



**King'ori (Deceased) v Humphrey Njuru Karanja & another (Civil Appeal  
(Application) 171 of 2018) [2023] KECA 739 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KECA 739 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 171 OF 2018  
DK MUSINGA, KI LAIBUTA & JM MATIVO, JJA  
JUNE 22, 2023**

**BETWEEN**

**JOHN MWANGI KING'ORI (DECEASED) ..... APPELLANT**

**AND**

**HUMPHREY NJURU KARANJA ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF NAIROBI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application by the 1st respondent to strike out the appeal dated 29th May 2018 having abated, and an application by the Legal Representative of the appellant herein to revive the abated appeal, all arising from the Judgment and Decree of the Environment & Land Court at Nairobi (Eboso, J.) dated 6th April 2018 in ELC Case No. 193 of 2007)*

**RULING**

1. Before this Court are two applications seeking different orders. The first in time is the application dated 29<sup>th</sup> December 2022, which is brought by the 1<sup>st</sup> respondent under the provisions of article 159 of the Constitution, unspecified provisions of the Appellate Jurisdiction Act, rules 71(1) (a) and (2) and 102(2) of the Rules of this Court. The principal orders sought in this application are an order for striking out the appeal (Civil Appeal No. 171 of 2018) on the grounds that the appeal has abated owing to the demise of the appellant. The 1<sup>st</sup> respondent also prays for an order directing that his Cross- Appeal dated 30<sup>th</sup> June 2018 be listed for hearing and determination.
2. The second application is dated 19<sup>th</sup> January 2023, and is brought by one Susan Nyokabi Mwangi, in her capacity as the legal representative of the estate of John Mwangi King'ori, the appellant herein, who is now deceased. It is brought under the provisions of rules 44 and 102 of the Rules of this Court. The legal representative of the estate of the deceased appellant prays for an order reviving the appeal, and for substitution of the deceased appellant.



3. We shall deal with each of the application separately, beginning with the notice of motion dated 29<sup>th</sup> December 2022. The 1<sup>st</sup> respondent contends that the Environment and Land Court delivered judgment in respect of ELC Suit No. 193 of 2007 on 6<sup>th</sup> April 2018. Dissatisfied with that decision, the appellant lodged an appeal before this Court on 29<sup>th</sup> May 2018. The 1<sup>st</sup> respondent, on his part, filed a Cross-Appeal on 30<sup>th</sup> June 2018.
4. He contends that sometime in February 2021 during the taxation of the Party-and-Party Bill of Costs before the Environment and Land Court, the appellant's advocate informed the court that his client had died on 22<sup>nd</sup> January 2021. It is contended that the legal representatives of the estate of the appellant obtained Grant of Letters of Administration Intestate on 17<sup>th</sup> August 2021, but failed and/or neglected to apply for substitution of the appellant; that a period of close to two years has passed since the demise of the appellant and the filing of this application; that, pursuant to the provisions of rules 71 and 102 of the *Rules of this Court*, the appellant's appeal abated on 22<sup>nd</sup> January 2022, one year after the date of the appellant's demise. The 1<sup>st</sup> respondent therefore prays that the appeal be struck out for having abated, and that his Cross-Appeal be heard and determined on merits.
5. The application is opposed by Susan Nyokabi Mwangi, the deceased appellant's legal representative, through a replying affidavit sworn on 19<sup>th</sup> January 2023. She concedes the fact that the appellant (John Mwangi King'ori) died on 22<sup>nd</sup> January 2021 and that, on 17<sup>th</sup> August 2021, Grant of Letters of Administration in respect of the appellant's estate was issued to her and the appellant's son, Solomon Irungu Mwangi. She contends that she suffers from high blood pressure, diabetes and cancer and that, as a result of her ill health, she was unable to give instructions as to the conduct of the appeal in good time, hence the abatement of the appeal.
6. She avers that she has made an application to revive the appeal and for substitution of the appellant; and that it is in the interest of justice that the application to strike out the appeal on grounds of abatement awaits the outcome of the application for revival of the appeal and substitution of the appellant.
7. The grounds in support of the application by Susan Nyokabi Mwangi on which she seeks to have the appeal revived and the appellant substituted mirror to a great extent her averments in the replying affidavit sworn on 19<sup>th</sup> January 2023. We shall therefore not regurgitate the said grounds. The only thing we could add is her averment that the appellant has a strong appeal with high chances of success, and that the orders sought in her application if granted will not prejudice the respondents in any way.
8. At the hearing of the two applications, Susan Nyokabi Mwangi, the legal representative of the deceased appellant, was represented by Mr. Chege, learned counsel. The 1<sup>st</sup> respondent was represented by Mr. Gaturu, learned counsel, while Ms. Matunda, learned counsel, appeared for the 2<sup>nd</sup> respondent. Urging the Court to allow the application for revival and substitution of the deceased appellant, counsel submitted that Susan Nyokabi Mwangi was sick and could not have applied for substitution of the deceased appellant in good time, and as a result whereof the appeal abated. He urged the Court to note that there was no replying affidavit filed by any of the respondents in opposition to the orders sought, and that the respondents could be reasonably compensated by an award of costs.
9. Mr. Gaturu strenuously opposed the application for revival of the appeal and substitution of the deceased appellant. He contended that the appeal abated more than two years ago, and that the legal representatives of the estate of the deceased appellant took no steps to remedy the situation; that the application to revive the appeal and substitute for the deceased appellant was triggered by his client's application to have the appeal struck out, and was therefore filed to merely counter his client's application. He contended that, after obtaining Grant of Letters of Administration, the legal representatives of the deceased appellant ought to have applied for substitution of the appellant. He



