



Kitonga v Kitonga; Kitonga (Intended Legal Representative) (Civil Appeal (Application) E187 of 2023) [2025] KECA 915 (KLR) (23 May 2025) (Ruling)

Neutral citation: [2025] KECA 915 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E187 OF 2023**

F SICHALE, JA

MAY 23, 2025

[IN CHAMBERS]

BETWEEN

MUTHOKA KITONGA APPELLANT

AND

MASILA KITONGA RESPONDENT

AND

FRANCIS KYUTHA KITONGA INTENDED LEGAL REPRESENTATIVE

(Being an Application for Substitution under Rule 96 of the Court of Appeal Rules)

RULING

1. Before me is a motion on notice dated 31st December 2024, supposedly brought under Rule 96 of the [Court of Appeal Rules](#) in which Muthoka Kitonga (the appellant/applicant herein) seeks the following orders;
 - “a. That Francis Kyutha Kitonga be substituted in the place of the respondent, Masila Kitonga who passed away on 12/02/2024, leaving this appeal pending (*sic*).
 - b. That the Honourable Court be pleased to make such further or other orders as may meet the ends of justice.
 - c. That costs of this application be in the cause.”



2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by the applicant, who deposed *inter alia* that the respondent herein Masila Kitonga who died on 12th February 2024, was his younger brother and that he had no wife or children at the time of his demise.
3. He further deposed that in the pleadings in the subordinate court, the deceased respondent was being supported by his brother Francis Kyutha Kitonga (the intended legal representative), whom he had “been forced to apply to bring him on board in these proceedings.”
4. Strangely, the motion was opposed vide Grounds of Opposition dated 5th May 2025, by the firm of J.K Mwalimu & Company Advocates purportedly on behalf of the respondent (the one who is alleged to be deceased) on the grounds *inter alia* that the same was frivolous and bad in law and therefore ought to be struck out.
5. It was further contended that the intended legal representative had not out taken out Letters of Administration of the Estate of the deceased and that therefore he lacked the capacity to represent the Estate of the deceased respondent.
6. It was submitted for the applicant that the he had submitted evidence of death of the respondent in the form of a letter from the Assistant Chief of the sub-location from where the parties hail and that the fact of death was indisputable.
7. He further submitted that since he had demonstrated his desire to proceed with the appeal notwithstanding the respondent’s death, he ought to be allowed to proceed, which was only possible with the substitution of the deceased respondent.
8. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the annexures thereto, the grounds of opposition, the applicant’s submissions and the law.
9. To start with the applicant’s motion is poorly drafted, wrongfully paragraphed and has some grammatical mistakes. The same clearly falls short of a pleading drafted by an Advocate of the High Court of Kenya.
10. Additionally, there is some confusion as the Grounds of Opposition filed in opposition to the same by the firm of J.K Mwalimu & Company Advocates are said to be filed on behalf of the respondent. The same respondent who is now said to be deceased.
11. Be that as it may, I have clearly gone through the record and save from a letter from the Assistant Chief Wikiliye Sub-location dated 23rd December 2024, there is no other document evidencing the deceased’s death. Not even a copy of the death certificate has been annexed to the application.
12. Additionally, there is no evidence that the intended legal representative has taken out Letter of Administration in respect of the Estate of the deceased to enable him file an application of this nature.
13. Accordingly, the same is hereby dismissed in its entirety.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY, 2025.

F. SICHALE

JUDGE OF APPEAL

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

signed



DEPUTY REGISTRAR

