



REPUBLIC OF KENYA



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**Azhar s/o Mohamed Akram v Singh & 4 others (Civil Appeal (Application)
23 of 2019) [2024] KECA 1756 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1756 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 23 OF 2019
M NGUGI, JA
DECEMBER 6, 2024**

BETWEEN

MOHAMMED AZHAR S/O MOHAMED AKRAM APPLICANT

AND

HARDEV KALSI SINGH 1ST RESPONDENT

THE ESTATE OF ILAM DIN S/O ILAM DIM (DECEASED) 2ND RESPONDENT

**THE ESTATE OF MOHAMMED ASLAM S/O ILAM DIN
(DECEASED) 3RD RESPONDENT**

MOHAMMED AKHTAR 4TH RESPONDENT

ASGIRI D/O ILAM DIN 5TH RESPONDENT

(Being an application to reinstate the appeal and application for substitution of parties arising from the ruling of the Court of Appeal sitting in Nairobi in Civil Appeal (Application) No.23 of 2019 delivered on 24th May 2024 by Musinga (P), Makhandia and Kantai JJ.A)

RULING

1. Mohammed Azhar s/o Mohamed Akram, now deceased, was dissatisfied with the decision of the Environment and Land Court (Mutungi, J.) dated 23rd July 2015 in ELC Case No. 186 of 2012 (OS). He filed an application dated 28th January 2019 seeking stay of execution of the judgment. The matter came up for hearing on 21st June 2023 and the Court (Okwengu, Mativo & Ngenye-Macharia, JJ. A) and upon being informed by counsel for the 1st respondent that the 1st respondent was deceased and no application for substitution having been made, the Court marked the application as having abated.
2. That order notwithstanding, the application was again listed before the Court (Musinga, Asike-Makhandia and Kantai, JJA, on 6th May 2024. It appears that one Ms. Farah Aztar, a relative of the



appellant, appeared and informed the Court that the appellant had also passed away, on 8th March 2021. In its ruling dated 24th May 2024 (Mohammed Azhar s/o Mohamed Akram v Singh & 4 others (Civil Appeal (Application) 23 of 2019) [2024] KECA 580 (KLR) (24 May 2024) (Ruling) this Court held, after noting the provisions of rule 102 of this Court's Rules 2022, that:

“In view of the foregoing, it is clear that this appeal has abated. The legal representatives of the deceased persons are however at liberty to apply for an order to revive the appeal, if they so wish. Ms. Farah Azhar does not have locus standi to prosecute the appeal or the pending application since she had not been substituted for the deceased appellant.”

3. Riding on this holding of the Court, the applicant, Ms. Farah Azhar Deeba, has filed the application dated 4th June, 2024 asking the Court to:
 - i. Set aside the ruling of this Court dated 24th May 2024 marking the appeal and application as abated;
 - ii. Grant the reinstatement and revival of the appeal and the application for stay of execution;
 - iii. Take cognizance of the Limited Grant of Letters of Administration Ad Litem issued by the High Court in Succession Cause No E357 of 2024 vesting powers to prosecute this suit on the personal representatives;
 - iv. Grant orders of substitution of parties to enable the Estate of Mohamed Azhar be put on record and the personal representative appointed in the ad litem grant have proper locus to prosecute the application and appeal.
 - v. Grant a favourable date for the prosecution of the application for stay.
4. The application is brought under rule 44, 53(4) and 102(3) and 4 of the Court of Appeal Rules, 2010 (the Rules now applicable are the 2022 Rules). It is based on the grounds set out on its face and is supported by an affidavit sworn by Farah Azhar Deeba. Ms. Deeba avers that the original appellant, now deceased, was her husband; that as his personal representative, she was never made aware of the intricate details surrounding the application and the appeal and was therefore not able to prosecute it in good time; that upon learning of its existence and after frustrations occasioned by family members and other third parties, she was finally able to petition for a limited grant of letters of administration ad litem. She avers that she was prevented by sufficient cause from prosecuting the application and the appeal; and should the orders sought not be granted, she will suffer a grave miscarriage of justice and suffer irreparable economic losses.
5. In submissions dated 27th June 2024 filed by the firm of Chiriswa Mungai & Co Advocates, the applicant submits that Civil Appeal No. 23 of 2019 was filed in 2019 but due to the busy schedule of the Court, it was not prosecuted; and that the appellant died on 8th March 2021. The applicant submits that she obtained the limited grant of letters of administration ad litem on 21st May 2024, while the appeal was marked as having abated on 24th May 2024.
6. In submissions dated 15th October 2024 filed by the firm of Buluma and Associates, apparently pursuant to directions issued on 12th June 2024, the applicant reiterates the background to the application and her submissions dated 27th June 2024. She implores the Court to invoke the overriding principles under its Rules and grant her an opportunity to prosecute the appeal.



7. There is no response to the application by the respondents, through their advocates, LJA Associates Advocates, were served, as evidenced in an affidavit of service sworn by one Washington Kibet on 1st June 2024.
8. I have considered the application, the affidavit in support, and the two sets of submissions filed on her behalf by two different law firms. I have not been able to find a notice of change of advocates among the documents placed before me, so it is not clear on what authority or basis the firm of Buluma & Co. Advocates filed the submissions dated 15th October 2024. Since the two sets of submissions raise essentially the same arguments, I will disregard the issue of representation and leave it to the applicant and her counsel to sort out.
9. Shorn of the prolix prayers, some of which are outside the remit of a single judge, such as the prayer seeking an order for setting aside the ruling of a full bench of the Court dated 24th May 2024, the applicant simply seeks to have the appeal revived, and to be substituted in place of the deceased appellant. She has brought the application under rule 44, 53(4), 102(3) and 4 of the Court of Appeal Rules, 2010. The Rules now in force are the 2022 Rules, rule 102 of which is applicable to the present circumstances. It provides that:
 102.
 - (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. Death of party to appeal.
 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. (Emphasis added)
10. This Court has, on two occasions this year, noted that the appeal the subject of this application had abated. However, rule 102(3) leaves the door open for the current applicant, the legal representative of the deceased appellant, to apply for revival of the appeal should she be able to show that she was ‘prevented by sufficient cause’ from continuing the appeal. The applicant’s reasons are, in essence, that she was not aware of the existence of the appeal until after the demise of her husband. Even then, she was prevented from acting by disputes with family members of her deceased spouse.
11. For a wife to be ignorant of her husband’s affairs in our society is not unusual; indeed, it is all too common. For matters to be further complicated for a widow by inter-family disputes after the demise of her spouse is again usual fare within our social context. That in such circumstances the spouse can fail to act with respect to her deceased spouse’s pending litigation and get caught up by the rules of procedure is therefore understandable, and excusable.
12. Accordingly, it is my finding that the justice of this matter requires that the application to revive Civil Appeal No. 23 of 2019 be allowed, and that the applicant, Farah Azhar Deeba, the personal representative of the deceased, Mohamed Azhar s/o Mohamed Akram be substituted as the appellant in his place, and I so order.
13. There shall be no order as to costs.



DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