- observed that no plausible reasons had been availed for failure to revive the appeal or seek substitution in good time. Counsel submitted that ailing of the legal representative of the deceased appellant could not have prevented her from filing the necessary application for substitution of the appellant.
10. On her part, Ms. Matunda contended that, in the absence of an application for substitution of the deceased appellant, the appeal abated automatically on 22<sup>nd</sup> January 2021. She contended that the legal representative of the deceased appellant obtained Grant of Letters of Administration on 17<sup>th</sup> August 2021, but took no steps to have the appellant substituted. According to counsel, the interests of justice tilted towards dismissal of the application to revive the appeal and to have the appellant substituted.
  11. We have considered the two applications, the affidavits in support, the replying affidavit and the oral submissions by counsel. The two applications are brought pursuant to the provisions of, *inter alia*, rules 71 and 102 of the Rules of this Court. We must point out from the onset that rule 71 cited by the 1<sup>st</sup> respondent in his application relates to Criminal Appeals and is therefore inapplicable. The applicable provision is rule 102 of the Court of Appeal Rules, 2022 which provides as follows:
    - “(1) An appeal shall not abate on the death of the appellant or the respondent but the Court shall, on the application of any interested person, cause the legal representative of the deceased 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 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]
  12. There are several indubitable facts in these two applications. Firstly, the appellant died on 22<sup>nd</sup> January 2021. Grant of Letters of Administration was made to his legal representatives on 17<sup>th</sup> August 2021. After obtaining Grant of Letters of Administration in respect of the appellant’s Estate, there was no application made either by the appellant’s legal representatives or by any interested person to have the legal representative of the deceased appellant made a party in place of the deceased pursuant to the provisions of rule 102(1). The interested person envisaged under this rule does not, in our view, preclude the respondents herein. The provisions of this rule are not exclusionary. The only requirement is demonstration of interest in the appeal.
  13. By operation of the provisions of rule 102(2), and in the absence of an application to substitute the deceased appellant, the appeal lodged by the appellant in this Court on 29<sup>th</sup> May 2018 abated on 22<sup>nd</sup> January 2021, one year after his demise. We therefore agree with the views expressed by the two respondents that the appeal has abated.
  14. However, the consequence for an appeal that has abated is not automatic striking out thereof. As borne out of the provisions of rule 102(3), such an appeal can be revived. The legal representative of a deceased party or an interested party to an appeal can apply for an order to revive an appeal that 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.
  15. It follows, therefore, that this Court can issue orders to revive an appeal that has abated, subject to proof that the legal representative of the deceased was prevented by sufficient cause from continuing the appeal. The germane argument by the respondents is that no explanation has been given as to why



the legal representatives did not make an application to substitute for the appellant after obtaining Grant of Letters of Administration. The widow of the deceased appellant counters this argument by stating that she has been suffering from high blood pressure, diabetes and cancer, and that she has been bed ridden for a long time. She was therefore unable to give instructions and/or apply for substitution of the deceased appellant.

16. In considering whether to allow revival of the appeal or not, we have to determine whether the reasons tendered by the legal representative of the deceased amount to “sufficient cause.” In support of her argument that she was sickly and therefore unable to issue instructions on the conduct of the appeal, she has annexed to her application various Medical Laboratory Reports prepared in her name. The documents reveal that the deceased’s legal representative has been in a poor state of health. We are therefore satisfied that the ill health could have prevented her from making an application for substitution of the appellant within the stipulated timeframe, hence occasioning abatement of the appeal.
17. We are therefore inclined to allow the application for revival of the appeal. In allowing the application, we are also guided by the overriding objectives of the Appellate Jurisdiction Act and the Rules made thereunder, which as embodied under section 3A of the Appellate Jurisdiction Act, is to facilitate just, expeditious, proportionate and affordable resolution of appeals. For purposes of furthering those objectives, the Court is required, under section 3B of the Act, to handle matters with the aim of, among other things, just determination of proceedings.
18. In Abok James Odera T/A A. J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, this Court stated that the principles encapsulated in overriding provisions of sections 3A and 3B of the Act:

“confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made there under” and that the application of the overriding objective principle operates “to embolden the court to be guided by a broad sense of justice and “fairness” and further that rules of the Court should be “construed in a manner which facilitates the just, expeditious, proportionate or affordable resolution of appeals.”
19. In Issa Masudi Mwabumba v Alice Kavenya Mutunga & 4 others [2012] eKLR, Koome, JA. (as she then was), invoked those principles when dealing with an application for revival of an appeal “made two years and eight months” after the death of a party. After setting out the principles that guide the Court in exercise of judicial discretion, the judge, in allowing the application for revival in that matter stated:

“Besides the principles set out in the case of Leo (*supra*), I am also guided by the provisions of Section 3A and 3B of the Appellate Jurisdiction Act otherwise known as the oxygen principle. Stemming from the overarching objectives in the administration of justice the goal is at the end of day, the court attains justice and fairness in the circumstances of each case. This is the same spirit that is envisaged as the thread that kneads through the Constitution of Kenya, 2010 in particular article 159.”
20. The interests of justice would, in the circumstances herein, be better served by allowing the application for revival of the abated appeal. We accordingly allow the notice of motion dated 19<sup>th</sup> January 2023 in terms of the prayer for the revival of the abated appeal only, and with costs of the application to the respondents.



21. Having allowed the application for revival of the abated appeal, the 1<sup>st</sup> respondent’s application dated 29<sup>th</sup> December 2022 cannot succeed. It is hereby dismissed. Costs in respect of the 1<sup>st</sup> respondent’s application shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY JUNE 2023.**

**D. K. MUSINGA, (P.)**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

