



REPUBLIC OF KENYA



KENYA LAW
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**Azere v Mungwang'a (Civil Appeal (Application) 125 of 2017)
[2022] KECA 734 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KECA 734 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KAKAMEGA
CIVIL APPEAL (APPLICATION) 125 OF 2017
F TUIYOTT, JA
JUNE 24, 2022**

BETWEEN

ESINASI KHAISA AZERE APPLICANT

AND

SIMON KITOTO MUNGWANG'A RESPONDENT

*(Being an appeal from the Judgment/Decree of the High Court of Kenya at Kakamega
(Matheka, J) delivered on 12th October, 2017 in High Court ELC No. 28 of 2017)*

RULING

Ruling of Tuiyott, JA

1. Esinasi Khaisa Azere, the appellant herein, died on 9th December, 2017. His Son Absalom Tayari Azere has obtained limited grant of letters of administration ad litem dated 25th October, 2018 to the estate of the deceased. He now seeks to substitute the deceased as the appellant and has moved Court for those orders in a notice of motion dated 22nd July, 2021.
2. The motion is brought under Order 24 Rule 9 of the *Civil Procedure Rules*. The applicant need not rely on the Civil Procedure Rules as the Rules of this Court, 2010 provide for the substitution of a deceased party. Rule 99 reads;

99 Death of party to appeal

- (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 to an appeal may apply for an order to revive an appeal which has abated; and, if it is proved that the legal representative 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.

3. Sub rule 2 requires an application of the nature before Court to be made within twelve (12) months from the date of death of the party. Failure to do so has a consequence, the appeal abates. The deceased died on 9th December, 2017 and since no application for substitution had been brought by 8th December, 2018, then the appeal abated on that date.
4. Although the application before court is not opposed, it is filed in an appeal which has abated without a prayer for revival. This Court is not one to grant orders that are not sought.
5. The notice of motion dated 22nd July, 2021 is incompetent as it is brought in an abated appeal and is hereby struck out. I make no order as to costs as the respondent did not participate in the application.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed.

Deputy Registrar

