



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mishack v Cheruiyot & another (Civil Application  
E027 of 2022) [2025] KECA 747 (KLR) (6 May 2025) (Ruling)**

Neutral citation: [2025] KECA 747 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION E027 OF 2022**

**PM GACHOKA, JA**

**MAY 6, 2025**

**BETWEEN**

**ESTHER MISHACK ..... APPLICANT**

**AND**

**JONATHAN CHERUIYOT ..... 1<sup>ST</sup> RESPONDENT**

**SAMWEL SANG CHERUIYOT ..... 2<sup>ND</sup> RESPONDENT**

*(An application for extension of time to file a notice of appeal, lodge the appeal and serve the record of appeal out of time against the judgment and decree of the Environment and Land Court of Kenya at Kapsabet (M. Mwanyale, J.) delivered on 12th October 2022)*

**RULING**

1. By Notice of Motion dated 22<sup>nd</sup> October 2024, the applicant has invoked sections 3 (1), (2) and (3) as well as 3A (1), (2) and (3) of the [Appellate Jurisdiction Act](#) and rules 53 (2) and (3) of the Court of Appeal Rules 2022. Though the applicant has indicated that the application is for extension of time to file a Notice of Appeal, lodge the appeal and serve the record of appeal out of time, the appellant has sought the following reliefs:
  1. ... Spent;
  2. That this Honourable Court be pleased to grant leave to join Elisha Kipyegon Ngeno as the 1<sup>st</sup> respondent in place of the deceased respondent;
  3. That the costs of this application be provided for.
2. 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 24<sup>th</sup> March 2023 against the judgement of the trial delivered on 12<sup>th</sup> October 2022. Thereafter, parties complied with filing their respective written submissions pursuant to the directions of the Court. Regrettably, before the ruling of the Court was delivered, the 1<sup>st</sup> respondent passed away on 17<sup>th</sup> November 2023.

3. The applicant continued that she was waiting for the 1<sup>st</sup> respondent's representative to substitute the deceased. It would later come to her attention that the 1<sup>st</sup> respondent obtained a grant of letters of administration ad litem on 22<sup>nd</sup> May 2024. The applicant wrote to the 1<sup>st</sup> 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 17<sup>th</sup> November 2024.
4. The applicant urged this Court to allow the application on account of the following reasons: the applicant stood to be prejudiced if the 1<sup>st</sup> 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.
5. The application was unopposed. Nonetheless, it was heard by way of written submissions. The respondents did not however file their written submissions. The applicant's written submissions, together with a list of authorities, both dated 14<sup>th</sup> February 2025, argued that she had filed an application to appeal out of time. Pending the determination of that application, the 1<sup>st</sup> 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 1<sup>st</sup> 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.
6. Rule 53 of the Court of Appeal Rules 2022 provides as follows:
  1. 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;
  2. If no application is made under sub rule
    - (2) within twelve months by the applicant or the respondent, the application shall abate.
    - (4)...
    - (5)...
7. It is not denied that the 1<sup>st</sup> respondent died on 17<sup>th</sup> September 2023. A grant of letters of administration ad litem was issued in favor of Elisha Kipyegon Ngeno. The applicant then filed this application seeking to substitute the 1<sup>st</sup> respondent deceased.
8. The present application has been met with a lot of indecision. I was compelled to copiously read the application to get a grasp of what the applicant was seeking. In addition, the facts espoused in the application were too scanty revealing insufficient information for the benefit of this Court. For instance, the applicant did not attach the purported application that was the basis of the present application as well as 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.

9. However, the interest of justice militate towards allowing the application rather than dismissing it. In the circumstances, I will reluctantly allow the appeal to the extent that leave is granted to join Elisha Kipyegon Ngeno as the 1<sup>st</sup> respondent's legal representative. The costs of the application shall abide the outcome of the appeal.

**DATED AND DELIVERED AT ELDORET THIS 6<sup>TH</sup> DAY OF MAY, 2025.**

**M. GACHOKA C.ARB, FCIARB.**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

