



Njoru & another v Equity Bank Limited & another; Ndegwa (Interested Party) (Civil Appeal (Application) 317 of 2018) [2023] KECA 896 (KLR) (24 July 2023) (Ruling)

Neutral citation: [2023] KECA 896 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 317 OF 2018
HM OKWENGU, JA
JULY 24, 2023**

BETWEEN

GRACE WANGUI NJORU 1ST APPELLANT

FRANCIS NDEGWA MURAGE 2ND APPELLANT

AND

AZIZ ATTALA 1ST RESPONDENT

EQUITY BANK LIMITED 2ND RESPONDENT

AND

JOHN MURAGE NDEGWA INTERESTED PARTY

(An application under section 3 & 3A of the Appellate Jurisdiction Act, Rule 69(1) (a) and 99 f the Court of Appeal Rules 2010 for substitution of the appellants)

RULING

1. Before me are two applications. The first one is a notice of motion dated 19th May 2021, brought by John Murage Ndegwa as an interested party, who is seeking to have the appeal revived and to be substituted in place of the 1st and 2nd appellants who are said to be deceased. The application was filed on behalf of the applicant by Kinyanjui and Njau Advocates.
2. By a notice of change of advocates dated 6th February 2023, Sebastian & Nyongesa Advocates gave notice that they were taking over from Kinyanjui & Njau Advocates as the advocates for the interested party, John Murage Ndegwa. Subsequently, the advocates filed a second application which is a notice of motion dated 9th February 2023, in which they sought to have the deceased appellants substituted by John Murage Ndegwa (John), in his capacity as the legal representative of the deceased appellants.



3. In his affidavit dated 19th May 2021 sworn in support of the motion, John deposes that the 1st and 2nd appellants who were husband and wife were his parents; and that the 1st appellant died on 23rd January 2019, while the 2nd appellant died on 26th October 2019. He has availed death certificates and explains that he was not aware of the pending appeal and only came to learn of it in February 2021, when he came across documents and pleadings relating to the appeal.
4. On the advice of his advocate, an application was made and his sister and himself were issued with letters of administration ad litem in regard to the estate of the two appellants on 1st April 2021. He was advised that the appeal had abated and he applied for reinstatement of the abated suit, but he was not substituted in place of the appellants. He added that the appeal was still live, and had been fixed for hearing on 14th February 2023, thereby necessitating expeditious substitution of the deceased appellants.
5. Although the respondents were served with hearing notices through email, they did not file any response to the motion, nor did they file any submissions. The motion therefore stands unopposed.
6. Rule 102 of the Court of Appeal Rules 2022 states 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 12 months from the date 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.”
7. It is evident from Rule 102 that once a party to an appeal dies, the appeal abates automatically after 12 months unless an application is made to have the legal representative of the deceased person substituted in place of the deceased. However, there is a provision for an appeal which has so abated to be revived, if the legal representative or any interested party to an appeal applies for it to be revived.
8. John admits that by the time his notice of motion dated 19th May 2021 was lodged, the suit had abated because it was more than 12 months from the time the two appellants had died. It was for this reason that John applied to have the appeal revived.
9. In *Said Sweilen Gheitan Saanum vs Commissioner of Lands (being sued through Attorney General) & 5 others* [2015] eKLR, this Court stated that:

“...The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff.”



10. Rule 102(3) of the Court of Appeal Rules gives the Court powers to revive an abated application subject to an application being made, and the Court being given a satisfactory explanation for the failure to apply for substitution within one year of the death of the deceased.
11. According to John's notice of motion dated 19th May 2021, the 1st appellant died on 23rd January 2019, while the 2nd appellant died 26th October 2019. By operation of the law, the appeal abated on 27th October 2020, being one year after the demise of the last surviving appellant. John sought orders to revive the appeal and to be substituted in place of the two appellants.
12. In *Gachibi Wang'ombe vs. James Muriuki & Another* [2011] eKLR, Aganyanya, JA. revived an abated appeal 6 years after the death of the appellant after factoring in the fact that the applicant (the legal representative,) was an elderly lady whose medical condition did not allow her to attend to the abated appeal with due dispatch. Taking into consideration the explanation given by John, and the efforts taken in applying for letters of administration and applying for revival of the suit and substitution, it is evident that John had a good explanation for failing to apply for substitution within 12 months. Both appellants having died in close proximity, the time taken by John is not unreasonable and the delay is not inordinate.
13. I find it appropriate and in the interest of justice to allow John's motion. Accordingly, the appeal which has abated is revived, and John is substituted in place of the deceased appellants. Costs shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY, 2023.

HANNAH OKWENGU

JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR

