting in Dar es Salaam, in **Karata Ernest & Others vs Attorney General (Civil Revision No. 10 of 2020) [2010] TZCA 30** (29 December 2010),(Luanda, J.A. , Ramadhani, C.J. , Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

“At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of a point of law which has been pleaded, or which arises by dear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when

deliberating on the merits or otherwise of the concerned legal proceedings.

25. Justice Prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of **Oraro vs Mbaja [2005] eKLR:**

I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

26. It is therefore my view that a preliminary objection must be based on current law, and be factual in its Constitution. It cannot be based on disputed facts or facts requiring further inquiry. In determining a preliminary objection, therefore, only 3 documents are required in addition to the Constitution. The impugned law, the application, and the preliminary objection. If you have to refer to the respondent's documents, then a preliminary objection is untenable.

27. In this case, the preliminary objection is unmerited. This now leaves the last issue, whether the application is merited. The application is not opposed. Therefore, the court must consider the case's inherent merits. The principles for extension of time were set out in the case of **Salat v Independent Electoral and Boundaries Commission & 7 others** [2014] KESC 12 (KLR), where the Supreme Court posited as follows:

From the above caselaw, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant.

85. This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a court should consider in exercise of such discretion:

Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.

Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court; Whether there will be any prejudice suffered by the respondents if the extension is

granted; Whether the application has been brought without undue delay; and whether, in certain cases, like election petitions, public interest should be a consideration for extending time. What is the position of the Court of Appeal application No Civil Application Sup No 5 of 2014(UR 2014) seeking certification? Is a letter to the Registrar sufficient to withdraw an application before the Court of Appeal? Paragraph 86. Counsel for the respondents urged the court to make a finding that in the absence of a court order withdrawing Application Sup No 5 of 2014 (UR 2014), filed in the Court of Appeal, the matter was still pending and thus, there existed two parallel applications. In response, the applicant contended that the application at the Court of Appeal seeking certification had since been withdrawn via a letter addressed to the registrar of the Court of Appeal, as has been the practice.

28. The applicant stated that their family was involved in Iran and the USA kind of disputes. There was no replying affidavit filed by the respondent disputing the facts. There is no other evidence to show that there were no disputes in the deceased applicant's family. The explanation is reasonable, given that it is a microcosm of the larger estate of the late Hudson Kagotho Macharia. It is noted from the respondent's submissions that she served the deceased three times after she died. This was:
- a. Application dated 7.10.2023.
 - b. Application dated 26.07.2023.
 - c. Application dated 26.04.2023.

29. The respondent posited that the applicant was fearing that the Respondent was going into possession. This meant that the respondent was not in possession. There is a need to hear the appeal, whichever the outcome. In that context, therefore, I am minded to allow the application.

30. This leaves the issue of costs, which are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

31. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR)**, as follows:

18. It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court,

accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

32. This is a matter for extension of time, each party will bear its costs.

Determination

33. In the circumstances, I make the following orders:

a) The preliminary objection dated 27.05.2025 lacks merit and is accordingly dismissed.

b) The application dated 1.04.2025 is allowed in the following terms:

(i) Time is enlarged to within which the Applicant may substitute the deceased Appellant.

(ii) The applicant, Christopher Mwangi Kagotho, is allowed to substitute the deceased Appellant, Esther Wambui Kagotho.

(iii) The order abating the appeal is set aside. The appeal is reinstated for hearing.

c) Directions on 13th May, 2026.

d) Each party to bear their own costs.

DELIVERED, DATED and SIGNED at **NYERI** on this **14th** day of **April, 2026**. Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Maina for the Applicant

Mrs. Wahome for the Respondent

Court Assistant - Michael/Martin