



**Mohamed & 2 others v Patel & 3 others (All ntended Substitute for
Hasmukh Kanji Premji Patel - Deceased) (Civil Appeal (Application)
E250 of 2024) [2025] KECA 1393 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1393 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E250 OF 2024
AK MURGOR, JA
JULY 31, 2025**

BETWEEN

**MOZA ABDILLAHI MOHAMED 1ST APPELLANT
KHALID ARVIND KANJI PATEL 2ND APPELLANT
KHALIDA ARVIND KANJI PATEL 3RD APPELLANT**

AND

**DHRUV HASMUKH KANJI PATEL 1ST RESPONDENT
KIRTAN HASMUKH KANJI PATEL 2ND RESPONDENT
DHARSHAK HASMUKH KANJI PATEL 3RD RESPONDENT
SURAJ ARVIND PATEL 4TH RESPONDENT
ALL NTENDED SUBSTITUTE FOR HASMUKH KANJI PREMJI PATEL -
DECEASED**

*(Being an application for substitution of the deceased respondent with his legal representative
and for leave to amend the Memorandum of Appeal in Mombasa Civil Appeal No E250 of 2024)*

RULING

1. Khalid Arvind Kanji Patel, the Applicant has brought this Notice of Motion dated 12th March 2025 pursuant to Section 3, 3A and 3B of the *Appellate Jurisdiction Act*, Rule 102 (1) and (2) of the Court of Appeal Rules, 2022, Article 159 of *the Constitution* seeking inter alia that;
 - i. the Court be pleased to substitute Hasmukh Kanji Premji Patel (the Deceased Respondent) with the legal representatives of his estate.



- ii. leave be granted to amend the Memorandum of Appeal and Record of appeal by striking out the name of Khalida Arvind Kanji Patel, the 3rd Appellant.
 - iii. this Court be pleased to grant any other or further order it may deem fit and expedient in the circumstances.
2. The Applicant's motion is brought on the grounds that Deceased Respondent, the executor and trustee of the will of the Estate of Arvind Kanji Premiji Patel (Deceased) passed away before the institution of this appeal and that the 3rd Appellant was inadvertently included as a party in the appeal even though she is deceased.
3. The application is supported by the affidavit of the Applicant in which he deposes that the Judgment, the subject of this appeal, that concerned an application dated 13th February 2023 for revocation of grant of Probate in respect of the Estate of Arvind Kanji Premiji Patel (Deceased) was delivered on 3rd May 2024; that after delivery of the Judgment, their then advocate, Mr. Richard Ngari orally applied for leave to appeal to this Court and thereafter, filed a Notice of appeal dated 15th May 2024, which erroneously included the 3rd Appellant who died on 28th March 2024 prior to the delivery of the Judgment; that, in addition, the Deceased Respondent died on 29th August 2024 a few months after the Judgment was delivered, and on 28th January 2025, a Grant of probate of the Deceased Respondent's estate was issued to (1) Dhruv Hasmukh Kanji Patel alias Dhruv Hasmukh Kanji, (2) Kirstan Hasmukh Kanji Patel alias Kirtan Hasmukh Kanji, (3) Dharshak Hasmukh Kanji Patel and (4) Suraj Arvind Patel.
4. It was further deponed that the grant of probate for the Estate of the late Arvind Kanji Premiji Patel (Deceased) was confirmed 10 years ago and his estate has not been distributed nor accounted for to date; that following his death, the Deceased Respondent, as executor required to be substituted, otherwise, the Estate of the late Arvind Kanji Premiji Patel (Deceased) will go to waste, to the detriment of his estate and its defendants.
5. In response the Respondents, through the 2nd intended Respondent Kirtan Hasmukh Kanji Patel, filed a Replying affidavit in which he deposes that he was served with a Notice of Motion dated 12th March 2025 and directions on 18th March 2025 at 1536 hours concerning this matter. However, neither him nor the other Respondents have ever been served with the Record of appeal referred to in the application and that the intended Respondents were not party to the High Court Succession Cause No.336 of 2013 in The Matter of The Estate of Arvind Kanji Premiji Patel – Deceased; Moza Abdillahi Mohamed, Khalid Arvind Kanji Patel & Khalida Arvind Kanji Patel vs Hasmukh Kanji Premji Patel, which appears to be the dispute giving rise to the appeal, nor have any of them participated in its proceedings.
6. The application was also opposed by one Ramesh Dhanji Harji; the named alternate executor of the will of the Estate of Arvind Kanji Premiji Patel (Deceased) in substitution of the executor, Deceased Respondent who died on 29th August, 2024; that the Estate of Arvind Premiji Kanji Patel filed an application dated 22nd January 2025 in Succession Cause No. 336 of 2013 Mombasa seeking to substitute Deceased Respondent with Ramesh Dhanji Harji; that the application dated 22nd January 2025 came up for hearing on the 23rd January 2025 and 25th February 2025 when the Applicants informed the trial court that they intended to file Replying Affidavits; that on 8th April 2025 when the application dated 22nd January 2025 came up for hearing before Mutai, J, the Applicant filed a Preliminary Objection dated 7th April 2025 which is yet to be heard and determined and therefore the application is still pending.



