



**Wanderi v Kionga (Civil Application 156 of 2012)
[2023] KECA 1233 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1233 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION 156 OF 2012
FA OCHIENG, LA ACHODE & WK KORIR, JJA
OCTOBER 6, 2023**

BETWEEN

SAMUEL WANDERI APPLICANT

AND

JAMES GICHURE KIONGA RESPONDENT

(Being an application to revive the abated Nakuru Civil Appeal No. 156 of 2012)

RULING

1. The application before us is dated April 19, 2023. It is brought under Rule 102(3) of the [Court of Appeal Rules](#). The applicant prays for orders that: the appeal which abated on July 19, 2020 be revived; and the applicant be allowed to substitute the appellant with one, Jane Njoki, the legal representative of the estate of the late James Gichure Kionga.
2. The application is supported by the applicant's affidavit and premised on the following grounds:
 - a. The impugned judgment was delivered on December 21, 2018 in favour of the respondent.
 - b. Being dissatisfied, the applicant filed an application for review dated February 18, 2019. However, the said application has never been heard or determined since then.
 - c. The applicant's efforts to have a date for the hearing of the application through letters to the court proved futile.
 - d. The applicant learnt of the respondent's death when an application for substitution was filed in HCCC No 495 of 1998, and it was not his fault that he did not apply for substitution.
 - e. The applicant's attempt to file an application for substitution was met with the information that the appeal had abated.



- f. The applicant is willing to prosecute his pending application which was not prosecuted for reasons beyond his control.
 - g. It is in the interest of justice that the application is allowed.
3. In response, Jane Njoki Geshure, the legal representative of the estate of the respondent stated that:
- a. Upon the death of the respondent, she obtained a limited grant for purposes of seeking compliance with the impugned judgment.
 - b. On February 18, 2019 the applicant filed an application seeking to set aside the impugned judgment as an afterthought.
 - c. The applicant's counsel failed to attend court during the hearing of the substantive appeal as his counsel claimed that he had not diarized the matter.
 - d. This being a land matter, the applicant ought to have handled it with the seriousness it deserves. Had the applicant been a diligent litigant, he would have taken the necessary steps to prosecute the appeal hence the court should not entertain his indolence.
 - e. The present application is a waste of the court's time as the applicant is out to frustrate the respondent from executing the impugned judgment.
 - f. The application is time barred as the same ought to have been filed within 30 days of the hearing of that decision.
 - g. The applicant is not being truthful when he says he was not made aware of the death of the respondent when he is the one who filed the application for substitution which application was subsequently dismissed.
 - h. By filing a myriad of applications, the applicant is out to frustrate the respondent's efforts to execute the impugned judgment.
 - i. It is trite that matters at the execution stage ought to proceed without the need for substitution of a deceased party, especially where the substantive dispute has been determined.
 - j. The application is devoid of merit and should be dismissed.
4. At the hearing of the application, Mr Simiyu, learned counsel appeared for the applicant whereas Miss Mwaniki, learned counsel appeared for the respondent. Counsel relied on their respective written submissions which they briefly highlighted as follows:
5. Mr Simiyu informed the court that the respondent died while the applicant's application for review was still pending before this court. The trial court's decision was overturned on grounds that fraud had not been proved even though the applicant had stayed on the land for over 39 years. The applicant has since been evicted from the land. The applicant's application for substitution was dismissed on the grounds that the appeal had abated. Counsel urged this court to exercise its power and revive the appeal.
6. The applicant submitted that he became aware of the death of the deceased through an application for execution in the High Court.
- He was only able to obtain the respondent's death certificate through the said application. The applicant urged that the application be allowed.
7. Miss Mwaniki was of the view that the application ought to have been filed within 30 days of the dismissal of the appeal. The applicant has filed a myriad of applications since the appeal was dismissed.



8. The respondent was of the view that the application herein was meant to frustrate the respondent's legal representative from executing the impugned judgment. The respondent reiterated that an application under Rule 102(3) of the Court of Appeal Rules is to be made within 30 days from the date of the decision; The applicant having filed the application after the lapse of the 30 days' period, the application should not be entertained by this court. The respondent pointed out that the applicant's application for substitution was dismissed by this court on March 31, 2023 and as such the applicant should not be allowed to seek a prayer for substitution within this application, as the same is res judicata. The respondent was of the view that the applicant's application is a delaying tactic meant to circumvent the due process of the law; when it is borne in mind that the applicant had filed a myriad of applications since the impugned judgment was delivered.
9. We have carefully considered the application, affidavits, submissions by counsel, authorities cited and the law. The issue for determination is whether or not the application is merited.
10. The applicant relied on the provisions of Rule 102(3) of the Court of Appeal Rules in making the present application. Rule 102 of the Court of Appeal Rules provides that:
 - "(1) If on any day fixed for the hearing of an appeal the appellant does not appear, the appeal may be dismissed and any cross appeal may proceed, unless the Court sees fit to adjourn the hearing:

