



Mukuha v Mukuha (Sued in his capacity as an administrator of the Estate of Peter Mukuha Kago - Deceased) (Civil Appeal (Application) 25 of 2016) [2025] KECA 500 (KLR) (21 March 2025) (Ruling)

Neutral citation: [2025] KECA 500 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) 25 OF 2016
JM MATIVO, PM GACHOKA & WK KORIR, JJA
MARCH 21, 2025**

BETWEEN

NEWTON KAGIRA MUKUHA APPLICANT

AND

SIMON GASHWE MUKUHA RESPONDENT

**SUED IN HIS CAPACITY AS AN ADMINISTRATOR OF THE ESTATE OF
PETER MUKUHA KAGO - DECEASED**

(Being an application for revival of Civil Appeal No. 204 of 2016; Newton Kagira Mukuha vs. Simon Gashwe Mukuha, and enlargement of time within which to file an application for substitution of Simon Gashwe Mukuha (now deceased) in Nakuru Civil Appeal No. 25 of 2016)

RULING

1. The appeal in which the instant application is filed stems from a ruling delivered on 31st October 2014 by A. Emukule J. and the judgment delivered on 6th October 2016 by A. K. Ndungu, J. in Nakuru High Court Succession Cause No. 92 of 2011. In the High Court, the applicant, Newton Kagira Mukuha (Newton), had filed objection proceedings against the administration of the estate of the deceased Peter Mukuha Kago (“Peter”) by Simon Gashwe Mukuha (“Simon”). Simon is the respondent in the appeal. Peter who died on 6th May 2010 was the father of Newton and Simon. The applicant being dissatisfied with the determination of his objection by the High Court filed Civil Appeal No. 25 of 2016 (*CA No. 204 of 2016*) - *Newton Kagira Mukuha vs. Simon Gashwe Mukuha (Sued in his capacity as an Administrator of the Estate of Peter Mukuha Kago (Deceased))*. Simon passed away on 26th August 2019 during the pendency of the appeal. After a protracted dispute on the appointment of administrators to substitute Simon, the High Court in a ruling delivered on 11th March 2024, appointed David Kimani Mukuha (“David”) and Grace Wambui Mukuha (“Grace”) as the new administrators of the estate of the deceased Peter.



2. The notice of motion dated 23rd March 2024, which is before us, is brought pursuant to rules 4, 44, 45, 49, and 102 of the Court of Appeal Rules, sections 3A and 3B of the [Appellate Jurisdiction Act](#), and Article 159(2) of [the Constitution](#). Through the application, Newton seeks to revive Nakuru COA Civil Appeal No. 25 of 2016 ([CA No. 204 of 2016](#)), which has abated and enlargement of time to file an application for substitution of the late Simon, with David and Grace being the new administrators of the estate of the deceased Peter.
3. In the grounds in support of the application and the applicant's supporting affidavit, it is the applicant's case that the delay in substituting the deceased respondent was occasioned by disagreements among the beneficiaries of the estate of the deceased Peter as to who was to be appointed to administer the estate in place of the deceased respondent. The applicant concedes that the son of Simon by the name Charles Mukuha Simon ("Charles") had filed an application dated 12th January 2024 seeking a determination that the appeal has abated. He, however, avers that this was done when there was a pending application before the High Court for the substitution of the late Simon as an administrator of the estate of Peter and that Charles has no audience before this Court as he is yet to be admitted as a party to the appeal. According to the applicant, it is in the interest of justice that the appeal be revived and time enlarged to allow the applicant to substitute Simon with the new administrators of the estate of Peter.
4. In a further affidavit sworn by the applicant on 29th May 2024, he discloses that prior to the appointment of counsel on 22nd February 2023, he was acting in person and had filed Civil Application No. E051 of 2021 dated 20th August 2021 seeking to have the late Simon substituted by Charles, who had been appointed an administrator of Simon's estate. After onboarding the counsel on record and upon his advice, he has since withdrawn the application.
5. Owing to the fact that the appeal in which this application has been filed has two numbers (No. 25 of 2016 and [CA No. 204 of 2016](#)), two parallel files under the two numbers were opened. The response to the application was filed in [CA No. 204 of 2016](#). In order to avoid recurrent confusion, we direct the Deputy Registrar of this Court to merge these applications under Appeal No. 25 of 2016.
6. The application is opposed through a replying affidavit sworn on 11th July 2024 by Charles in his capacity as the administrator of the estate of the deceased Simon. Charles challenges the applicant's locus standi on the basis that he is not an interested party or a legal representative of the estates of Peter and Simon. Turning to the substance of the application, Charles avers that the period for substitution lapsed on 25th August 2020, and the applicant has not sufficiently explained why he did not act within the provided timeline. He avers that he has since filed an application to have the appeal marked as abated. Further, that the applicant has not sufficiently explained the delay in bringing the present application. Charles also deposes that he was joined in the appeal at the instance of the applicant without the Court's permission. He further avers that the estate of the deceased Peter has never been a party to the appeal; hence, the proceedings before the High Court for appointment of new administrators have no bearing on this application. Additionally, Charles deposes that the cause of action in the appeal concerns the offence of intermeddling, which is personal to the accused, and the revival of the appeal will serve little or no purpose. Further, that the estate of Peter has substantially been distributed in accordance with his will. He, therefore, maintains that the application lacks merit and should be dismissed with costs.
7. When this matter came up for hearing on 3rd March 2025, learned counsel Mr. Muchoki appeared for the applicant while his counterparts learned counsel Mr. Cecil Kuyo and learned counsel Ms. Omondi were present for the respondent. Learned counsel Mr. Moindi represented Grace, one of the two administrators of the estate of the deceased Peter.



