



REPUBLIC OF KENYA



Mungai & 3 others v Mbugua & another (Civil Appeal (Application) 311 of 2019) [2024] KECA 1752 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KECA 1752 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 311 OF 2019
M NGUGI, JA
DECEMBER 6, 2024**

BETWEEN

**JANE NJERI MUNGAI 1ST APPLICANT
MARTIN MUNGAI 2ND APPLICANT
JOSHUA MBUGUA AKA PETER MBUGUA NGUGI 3RD APPLICANT
SUSAN NAIPONO LETUYA 4TH APPLICANT**

AND

**ALLANT GITAU MBUGUA 1ST RESPONDENT
GICHAGE KIMANI 2ND RESPONDENT**

(Being an application for substitution in an appeal from the judgment of the High Court (W.M. Musyoka J.) dated 30th June 2017 in High Court Succession Cause No. 1574 of 2006 and the ruling of the High Court at Kajiado (Nyakundi J.) dated 18th April 2018)

RULING

1. In the application dated 1st July, 2024, the applicants pray that Allan Gitau Mbugua and Gichage Kimani, both of whom are deceased, be substituted with Susan Naipono Letuya and Anthony Peter Mbugua, the legal representatives of the estate of Samuel Ngugi Mbugua (deceased) as respondents in the appeal,

{notwithstanding that they have always been parties to the appeal. The applicants do not indicate, in the application, under which provisions of the law it is brought. However, in their submissions dated 9th October 2024, they state that it has been brought under rule 102 of the Rules of this Court.
2. The application is based on seven grounds set out on its face and reiterated in an affidavit in support sworn jointly by Jane Njeri Mungai and Peter Mbugua Ngugi on 1st July, 2024. The applicants aver



that the appeal emanates from the decision of Musyoka J. on the will and distribution of the estate of the deceased, Samuel Ngugi Mbugua, between his two houses. They further aver that following the demise of Allan Gitau Mbugua and Gichage Kimani, the applicants wish to have them substituted with Anthony Peter Mbugua and Susan Naipono Letuya, representing the 1st and 2nd house respectively, to take over the administration of the estate.

3. The applicants aver that on 6th July 2020, both houses of the deceased were ordered to file submissions on the appeal. The 2nd house filed its submissions, but the 1st house did not. The matter then came up before the Deputy Registrar of this Court

{on 12th March 2024 when she was advised of the passing on of Allan Gitau Mbugua and Gichage Kimani, and their substitution with Susan Naipono Letuya from the 2nd house and Anthony Peter Mbugua from the 1st house respectively to take over the administration of the deceased's estate. The applicants aver that while it was alleged, at the appearance before the Deputy Registrar, that the appeal had abated, their position is that parties to a succession cause are not determined by the heading on the face of court documents but according to their beneficial interests.

4. The applicants maintain that as long as the beneficiaries of an estate are alive, a succession suit cannot be deemed to have abated should a party named in the suit die; that no members of the deceased's household have died; and that even if they were to die, their interest would devolve to their personal representative. They further aver that the application, if allowed, will not prejudice the first house of the deceased because they have been parties to the suit all along.

5. The applicants filed submissions dated 9th October 2024 in which they rely on the decisions of this Court in Omar alias

{ { *Zuhura Wangare Kamandura v Chege* [2023] KECA. 1200 (KLR) and *Elizabeth Wanjiru Njenga & Another v Margaret Wanjiru Kinyara & 2 Others* [2018] eKLR in which the Court allowed revival of an appeal that had abated and substitution of the deceased appellants with their personal representatives. They submit that they have satisfied the provisions of Rule 102(1) of this Court's Rules, 2022, and pray that their application be allowed.

6. There is no response to the application, though I have not found evidence of service in the documents placed before the Court.

7. Rule 102 of this Court's 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. 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.

8. { } 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).



1. The applicants argue that their appeal has not abated, and then proceed to make a rather interesting submission which, if I understand them correctly, may be based on a misapprehension of the law on abatement of suits or appeals. They state that:

“We submit further that the application is made notwithstanding that parties to a succession cause are determined according to their beneficial interests and not according to the heading on the face of Court documents which in our view means that all the members of the deceased houses have always been parties to this appeal irrespective of whether they were specifically named in the heading as their being parties is dependent not on the heading in Court document but rather their respective beneficial interests. Put differently Antony

{Peter Mbugua and his siblings from the deceased 1st house and Susan Naipono Letuya and her siblings and mother from the deceased 2nd house have always been parties to the dispute before the Superior Court which dispute culminated to this Appeal notwithstanding that when filing the appeal the same was directed to them through the previous administrators who as a matter of practice were named as the 1st and 2nd Respondents.”

9. There is no argument that the applicants are beneficiaries of the estate of Samuel Ngugi Mbugua (Deceased). From what can be gathered from the pleadings before me, decisions regarding the will of the deceased and the distribution of his estate were made by Justices Musyoka and Nyakundi, respectively, with which the applicants were dissatisfied. They filed an appeal, and two of the parties to the appeal, Allan Gitau Mbugua and Gichage Kimani, are deceased. The applicants do not say when they passed away, but from the letters of administration issued to Anthony Peter Mbugua Ngugi and Susan Wanjiru alias Susan Naipanoi Letuya on 22nd September 2022, more than two years had elapsed by the time the applicants informed the Deputy Registrar of this

{Court on 12th March 2024 that they were deceased. That being the case, the appeal had abated as provided under rule 102. That notwithstanding, however, rule 102(2) and (3) provide for the revival of an appeal that has abated where personal representatives of a deceased appellants or respondent demonstrate to the Court, on an application for revival of the appeal, that they were prevented by sufficient cause from continuing the appeal.

10. In the matter before me, the applicants seek substitution of the parties, but they have not sought revival of the appeal which abated twelve months from the death of Allan Gitau Mbugua and Gichage Kimani. The applicants have therefore put the cart before the horse: there is no appeal with respect to which an order for substitution can be made. However, as the cases cited by the applicants, particularly Omar alias Zuhura Wangare Kamandura v Chege (supra) illustrate, an application can be made, simultaneously, for revival of an appeal and substitution of the personal representatives of the deceased appellants, or the persons appointed to represent the estate of a deceased person, as in this case.
11. {Accordingly, I am unable to grant the orders for substitution sought in the application before me, and it is hereby dismissed. The applicants are, however, at liberty to file an application under rule 102 for revival of the appeal and substitution of the deceased representatives of the estate of Samuel Ngugi Mbugua (Deceased).
12. 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

