



**Mishack v Cheruiyot & another (Civil Application
E026 of 2022) [2025] KECA 745 (KLR) (6 May 2025) (Ruling)**

Neutral citation: [2025] KECA 745 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E026 OF 2022
PM GACHOKA, JA
MAY 6, 2025**

BETWEEN

ESTHER MISHACK APPLICANT

AND

JONATHAN CHERUIYOT 1ST RESPONDENT

SAMWEL SANG CHERUIYOT 2ND RESPONDENT

*(An application for stay of execution of the judgment and decree of the
Environment and Land Court of Kenya at Kapsabet (M.Mwanyale,
J.) delivered on 12th October 2022 in ELC Case No. 17 of 2022)*

RULING

1. This is one of those cases in which the draftsmanship was poor leaving a lot to be desired. The applicant, through her instructing counsel, in her descriptive language, stated that the application sought to extend time to file a notice of appeal out of time. However, the body of the application is a complete turn that does not speak to a notice of appeal being filed out of time. The applicant then went further to submit that she had filed an application for stay of execution of the impugned judgment; a sharp contrast to what was stated in her application.
2. It is important to remind parties that the merits or otherwise of a case can be ultimately reflected from their pleadings. In this case, the applicant has compelled me to painstakingly read the application over and over again to get a grasp of the prayers being sought. Furthermore, the applicant has created confusion out of which could potentially give rise to a miscarriage of justice.
3. I will not tire to remind parties to constantly remain vigilant and assiduous when preparing their pleadings. While it is presumed that the administration of justice is granted by the Court, advocates are officers of the court. They are therefore required to familiarize themselves with the law, conduct



adequate research and mount a properly prepared pleading as a cornerstone to the administration of justice.

4. As mentioned earlier, though the body of the application indicates that the applicant seeks leave to file her notice of appeal out of time, the appellant invoked section 3 (1), (2) and (3), section 3A (1),(2) and (3) of the *Appellate Jurisdiction Act* and rules 53 (2) and (3) of this Court's rules in her Notice of Motion dated 22nd October 2024 seeking the following reliefs:
 1. ... Spent;
 2. That this Honourable Court be pleased to grant leave to join Elisha Kipyegon Ngeno as the 1st respondent in place of the deceased respondent;
 3. That the costs of this application be provided for.
5. The applicant is supported by the grounds on its face and the supporting affidavit of Kimaiyo Keroney Arap Sego, an advocate practicing in the nature and style of KK Arap Sego & Company Advocates on record for the applicant. The facts giving rise to the application are that the applicant filed an application for stay of execution on 24th March 2023 against the judgement of the trial delivered on 12th October 2022. Thereafter, parties complied with filing their respective written submissions arising from the directions of the Court. Regrettably, before the ruling of the Court was delivered, the 1st respondent passed away on 17th November 2023.
6. The applicant continued that she was waiting for the 1st respondent's representative to substitute the deceased. It would later come to her attention that the 1st respondent obtained a grant of letters of administration ad litem on 22nd May 2024. The applicant wrote to the 1st respondent requesting substitution of the deceased. However, that did not take place. The applicant, in the circumstances, filed the present application, as she was apprehensive that the stay application would abate on 17th November 2024.
7. The applicant urged this Court to allow the application on account of the following reasons: the applicant stood to be prejudiced if the 1st respondent was not substituted since the ruling in respect to that application was yet to be delivered; this Court was vested with the requisite jurisdiction; the respondents stood to suffer no prejudice if the orders sought were granted.
8. The application did not favor a response from the respondents.
Nonetheless, the application was heard on the basis of the parties' written submissions. However, as at the time of writing this ruling, I was not impressed with the respondents' submissions.
9. The applicant filed her written submissions, together with her list of authorities, both dated 14th February 2025, to submit that she had filed an application to appeal out of time. Pending the determination of that application, the 1st respondent passed on. She relied on the facts espoused in her Notice of Motion to submit that by dint of rule 53 of this Court's rules, the application was mandatory, necessary and proper. The applicant submitted that the intention of the application was to confer a personal representative of the 1st respondent's estate. That the appeal was arguable and would be rendered nugatory if the orders sought were not granted. She further continued that the application was timeous and was necessitated to preserve the subject matter. That it was filed to avoid being caught up with the doctrine of abatement. Finally, she submitted that it was in the interest of justice that the application be allowed as prayed.
10. Rule 53 of the Court of Appeal Rules 2022 provides as follows:



- (1) ...;
 - (2) A civil application shall not abate on the death of the applicant 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;
 - (3) If no application is made under sub rule
 - (2) within twelve months by the applicant or the respondent, the application shall abate.
 - (4) ...;
 - (5) ...
11. A cursory perusal of the application and the facts established therein indicate that the 1st respondent died on 17th September 2023. A grant of letters of administration ad litem was issued in favor of Elisha Kipyegon Ngeno. The applicant then filed this application dated 22nd October 2024 on 6th November 2024 seeking to substitute the 1st respondent deceased.
12. As stated earlier, reading this application has been met with perplexity. The applicant has not attached the purported application that was the basis of the present application. The applicant has similarly not attached the submissions and responses (if any) filed for the benefit of this Court. In arguing the application, the applicant made reference to an application for extension of time to appeal out of time; similarly, that was not attached to the body of the application herein.
13. However, the interest of justice militate towards allowing the application rather than dismissing it. In the circumstances, I will reluctantly allow the application to the extent that leave is granted to join Elisha Kipyegon Ngeno as the 1st respondent's legal representative. The costs of the application shall abide the outcome of the appeal.

DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF MAY, 2025.

M. GACHOKA C.Arb, FCI Arb.

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