8. Mr. Muchoki relied on submissions dated 29th May 2024 in advancing the applicant's case. Counsel pointed out that Civil Appeal No. 204 of 2016, also known as No. 25 of 2016, has abated by operation of the law due to the death of the respondent (Simon) who was sued in his capacity as an administrator of the estate of the deceased Peter. Counsel while appreciating the power of the Court under rule 102 of the Court of Appeal Rules, 2022 to revive an appeal that has abated if it is proved that the delay in applying for substitution was due to sufficient cause, submitted that the applicant has demonstrated sufficient reason for the delay in applying for the substitution of the deceased respondent. According to counsel, the fact that the surviving beneficiaries of the estate of the deceased Peter could not initially agree on the way forward regarding the appointment of new administrators necessitated the filing of an application in the High Court, leading to the appointment of David and Grace as administrators.
9. Responding to the submissions by counsel for the respondent, Mr. Muchoki argued that the High Court had addressed the issue of the testacy of the deceased Peter and the applicant's entitlement to the shares held by the deceased in Naivas Ltd. Counsel submitted that these were issues that only the administrators of the estate of deceased Peter could respond to and not Charles who is an administrator of the estate of deceased Simon and not that of the deceased Peter. Counsel also urged the Court to adopt a liberal interpretation of rules 53 (4) and 102 (3) of the Court of Appeal Rules and find that the applicant is an interested party in the estate of the deceased Peter.
10. Counsel for the applicant pointed out that a previous attempt to substitute the deceased respondent with a different individual was withdrawn as that person was not a direct beneficiary to the estate of the deceased, Peter. Counsel submitted that the delay was not deliberate and relied on [*Abok James Odera T/ A.A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates*](#) [2013] eKLR and [*Issa Masudi Mwabumba vs Alice Kavenya Mutunga & 4 Others*](#) [2012] eKLR for the proposition that in exercising its discretion, the Court should be guided by the overriding objectives set out in sections 3A and 3B of the [*Appellate Jurisdiction Act*](#). He further submitted that allowing the revival of the appeal and the substitution of the deceased respondent would serve the interests of justice by allowing the appeal to be heard on its merits. Counsel also argued that granting the orders sought would not be prejudicial to the administrators of the estate of the deceased Peter and that the applicant is ready to abide by any directions given by the Court.
11. On his part, Mr. Moindi informed the Court that despite not having responded to the application, his client supported the application. Counsel reiterated that the wrangles by the siblings occasioned the delay in bringing the application for substitution and that the new administrators are the only persons capable of responding to the issues raised in the appeal.
12. In opposition to the application, Mr. Kuyo relied on submissions dated 29th August 2024. Counsel reiterated Charles' position that the applicant lacked locus standi to bring the application as he is not a beneficiary or an interested party in the estate of the deceased respondent. In urging that the application lacks merit, counsel submitted that the revival of the appeal will serve no purpose as the cause of action was extinguished with the respondent's death because the appeal arose from a claim of intermeddling, which, according to counsel, was a personal offence against the deceased respondent. To buttress this argument, counsel relied on [*Kelly Kases Bunjika vs. Director of Public Prosecutions & Another*](#) [2018] eKLR and [*Re Estate of M'Ngarithi M'Miriti*](#) [2017] eKLR.
13. Turning to the substance of the application, counsel submitted that the delay of four years in bringing the application was inordinate as the applicant was all along aware of his brother's death. On this, counsel relied on [*Raphael Musila Mutiso & 3 others vs. Joseph Ndava Nthuka & Another*](#) [2019] eKLR to urge that the application should not be allowed because the delay has not been sufficiently explained. Counsel reiterated that the new administrators cannot be substituted in place



