



Olang v Miduri (Suing on behalf of Albert Miduri Olang) (Civil Appeal (Application) 46 of 2020) [2023] KECA 1303 (KLR) (27 October 2023) (Ruling)

Neutral citation: [2023] KECA 1303 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) 46 OF 2020
M NGUGI, JA
OCTOBER 27, 2023**

BETWEEN

ELLY MUNDU OLANG APPLICANT

AND

POLYCARP ONYANGO MIDURI (SUING ON BEHALF OF ALBERT MIDURI OLANG) RESPONDENT

(Being an appeal from the Judgment/Order of the Honourable Court delivered on the 31st October, 2019 (T.W Cherere J.) in High Court Succession Cause No.214 of 2008)

RULING

1. The application dated October 31, 2022 seeks an order that this Court be pleased to revive the appeal herein which has abated following the death of the appellant, Elly Mundu Olang, and to cause Moses Okiya Mundu to be made a party in place of the deceased appellant. It also prays that the costs of the application be awarded to the appellant.
2. The application, which is brought under Rule 102 of the *Court of Appeal Rules, 2022*, is based on the grounds that the appellant died on October 7, 2020 during the peak of the corona virus pandemic. The applicant had not been able to contact the appellant's advocates, who had closed their offices due to the pandemic, to tell them about the demise of the appellant. The applicant states in the grounds in support of the application that the process of obtaining a limited grant of letters of administration ad litem was protracted and the grant was only obtained on October 25, 2022, by which time the appeal had abated. It is stated further that the purpose of the substitution sought is to ensure that the interests of the deceased appellant's estate are safeguarded from irreparable damage that is not capable of compensation in damages.
3. The application is supported by an affidavit sworn by Moses Okiya Mundu. Mr. Mundu avers that the appellant passed away at the peak of the corona virus pandemic and during that time, the appellant's



advocate on record had suspended operations and could not be readily reached to be notified of the appellant's death. By the time the applicant managed to get in touch with the advocates on record, the appeal had already abated, and there was therefore need to agree on who was to substitute the deceased appellant.

4. The applicant further deposes that prior to his demise, the deceased appellant had moved the trial court seeking stay of execution of the impugned decision but the orders were denied prompting the respondent to commence execution of the impugned judgment. It is his averment that he is apprehensive that unless the orders sought are granted, the respondent will move and commence eviction in relation to part of the properties located in Muhoroni that had earlier been purchased by third parties who have carried out developments on them prior to the delivery of the judgment.
5. In submissions dated November 14, 2022, the applicant reiterates the contents of his affidavit in support of the application with regard to the death of the appellant and the process of seeking orders for his substitution. He submits that upon learning that the appeal had abated, he promptly applied to be appointed as the appellant's personal representative.
6. He submits further that the application for letters of administration ad litem, which were issued on October 25, 2022, was conducted promptly given the challenges attendant on obtaining the consents of 11 geographically dispersed beneficiaries of the deceased appellant. He submits further that the instant appeal challenges the mode of distribution of an estate following a succession cause whose verdict continues to affect the appellant's dependants, and cannot therefore be said to be a stale appeal that was solely personal to the deceased appellant.
7. The applicant cites in support of this submission the decision in *Kishor Kumar Dhamji v Amolak Singh & 4 others* [2016]eKLR. It is his contention that unless the orders sought are granted, the estate of the appellant is likely to suffer irreparable harm incapable of compensation by way of award of damages.
8. I have considered the application and the affidavit in support, as well as the submission of the applicant. Rule 102 of the *Rules* of this Court provides that:

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 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. (Emphasis added).
9. I have perused the documents annexed to the application.



They include a death certificate in respect of the deceased which indicates that he passed away on October 7, 2020. An application in respect of his estate was made in 2022, and grant ad litem in respect thereof issued on October 25, 2022. I have noted the averments by the applicant with respect to the difficulty in communicating with the appellant's advocate in good time due to the corona virus pandemic, and the difficulties attendant on communicating with the other dependants of the deceased appellant's estate for consents on who should be substituted for the deceased appellant.

10. I take judicial notice that during the peak of the corona pandemic between 2020 and 2022, a number of offices were not open for in-person communication, and so the averment that the applicant was not able to communicate with the appellant's advocates in time to inform them of his demise is credible.
11. In the circumstances, I am satisfied that the applicant was prevented by sufficient cause from continuing the appeal. I am further satisfied that it is in the interests of justice that an order be and is hereby made reviving the appeal. The deceased appellant shall be substituted with the present applicant, Moses Okiya Mundu, the personal representative of the deceased appellant, who shall take such steps in the appeal not yet taken prior to the demise of the appellant to facilitate the expeditious disposal of the appeal. There shall be no order as to costs.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF OCTOBER, 2023.

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