7. When the instant application came up for hearing on a virtual platform, learned counsel Mr. Ndere appeared for the Applicant, learned counsel Ms. Okata appeared for the estate of Arvind Kanji Premji Patel and learned counsel Mr. Onyony appeared for the 1st, 2nd, 3rd, and 4th Respondents.
8. Counsel for the Applicant submitted that the application seeks for the substitution of the Deceased Respondent with the legal representatives of his estate in accordance with Rules 87 (2) and (3) of the Court of Appeal Rules; that there is an application in the trial court seeking to substitute the Deceased Respondent with an executor already named in the will, but the Applicant has opposed the application. It was argued that the substitution by the Respondents was in accordance with this Court's rules, and is irrespective of whether or not the will specified an alternative representative. It was asserted that there are two appeals pending before this Court which cannot proceed unless the Deceased Respondent is substituted.
9. On behalf of the 1st to 4th Respondents, Mr. Onyony relied on the Respondents' Replying Affidavits and begun by questioning whether this Court has jurisdiction to determine this application; that in particular, there is no Notice of appeal that has been filed in this Court in respect of the appeal, and no appeal has been filed as a basis for this application, and therefore there is nothing for this Court to determine.
10. Regarding substitution of the Deceased Respondent, it was submitted that the issue is pending before the trial court, which is the proper forum. Furthermore, the 1st to 4th Respondents have been inappropriately enjoined in these proceedings. It was argued that their brother, having been appointed an executor of his brother Arvind Kanji Premji Patel's estate, does not provide the Applicant with the right to substitute the Deceased Respondent with the 1st to 4th Respondent's in these proceedings.
11. For her part, Ms. Okata learned counsel for the Estate of Arvind Kanji Premji Patel (Deceased) also opposed the application, for the reasons that the Applicant has taken it upon himself to lodge an application similar to one lodged in the trial court. Furthermore, the Applicant has included parties in this appeal who were not before the trial court. It was submitted that since it is not the estate of the Deceased Respondent that is in contention, the inclusion of the 1st to 4th Respondents is unwarranted, unprocedural, and an abuse of the court process.
12. In reply, Mr. Ndere submitted that this is an application and not an appeal, and therefore there was no need to file a Notice of appeal. Counsel stated that an appeal is pending before this Court, and Rule 87 allowed for substitution of a deceased person.
13. I have considered the motion, the replying affidavits and the parties' submissions. In the motion, the Applicant is seeking to remove the 3rd Appellant as a party in the appeal and to substitute the Deceased Respondent with the 1st to 4th Respondents, who he asserts are the legal representatives of his estate. Consequently, a consideration of the issues raised discloses three matters for determination;
 - i) whether this Court has jurisdiction to consider this application;
 - ii) whether the 3rd Appellant should be removed as a party to the appeal and her name struck out as a party; and
 - iii) whether the Deceased Respondent should be substituted by the 1st to 4th Respondents.
14. Beginning with whether this Court has jurisdiction to hear this application, it is the Respondent's contention that this Court lacks jurisdiction to determine this application because there is no Notice of appeal lodged in this Court. In reply, counsel for the Applicant asserts that a Notice of appeal dated 15th May 2024 was lodged in this Court in respect of Mombasa Civil Appeal No. E250 of 2024. Since