of the deceased respondent as the subject of the suit was personal to the deceased respondent and was not brought against the deceased respondent in his capacity as the administrator of the estate of the deceased Peter. Finally, counsel submitted that because the estate of the deceased, Peter, has substantially been distributed, the revival of the appeal will be an exercise in futility. Counsel consequently prayed for the dismissal of the application with costs.

14. We have reviewed the application and the supporting affidavits and the annexes thereto. We have also considered the replying affidavit and the submissions by counsel on record for the parties. The application is brought pursuant to rule 102 of the *Court of Appeal Rules*, 2022, which provides, inter alia:

- “(1) An appeal shall not abate on the death of the appellant or the respondent 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.
- (2) If no application is made under sub-rule (1) within twelve months from the date of 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.” [Emphasis added]

15. In this application, three issues arise for our determination: first, whether the applicant has locus standi to bring the application; second, whether the applicant has sufficiently explained the delay in lodging the application; and third, whether the application to substitute the deceased respondent is merited.

16. Certain facts in this application are not disputed. There is no doubt that the present application seeks to revive an appeal filed against the ruling by A. Emukule, J. dated 31st October 2014, which resulted in the judgment of A. K. Ndungu J. dated 6th October 2016 in Nakuru High Court Succession Cause No. 92 of 2011. There is also no dispute that the deceased respondent (Simon) was, until his death on 26th August 2019, the administrator of the estate of the deceased Peter. It is also not disputed that David and Grace are now the official administrators of the estate of the deceased Peter pursuant to their appointment by the High Court.

17. One of the grounds upon which Charles objected to the application is that the applicant lacked locus standi. His argument is that the applicant is neither an interested party nor an administrator of the estate of the deceased respondent and therefore lacks locus standi under rule 102 of the Court of Appeal Rules. In order to appreciate the nature of the application before the Court, it is important to consider and appreciate the import of rule 2 of the *Court of Appeal Rules*, which defines an interested party as:

“Interested Party” means a person or entity that has an identifiable stake, legal interest or duty in the proceedings before the Court but is not a party to the proceedings, or may not be directly involved in the litigation but has been allowed by the Court upon application, to appear as an interested party to address it in respect of a matter of law or fact;”

18. The applicant before us is more than an interested party. He has a stake in the estate of the deceased Peter as a beneficiary and being dissatisfied with the distribution of the estate, he is entitled to appeal against the decision distributing the estate and has indeed filed an appeal against the deceased



administrator (Simon). Therefore, the applicant having a stake, responsibility, and interest in the abated appeal qualifies to lodge an application for substitution of the deceased respondent (Simon) under rule 102 of the Court of Appeal Rules. There was also the argument that the applicant has no locus standi in respect to the estate of the deceased, Simon. This argument cannot be faulted. However, our understanding is that the applicant is not going after the estate of the deceased Simon. All he is doing is to have the late Simon, who was the administrator of the estate of the deceased Peter, substituted so that he can have an opportunity of pursuing his appeal in respect to decisions concerning the estate of the deceased Peter. We, therefore, find that the applicant (Newton) has the requisite locus standi to move this Court as he has.

