



REPUBLIC OF KENYA



**KENYA LAW**  
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**Davanis Supplies Limited & 2 others v Zone & 2 others (Civil Appeal  
(Application) 69 of 2019) [2025] KECA 1027 (KLR) (30 May 2025) (Ruling)**

Neutral citation: [2025] KECA 1027 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 69 OF 2019  
F TUIYOTT, AO MUCHELULE & GV ODUNGA, JJA  
MAY 30, 2025**

**BETWEEN**

**DAVANIS SUPPLIES LIMITED ..... 1<sup>ST</sup> APPLICANT  
DAVID K MUNDUI ..... 2<sup>ND</sup> APPLICANT  
EVANS MATUNDA ..... 3<sup>RD</sup> APPLICANT**

**AND**

**EXPORT PROCESSING ZONE ..... 1<sup>ST</sup> RESPONDENT  
GABRIEL MUTISO MAANDA ..... 2<sup>ND</sup> RESPONDENT  
THE COMMISSIONER OF LANDS ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal against the Ruling and Order of the High Court of Kenya at Nairobi,  
(Joyce N. Khaminwa, J.) delivered on 3rd November, 2008 in H.C.C.C. No. 89 of 2007)*

**RULING**

1. The notice of motion dated 14<sup>th</sup> October 2019 seeks to have the appeal against the 1<sup>st</sup> respondent marked as abated.
2. At the High Court, Gabriel Mutiso Maanda (deceased) was the plaintiff in a suit he filed against Davanis Supplies Limited, David K. Mundui, Evans Matunda, The Commissioner of Lands and Export Processing Zone.
3. This appeal is against the judgment of Lady Justice Joyce Khaminwa dated 3<sup>rd</sup> November 2008.
4. It is common ground that a notice of appeal was drawn on 5<sup>th</sup> November 2008, lodged and then served on the 1<sup>st</sup> respondent (now deceased) on 10<sup>th</sup> November 2008, all on time. Soon thereafter, the deceased died on 27<sup>th</sup> December 2008. It is also common ground that Grant of Representation to the Estate of



the deceased was made to Beatrice Sila Mutiso and Amos Kilungya Mutiso on 19<sup>th</sup> April 2011. More than seven (7) years later, the record of appeal was filed herein on 26<sup>th</sup> February 2019. It is also not disputed that to date the appellants have not moved the Court to substitute the deceased with the administrators of his estate. The question is whether, in the circumstances, the appeal has abated.

5. Although all parties were duly served, only the appellants and the 3<sup>rd</sup> respondent were represented by counsel at plenary hearing, Ms. Kemunto for the appellants and Mr. Opwaka. Learned counsels chose not to highlight their written submissions. We have considered those submissions alongside those filed on behalf of the 1<sup>st</sup> respondent (we suppose of the administrators of his estate), the motion and the replying affidavit filed on behalf of the appellants.
6. The motion before us was filed when the now revoked Court of Appeal Rules, 2010 were in operation, and we consider and decide this motion on the basis of those Rules. Then, the law on abatement of civil appeals was found in rule 99 which read:

“”99. Death of party to appeal

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 to an appeal may apply for an order to revive an appeal which has abated; and, if it is proved that the legal representative 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.”

7. To be observed is that rule 99 was on appeals that had already been instituted under rule 82. Here, the record of appeal was filed on 26<sup>th</sup> February 2019. This is the date when the appeal was instituted. The deceased died on 27<sup>th</sup> December, 2008, just a few days after the notice of appeal had been lodged, but way before the appeal had been instituted. At the time of the death of the deceased there was no appeal but an intended appeal. While rule 99 is on “Death of party to appeal”, we think that the relevant provision to the matter at hand is rule 85 on “Death of a party to an intended appeal”. This latter rule provides;

“ 5. Death of party to intended appeal

1. An appeal shall not be instituted in the name of a person who is dead but may be instituted in the name of his legal representative.
2. An appeal shall not be incompetent by reason only that the respondent was dead at the time when it was instituted 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.”



8. Rules 87 and 102 of our current rules are a mirror of rules 85 and 99 respectively of the retired Rules save that both rules have additional provisions that an application for substitution under rule 87(1) and for revival of an abated appeal under rule 102(2) shall be made to a single judge.
9. In the scheme of the current rules, as was the previous rules, an appeal and not an intended appeal can abate. A notice of appeal simply evinces an intention of a party to appeal. An intention to appeal can be said to be lost when a legal representative to a deceased appellant does not take steps to institute the appeal within the timelines prescribed by the rules. What abates are proceedings before a trial or appellate court. Here the named 1<sup>st</sup> respondent died before the appeal was instituted and the identity of the legal representatives of the deceased was known to the appellants before the appeal was instituted. The appeal ought to have been instituted in the name of the legal representatives and not in the name of the deceased as was done. Yet, by dint of rule 85(2) of the retired rules, the appeal is not incompetent and so under that rule any interested party, including the personal representatives of the deceased, can apply to Court to cause the legal representatives to be made a party in place of the deceased.
10. The notice of motion dated 10<sup>th</sup> October 2019 is misconstrued and is hereby dismissed with costs to the appellants.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF MAY 2025.**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**A. O. MUCHELULE**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

