



REPUBLIC OF KENYA



**KENYA LAW**  
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**Obat v Obat & 4 others (Civil Application E191 of 2022)  
[2024] KECA 1021 (KLR) (16 August 2024) (Ruling)**

Neutral citation: [2024] KECA 1021 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E191 OF 2022  
HM OKWENGU, JA  
AUGUST 16, 2024**

**BETWEEN**

**PIUS ONYANGO OBAT ..... APPLICANT**

**AND**

**LAWRENCE OLOO UDUNY ..... 1<sup>ST</sup> RESPONDENT**

**BENEDICT OBAT ..... 2<sup>ND</sup> RESPONDENT**

**JACOB OGOS TALO ..... 3<sup>RD</sup> RESPONDENT**

**PETER ODUOR WANDEI ..... 4<sup>TH</sup> RESPONDENT**

**MARTIN ONYANGO UDUNY ..... 5<sup>TH</sup> RESPONDENT**

*(Being an application under Article 50 and 159 of the Constitution, Sections 3A and 3B of the Appellate Jurisdiction Act, Rules 44, 46 and 102 of the Court of Appeal Rules, 2022 and Order 51 Rule 1 & 15 of the Civil Procedure Rules, 2010)*

**RULING**

1. By a Notice of Motion dated 13<sup>th</sup> May, 2024, brought under Article 50 and 159 of the *Constitution*, Sections 3A and 3B of the *Appellate Jurisdiction Act*, Rules 44, 46 and 102 of the *Court of Appeal Rules*, and Order 51 Rule 1 and 15 of the *Civil Procedure Rules*, the Court is being asked to grant leave to Sylvester Ochieng Onyango (Sylvester), James Onyango Obat and Maurice Odhiambo Onyango to file an application for leave to revive the appeal out of time.
2. It is also prayed that upon granting leave the Court issues a decree to stay the hearing and determination of the 1<sup>st</sup> to 5<sup>th</sup> respondents' notice of motion dated 19<sup>th</sup> April, 2024, pending the hearing and determination of the instant application. Further, the Court is requested to revive Kisumu Civil Appeal No 191 of 2022 upon Sylvester, James Onyango Obat and Maurice Odhiambo Onyango being substitute as the legal representatives of Pius Onyango Obat (Pius), now deceased.



3. Further, the Court is requested to grant leave to the applicant to amend the memorandum of appeal dated 6<sup>th</sup> April, 2022, and record of appeal dated 20<sup>th</sup> July, 2022; and that the amended memorandum of appeal and record of appeal be set down for directions on priority basis; and finally, that the appellant/applicant be at liberty to serve the respondents with the amended memorandum of appeal, in accordance with the proposed amended memorandum of appeal.
4. The application is supported by grounds stated on the face of the motion, and an affidavit sworn by Sylvester who is said to be the applicant. In brief, Sylvester is son to Pius who died on 13<sup>th</sup> August, 2021. Letters of administration intestate for the estate of Pius, were issued to Sylvester, one James Obat Onyango, and Maurice Odhiambo Onyango as joint administrators on 10<sup>th</sup> May, 2023.
5. Prior to his death, Pius had instituted proceedings against the respondents at Ukwala, in Ukwala PM ELC No 70 of 2018 in regard to Uholo/Magoya/221 (suit property). Judgment was delivered in Pius's favour but the respondents successfully filed an appeal in Siaya ELC Appeal No 43 of 2021, which was allowed, and judgment and decree in Ukwala PM ELC No 70 of 2018 set aside. There is a notice of appeal filed on 19<sup>th</sup> January, 2021, from the judgment in the ELC Appeal, but it is contentious as to whether Pius is the one who filed the notice and if so, whether the same was filed within the prescribed time.
6. By a notice of motion dated 19<sup>th</sup> April, 2024, the respondents moved the Court under Rule 75(2), 77(1), 82(1) and 84 of the *Court of Appeal Rules*, seeking to have the appeal that had been filed by Pius struck out, on the grounds that the notice of appeal was not competent, the same having been lodged on 28<sup>th</sup> December, 2021, outside the prescribed period, and without leave; and that the memorandum of appeal was instituted in the name of Pius after his death, without substitution by a legal representative.
7. Sylvester has deposed to various issues that are not necessarily relevant for the purposes of this application. Suffice to state that part of the suit property was acquired by the government, and there is an amount of Kshs 7,550,000/- which was deposited in a joint interest earning account at KCB Siaya Branch in the joint names of the parties' advocates. This means that the determination of the ownership of the suit property also determines entitlement to the amount deposited in the bank. There are some interpleader proceedings relating to the amount deposited in the bank, wherein the Court delivered a judgment in the interpleader proceedings on 19<sup>th</sup> January, 2024 reiterating this position. This is probably the reason why both the applicant and the respondents have come up with their applications.
8. By the notice of motion dated 13<sup>th</sup> May, 2024, the applicant is seeking to revive the appeal and to have Sylvester and the other two administrators of the estate of Pius substituted in place of Pius. The applicant also seeks to stay the hearing of the respondent's motion and leave to amend the memorandum of appeal and the record of appeal.
9. The application is opposed through a replying affidavit sworn by one of the respondents Peter Oduor Wandej, who deposes that Pius died before filing any appeal, and that the application filed by the applicant is incompetent. He urges the Court to dismiss the motion, the same having been brought with inordinate delay.
10. Rule 102 of the *Court of Appeal Rules*, which deals with death of a party to an appeal states as follows:

“(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 twelve months from the date of the death 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.”

11. A reading of the above rule shows that a suit abates, if, no application is made within twelve months, for the legal representative of the deceased appellant or deceased respondent to be made a party in place of the deceased. Where an appeal has abated, the person claiming to be a legal representative of the deceased or any interested party, may apply to have the abated appeal revived if he proves that he was prevented by sufficient cause from continuing with the appeal. Therefore, the question before us is, first whether the motion is properly before us, and if so whether, his legal representatives have a good reason for making the application for reviving the appeal almost three years after the death of Pius, and whether Pius had filed an appeal.
12. In the first place although Sylvester claims to be the applicant, looking at the notice of motion dated 13<sup>th</sup> May 2024, the motion has been filed in the name of Pius Onyango Obat as the applicant. To this extent the motion is defective, as under Rule 102(3) of the Court of Appeal Rules, the motion ought to have been brought by the applicant first, for revival of the abated appeal, and second, for substitution of the legal representatives in place of Pius once the appeal is revived. Secondly, the application before us is an omnibus application, it seeks substitution under Rule 102 of the Court of Appeal Rules, which under Rule 102(4) is a single Judge application, but it also seeks stay of proceedings and amendment of pleadings which are not matters within the jurisdiction of a single Judge. The application is therefore incompetent. That being the position I do not find it necessary to go into the merit of the application for revival of the appeal or substitution of Pius.
13. The notice of motion dated 13<sup>th</sup> May 2024, is accordingly struck out, and costs awarded to the respondents as against the applicants. Dated and Delivered at Kisumu this 16<sup>th</sup> day of August, 2024

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

