



REPUBLIC OF KENYA



KENYA LAW
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**Otula v Daudi & 4 others (Civil Application E003 of 2023)
[2023] KECA 569 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 569 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E003 OF 2023
PO KIAGE, JA
MAY 12, 2023**

BETWEEN

ALFRED MIYUMO OTULA APPLICANT

AND

MAGDALENE ALUOCH DAUDI 1ST RESPONDENT

JOANES AMIMO OTULA 2ND RESPONDENT

MOSES SHIKUKU SULE 3RD RESPONDENT

CHARLES OMBATI OMWENGA 4TH RESPONDENT

FREDRICK OCHIENG WOKORI 5TH RESPONDENT

*(Application under Rule 102 of the Court of Appeal Rules, 2022
for substitution of the Appellant in Civil Appeal No. 120 of 2018)*

RULING

1. The motion dated December 31, 2022 is brought under Rules 4, 102(3) and 102(4) of the *Court of Appeal Rules, 2022*. The motion seeks to extend time for the applicant to substitute the appellant, Michael Nyagwa Otula, and revive the appeal. The appellant expired on January 16, 2020 as attested to by the Certificate of death annexed to the supporting affidavit of the applicant Alfred Miyumo Otula. I note that there was some laxity in the drafting of the application, the applicant does not appear as a party in any of the lodged pleadings, but is simply mentioned in the text.
2. The application is based on grounds on its face and a supporting affidavit sworn by the applicant on December 31, 2022. It is deposed that, the substitution will help in resolving the issues in controversy; the family of the appellant took long in agreeing on his replacement; the applicant works and stays in Hong Kong and getting permission to come to Kenya was a challenge and, the applicant was given a limited grant to enable him to represent the deceased appellant and his family.



3. In answer to the application, the 2nd to 5th respondents filed a replying affidavit sworn on March 7, 2023 by the 3rd respondent on their behalf. It is averred that the 1st respondent is deceased. The respondents oppose the application contending that pursuant to Rule 102(2) of this Court's Rules, the application to substitute ought to have been made within 12 months from the date of death of the appellant. They assert that the appeal herein has abated since the application was lodged 2 years after the death of the appellant on January 16, 2020. Further, the applicant has not demonstrated by way of documentary evidence that the family of the deceased appellant had a disagreement in finding his replacement and that he works and lives in Hong Kong where he had difficulty getting permission to come to Kenya. The respondents contend that the applicant has not proved that he was prevented by sufficient cause from continuing with the appeal to warrant its revival. Moreover, they argue, the appeal was filed out of time without leave of the court. The law firm of Amos O. Oyuko & Company Advocates also lodged written submissions on behalf of the respondents which largely reiterate the averments in the replying affidavit.
4. The application is made under Rule 102 of this Court's Rules which provides;
 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”.
5. Evidently pursuant to Rule 102(2) the application dated December 31, 2022 was lodged out of the stipulated 12 months’ period, the appellant having perished on January 16, 2020. The respondents contest the reasons given by the applicant for enlargement of time to substitute the appellant arguing that he has not given any sufficient cause that prevented him from continuing with the appeal.
6. Certainly a delay of about 3 years is inordinately long. However, in the interests of justice and in view of the fact that the applicant, Alfred Miyumo Otula, holds letters of administration *ad litem* issued to him on December 20, 2022 at Kisumu, in *Misc. Cause No. E166 of 2022*, I am of the view that the appeal should be revived pursuant to Rule 102(3) of the Court of Appeal Rules.
7. Consequently, I allow the motion with no orders as to costs. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF MAY, 2023.

P.O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