there is a Notice of appeal that has been filed in respect of the appeal to which this application relates, I am satisfied that I have the requisite jurisdiction to hear and determine this application.

15. Next is the question of whether the 3rd Appellant who is deceased should be struck out as a party to the appeal. I have been through the material annexed to the Applicant's affidavit, and it is true that the 3rd Appellant is deceased as she died on 28th March 2024. In addition, the annexures disclose that by way of Succession Cause Number E087 of 2024 in the matter of the estate of Khalidah Arvind Kanji Patel letters of administration in respect of her estate were issued to her personal representatives being Moza Abdillahi Mohamed and Khalid Arvind Kanji Patel on 30th September 2024. Accordingly, it is befitting that Khalidah Arvind Kanji Patel, the 3rd Appellant, be removed as a party to the appeal and her name duly struck off the Memorandum and Record of appeal.
16. The final issue is whether the Respondent Deceased can be substituted with the 1st to 4th Respondents who are alleged to be his personal representatives.
17. With respect to the substitution of the Deceased Respondent, Rule 102 of the Court of Appeal Rules 2022 states that:
 - "(1) An appeal shall not abate on the death of the appellant or respondent, but the court shall on the application of any interested person cause the legal representative of the deceased person to be made a party in place of the deceased.
 - (2) If no application is made under sub-rule (1) within 12 months from the date 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.An application under sub-rule (3) may be made before a single judge."
18. In this application, the Applicant, seeks to substitute the Deceased Respondent who is the executor and trustee of the Estate of Arvind Kanji Premji Patel (Deceased) with (1) Dhruv Hasmukh Kanji Patel alias Dhruv Hasmukh Kanji, (2) Kirstan Hasmukh Kanji Patel alias Kirtan Hasmukh Kanji, (3) Dharshak Hasmukh Kanji Patel and (4) Suraj Arvind Patel who are alleged to be his legal representatives.
19. I have been through the record and the annexures and there is no evidence that the 1st to 4th Respondents have been appointed the legal representatives of the Deceased Respondent, in his capacity as executor and trustee of the Estate of Arvind Kanji Premji Patel (Deceased) or at all.
20. In the circumstances, leave for substitution of the Deceased Respondent by (1) Dhruv Hasmukh Kanji Patel alias Dhruv Hasmukh Kanji, (2) Kirstan Hasmukh Kanji Patel alias Kirtan Hasmukh Kanji, (3) Dharshak Hasmukh Kanji Patel and (4) Suraj Arvind Patel be and is hereby declined.
21. In sum, the Notice of motion dated 12th March 2025 partly succeeds. And I make the following orders:
 - i. The 3rd Appellant be and is hereby removed as a party to Mombasa Civil Appeal Number E250 of 2024;
 - ii. Leave be granted to amend the Memorandum of Appeal and Record of appeal by striking out the name of the 3rd Appellant.
 - iii. The substitution of the Deceased Respondent by



- (1) Dhruv Hasmukh Kanji Patel alias Dhruv Hasmukh Kanji,
- (2) Kirstan Hasmukh Kanji Patel alias Kirtan Hasmukh Kanji,
- (3) Dharshak Hasmukh Kanji Patel and
- (4) Suraj Arvind Patel be and is hereby declined;

iv. No orders as to costs.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 31ST DAY OF JULY, 2025

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

