



**Consolidated Bank of Kenya Limited v Shah; Shah (Administrator of the Estate of the Late Kapurchand Depah Shah) (Intended Respondent) (Civil Appeal (Application) 77 of 2018) [2024] KECA 1750 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1750 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 77 OF 2018  
FA OCHIENG, JA  
DECEMBER 6, 2024**

**BETWEEN**

**CONSOLIDATED BANK OF KENYA LIMITED ..... APPLICANT**

**AND**

**KAPURCHAND DEPAH SHAH (DECEASED) ..... RESPONDENT**

**AND**

**TARANGLATA RAMESH SHAH (ADMINISTRATOR OF THE ESTATE OF THE LATE KAPURCHAND DEPAH SHAH) ..... INTENDED RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Nairobi (Nambuye, J.) dated the 21st September 2012 in HCCC No. 2723 of 1998)*

**RULING**

1. The application before me is dated 1<sup>st</sup> July 2024. The application is brought pursuant to Rule 102 of the *Court of Appeal Rules*.
2. The applicant prays for orders that:
  - “a. The appeal herein which has abated be revived.
  - b. the respondent herein be substituted in place of the deceased respondent in the appeal herein.
  - c. The costs of this application be in the appeal.”



3. The application is premised on the grounds that:
  - a. The respondent herein died on 1<sup>st</sup> April 2021.
  - b. Efforts to have the advocates on record for the deceased respondent substitute the respondent to enable the applicant to prosecute the appeal have failed.
  - c. The information about the death of the respondent in the appeal and the appointment of the administrator of the said deceased's estate has only come to the knowledge of the applicant early this year.
  - d. The applicant is desirous of prosecuting the appeal herein as evidenced by its compliance with the directions on filing submissions and court attendance whenever required to do so.”
4. The application was further supported by the affidavit of Judith Chepkorir, the applicant's recovery officer, sworn on 1<sup>st</sup> July 2024. She reiterated the grounds on the face of the application and further stated that the respondent's previous counsel on record had also died.
5. She stated that the applicant's advocates obtained information about the death of the respondent through a Gazette Notice of the application for letters of administration in Nyeri CMCC P & A case No. 484 of 2021.
6. She further stated that the applicant was desirous of pursuing the appeal as evidenced by its filing of submissions and bundle of authorities in 2018 pursuant to the court's directions.
7. In response to the application, the intended respondent filed grounds of opposition dated 12<sup>th</sup> August 2024. He stated that the application was bad in law, as it offends the provisions of Rule 96(2) of this [Court's Rules](#), which are couched in mandatory terms.
8. On 25<sup>th</sup> October 2024 at 11:08 a.m., the parties herein were served with a hearing notice for 5<sup>th</sup> November 2024. The parties were directed to file their written submissions.
9. On the date of the hearing, only the applicant had filed its written submissions dated 29<sup>th</sup> October 2024. The applicant said that after filing its submissions on the appeal, and serving the same on the respondent in person on 2<sup>nd</sup> November 2018, the appeal was listed for hearing on 21<sup>st</sup> November 2022, 22<sup>nd</sup> May 2023, and 16<sup>th</sup> October 2023; but was taken out on all occasions because the respondent's advocates had not been served with hearing notices.
10. The applicant pointed out that on 29<sup>th</sup> January 2024, the respondent's counsel appeared before the court and informed the court of the respondent's death, and that he did not have instructions from the administrators of the estate of the deceased.
11. The applicant submitted that although the administrator of the estate of the deceased was obliged to file an application to be substituted as a respondent in this case, he failed to do so. The applicant pointed out that it had filed the application herein expeditiously after the respondent failed to move the court.
12. The applicant pointed out that Rule 96(2), which was relied upon by the respondent in his grounds of opposition, was not relevant to the matter before this Court.
12. To buttress its submissions, the applicant relied on the case of [James Mwaniki Njuguna vs Republic & 5 Others](#) [2024] KECA 622 KLR, in submitting that where there was a legal representative who sought and was granted that mandate, justice will be served by an order that the said legal representative substitute the deceased.



13. I have carefully considered the application, the grounds of opposition, the submissions by the applicant, the authorities cited, and the law. The issue for determination is whether the abated appeal should be revived, and whether the intended respondent should be substituted in place of the respondent.
14. It is common ground that the facts in this application are not disputed. By the time the applicant first became aware that the respondent had died and that he had been substituted by the intended respondent herein, a period of more than 12 months had lapsed.
16. Rule 102 of the *Court of Appeal Rules* provides 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 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.
  - 4) An application under sub rule (3) may be made before a single judge.”
17. In this case, despite the respondent’s death and the subsequent appointment of a legal representative of the estate of the deceased, there was no application for the substitution of the deceased within 12 months from 1<sup>st</sup> April 2021.
18. Despite knowing of the appeal herein, the intended respondent, as the administrator of the estate of the deceased respondent, did not take any steps to substitute the deceased. This is evidenced by the conduct of the respondent’s counsel who appeared before the court on 29<sup>th</sup> January 2024, without instructions, from the intended respondent.
19. The applicant herein had already filed submissions to the appeal way back in 2018. What is pending is for the respondent to file his submissions and for the matter to be set down for hearing. The applicant has also taken the initiative to file the application for substitution. In the case of *John Mugambi & 21 others vs Kenya National Assurance Co. (2001) Limited* [2016] eKLR, this Court held thus:
- “The restoration of dismissed appeals is an exceptional relief, for cause, granted to an appellant who would otherwise have no recourse under the general tenet that there has to be an end to litigation. For precisely that reason, such appellant must move the court with expedition.”
20. In the circumstances, I am satisfied that the applicant demonstrated a desire to pursue the appeal herein. I am persuaded by the evidence before this Court that it will be in the interest of justice and fairness that the appeal be revived.



21. As regards, the substitution of the respondent, this Court in the case of *James Mwaniki Njuguna vs Republic & 5 Others*, (supra), held thus:

“20. Meanwhile, it would have been unseemly for the applicant to purport to impose a legal representative upon the estate of the 5th respondent, considering that the said respondent was one of the six persons against whom he was canvassing the appeal.

21. But now that there is a legal representative who sought and was granted that mandate, justice will be best served by an order that Benson Gachau Mungai do substitute the 5<sup>th</sup> respondent herein.”

22. In the circumstances, I find that, as the intended respondent sought and was granted the mandate to represent the estate of the deceased, it will be in the interest of justice that Taranglata Ramesh Shah, as the administrator of the estate of the respondent, be substituted in place of the respondent.

23. Consequently, the appeal herein is revived, and the respondent is substituted by his legal representative, Taranglata Ramesh Shah.

24. As costs follow the event, the costs of the application shall be borne by the intended respondent.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF DECEMBER, 2024.**

**F. OCHIENG**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