19. Turning to the application for revival, there is no contest as to the Court’s power to revive an appeal that has abated. In considering whether to allow revival of the appeal, we have to determine whether the reasons tendered by the applicant amount to “sufficient cause,” as was held in *Olang vs. Miduri (Suing on behalf of Albert Miduri Olang)* [2023] KECA 1303 (KLR).
20. In this application, the applicant explains that he could not apply for substitution within the stipulated 12 months or soon thereafter due to the sibling rivalries that delayed the appointment of administrators to substitute the late Simon. He took the Court through the historical journey leading to the appointment of David and Grace as the new administrators of the estate of the deceased Peter. Charles did not dispute this history and being the grandson of the deceased Peter, must have been aware of the circumstances that led to the delay in substituting his deceased father (Simon) with other administrators. We must also appreciate that while the new administrators were appointed on 11th March 2024, the application was filed hardly two weeks later on 25th March 2024. This confirms the desire by the applicant to revive and pursue his appeal. We are therefore satisfied that the reasons advanced, specifically the beneficiaries’ inability to reach a consensus on the administration of the estate of the deceased Peter, when viewed in light of the overall circumstances of this application, constitute adequate grounds to justify an order for the revival of the abated appeal.
21. A question arose in relation to the futility of the revival of the appeal owing to the contention by Charles that the subject matter of the appeal was personal to the late Simon. Although this is an issue to be taken up substantively in the appeal once it is revived, we have had a casual look at the ruling of A. Emukule, J. dated 31st October 2014 which informed the judgment of A.K. Ndung’u, J. dated 6th October 2016 and we are of the view that there is a lot to be said about Charles’ position. Through his third supporting affidavit sworn on 30th July 2024, the applicant has also adequately responded to Charles’ arguments on the issue. We will, therefore, leave that issue for the bench that will eventually be tasked to hear the revived appeal.
22. Similarly, Charles’ plea that allowing the application will be an exercise in futility because the estate of the deceased Peter has been fully administered does not find favour with us. In our view, it is not within the remit of this application for the Court to pronounce itself on such a far-reaching issue that will effectively determine the appeal. Once again, we leave that issue to the bench that will hear the appeal.
23. Charles also opposed the application on the ground that the delay of four years in bringing the application for the revival of the appeal was inordinate. We are aware that the applicant has invoked the provisions of sections 3A and 3B of the *Appellate Jurisdiction Act*, which requires that we be guided by the interests of justice and fairness in order to facilitate a just, expeditious, and proportionate resolution of appeals. In the circumstances, and going by the cited authorities, the instant application is for allowing. In our view, and as already stated, the reasons advanced for the delay cannot make us hold that the delay is inordinate. We allow the application for the revival of the abated appeal as well as the application for the substitution of the late respondent (Simon) with David and Grace.



24. Consequently, we find merit in the notice of motion dated 23rd March 2024, which we hereby allow as follows:

- i. Nakuru Civil Appeal No. 25 of 2016 (*CA No. 204 of 2016*), which had abated, is hereby revived;
- ii. The respondent Simon Gashwe Mukuha (deceased) is hereby substituted with David Kimani Mukuha and Grace Wambui Mukuha who are now the administrators of the estate of Peter Kago Mukuha;
- iii. The applicants should file and serve an amended record of appeal in compliance with this ruling within 14 days from the date hereof; and
- iv. The costs of this application shall be in the appeal.

25. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF MARCH 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