Provided that where an appeal has been so dismissed or any cross-appeal so heard has been allowed, the appellant may apply to the Court to restore the appeal for hearing or to re-hear the cross-appeal, if he can show that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing."
11. If the appellant appears and the respondent fails to appear the appeal shall proceed in the absence of the respondent and any cross appeal may be dismissed, unless the Court sees fit to adjourn the hearing:

Provided that where an appeal has been allowed or cross-appeal dismissed in the absence of the respondent, he may apply to the Court to re-hear the appeal or to restore the cross-appeal for hearing, if he can show that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing.
12. An application for restoration under the proviso to sub-rule (1) or the proviso to sub-rule (2) shall be made within thirty days of the decision of the Court, or in the case of a party who should have been served with notice of the hearing but was not so served, within thirty days of his first hearing of that decision.
13. For the purposes of this rule, a party who has lodged a statement under rule 100 shall be deemed to have appeared.
14. The respondent lodged the appeal in question. On the date of hearing, the applicant's counsel did not attend court for the reason that he had not diarized the matter. The court proceeded to hear the appeal in the absence of the applicant and a judgment was delivered on December 21, 2018. The appeal was dismissed.
15. Being aggrieved by the decision of the court, the applicant filed an application dated February 18, 2019 seeking to review the said judgement. According to the applicant, the application has never been heard or determined. The respondent died on July 17, 2019 after the appeal had been determined; what was pending was the hearing of the application for review. The applicant claims that he was not aware



of the death of deceased until execution ensued in the High Court, but he has not specified when exactly he became aware. On February 24, 2020 Jane Njoki Geshure obtained a limited grant as the legal representative of the estate of the respondent.

16. The applicant conceded that an application for restoration of an appeal which has been dismissed for the failure of a party to attend court ought to be filed within 30 days of the decision or of the day he became aware of the decision. The respondent contends that the application was filed more than 30 days from the date the appeal was dismissed. This court in *John Mugambi & 21 others v Kenya National Assurance Co (2001) Limited* [2016] eKLR observed that rule 102(3) of the *Court of Appeal Rules* is couched in mandatory terms and stated thus:

“The restoration of dismissed appeals is an exceptional relief, for cause, granted to an appellant who would otherwise have no recourse under the general tenet that there has to be an end to litigation. For precisely that reason, such appellant must move the court with expedition. He must move with speed and within a specified time set out in Sub-rule 3;

‘An application for restoration under the proviso to sub-rule (1) ... shall be made within thirty days of the decision of the Court, or on the case of a party who should have been served with notice of the hearing but was not so served, within thirty days of his first hearing of that decision.’

That proviso is in mandatory terms and the time it sets out is peremptory. In the case before us, the applicant’s advocates were served with a hearing notice. They therefore had only up to April 17, 2014 to file an application for restoration. They did not do so until May 22, 2015 which was more than thirteen months out of time. That renders the application before us incompetent.”

17. The present application was filed over 4 years after the appeal was dismissed. The applicant attributed the delay in filing the application to the death of the respondent which resulted in the abatement of the appeal. In the circumstances, we are not satisfied that the applicant tendered a reasonable and sufficient explanation as to the reason for the delay. The delay herein was inordinate bearing in mind the time frame specified by the rules.
18. In the present case, it is clear that the appeal herein was dismissed, it did not abate as alleged by the applicant. The court in dismissing the applicant’s application for substitution observed that the appeal could only be revived through an application to the court. To our minds, this is what prompted the applicant to file the present application on April 19, 2023. Given the long period of time that had lapsed, we find that the applicant’s action was as an afterthought. The applicant has not made any effort to show that he was prevented by sufficient cause from prosecuting his application for review. It is an important principle of the *Constitution* that justice must be dispensed without undue delay. The Supreme Court in the case of *Nicholas Kiptoo arap Korir Salat v IEBC & 7 Others* [2014] eKLR observed that Article 159 of the *Constitution* is not a panacea in each and every instance of breach of procedure. It is only available in deserving cases. Before us is a matter that has been in court for the past 11 years. The applicant has not given any reason why the application for review was not prosecuted.
19. We are satisfied that in the circumstance of the present application, there is no basis for restoring the appeal. The application is totally lacking in merit and the same is hereby dismissed with costs to the respondent.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 6TH DAY OF OCTOBER, 2023.



F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

