



REPUBLIC OF KENYA



**Musyoka v Halai Developers Limited & 3 others (Civil Appeal (Application)  
E499 of 2020) [2023] KECA 823 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KECA 823 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E499 OF 2020  
HM OKWENGU, JA  
JULY 7, 2023**

**BETWEEN**

**ELIAS M. MUSYOKA ..... APPLICANT**

**AND**

**KRISHNA B SASSODIA ..... 1<sup>ST</sup> RESPONDENT**

**HALAI DEVELOPERS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**MRS. DHARAMA SASSODIA ..... 3<sup>RD</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> RESPONDENT**

*(Application for stay/injunction pending the hearing and determination of an intended appeal arising from the Judgment and decree of the Environment and Land Court at Nairobi (Obaga, J) dated 10th April 2019 in ELC No. 159 of 2013)*

**RULING**

1. By a notice of motion dated April 3, 2023, said to be brought under Rules 1(2)(4), 42(51), (4) 85(2), and 99 of the [Court of Appeal Rules](#), the applicant Elias M. Musyoka has moved this court for orders that I reproduce herein verbatim:
  - i. That this honourable court be pleased to grant its leave to legal representative of the deceased Elias Musyoka, appellant Anne Musyoka, wife of the deceased, to substitute him as the appellant herein and the appeal against the estate of the 2<sup>nd</sup> respondent, the 3<sup>rd</sup> and 4<sup>th</sup> respondent be accordingly revived.
  - ii. That upon such substitution as proposed above, the appeal herein be deemed as duly amended in respect of the appellant.
  - iii. That the costs of this motion do abide the outcome of this appeal.



2. According to the grounds stated on the face of the motion, the deceased Elias Musyoka, who is the appellant passed away on the July 10, 2021, but had instituted Civil Appeal No. E499 of 2020 and Civil Appeal (Application) No. 232 of 2019 before his demise. The lawyers on record were not aware of the appellant's demise until March 27, 2023 when they traced the widow who supplied them with the death certificate and letters of administration. The widow wishes to revive the appeal, hence the application for substitution.
3. The application is also supported by an affidavit sworn by the deceased appellant's widow Anne Musyoka who explains that her husband had dealt with several lawyers in the suit and that she was not aware of the last lawyer her husband had before his demise, and only came to learn of him much later. She has produced a copy of certificate of death indicating that the deceased appellant died on July 10, 2021. She has also produced letters of administration intestate dated June 22, 2022 for the estate of the deceased that were granted to her and two others, Eric Musyoka Musaili and Raymond Kimanzi Musyoka.
4. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have opposed the motion through grounds of opposition in which they contend that the application is nothing more than a ploy to buy more time and delay the determination of Civil Appeal No. E499 of 2020; that the applicant has invoked wrong and inapplicable provisions of law vis-à-vis the relief sought; that the application is without merit, and bad in law; that the application to substitute the deceased appellant has been brought after an undue delay of almost 3 years from the date of his demise; that the appeal should be marked as abated as the personal representative has failed to prove that she was prevented by sufficient cause from continuing with the appeal; and that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents will suffer prejudice if the orders sought are granted.
5. In a further affidavit, Anne Musyoka urged the Court to reject the grounds of opposition as they are only intended to obfuscate and or cloud issues; that she should not be punished for mistake of counsel; that she was late in filing the application for substitution by one year, which delay was caused by the death, privacy and lack of communication between the deceased appellant and his lawyer; and that the respondents stand to suffer no prejudice as they have been in occupation of the suit property since the beginning of the dispute. The applicant also filed written submissions in which *Silas Njeru Njiru & others v Mugo Mukere & others*, Civil Case No. 220 of 2014 was relied upon.
6. The respondents also filed written submissions in which they contend that the appeal has been brought to an end by the demise of the appellant and that in accordance with Rule 102 of the *Court of Appeal Rules*, no application having been made within 12 months from the date of the death of the appellant, the appeal has abated. The respondents cited *Constituency Development Board Fund v Gitthinji & anor*, Civil Appeal (Application) No.18/2018 where the court dismissed a similar application. The respondents argued that the prayer for substitution was not merited as the application has been brought after an inordinate delay of three years which delay has not been explained. They urged the court to reject the argument that the deceased appellant was a private person who dealt with many lawyers as the applicant has not produced anything to confirm that indeed her efforts to contact the advocate on record were in vain, nor did the appellant's advocate demonstrate that he had attempted to contact the appellant. The court was urged to find that the appeal abated by operation of law on July 10, 2022.
7. I have considered the applicant's motion, the supporting affidavit, the affidavit in reply and the contending submissions. To start with the applicant has brought her motion under various rules in the *Court of Appeal Rules*. First is Rule 1(2) & (4). Rule 1(2) provides that the rules of the court shall not limit or otherwise affect the inherent power of the court to make any orders as may be necessary for the



ends of justice or to prevent abuse of the process of the court. This is a general provision that must be applied together with another enabling Rule. There is no Rule 1(4) in the Rules.

8. The applicant has also cited Rule 42(51) (4). However, neither Rule 42(51) nor 42(4) exists in the [Court of Appeal Rules](#). Rule 85(2) also cited by the applicant provides that a party who has failed to lodge a notice of appeal within the stipulated time shall be liable to pay the costs arising from the appeal being deemed to have been withdrawn. That Rule is not applicable in the circumstances herein. Rule 99 of the [Court of Appeal Rules](#) deals with settlement of appeals where parties have agreed on settlement and provides that the consent may be adopted as an order of the court. This Rule is also not applicable to the circumstances herein.
9. This means that the applicant has not cited any Rule that is applicable to the prayers that are sought. This is a sad situation considering that the applicant is represented by an advocate, one David Mugoi & Co. Advocates. Be that as it may, article 159(2)(d) of the [Constitution](#) requires that justice be administered without undue regard to procedural technicalities, and I therefore proceed to consider the application under the appropriate Rule, which is Rule 102 of the [Court of Appeal Rules](#).
10. That Rule states as follows:

“ 102

- (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 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.”
11. The above Rules require that an application be made to substitute a deceased appellant within 12 months, and if no application is made within this period the appeal automatically abates. However, the Court may revive such an appeal, upon request by a legal representative if the legal representative had a plausible reason for not continuing with the appeal.
  12. In this case, the appellant died on July 10, 2021, and therefore the appeal abated 12 months later, on July 10, 2022 as no application had been made for a legal representative to be made a party to the appeal. The motion seeks to have the deceased’s wife Anne Musyoka who has been appointed as the legal representative of the deceased appellant substituted in place of the deceased appellant, and to have the appeal revived. Anne Musyoka has explained why there was a delay in making her application. It is not unusual for a husband to keep his affairs private to the extent that even the wife may not be aware of what is going on. The explanation is therefore plausible. Indeed, Anne Musyoka applied for and obtained letters of administration within one year and she would definitely have made the necessary application if she was aware of the matter.



13. In the circumstances, I think it is fair and just that Anne Musyoka as the legal representative of the deceased be substituted in place of the appellant, and that the appeal be revived. The costs of the motion shall be in the appeal.

Those shall be the orders of the court

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF JULY, 2023.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

