



**Wamwathi v Ndirangu & another (Civil Application E068 of 2022)
[2024] KECA 1324 (KLR) (27 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1324 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E068 OF 2022
MA WARSAME, JA
SEPTEMBER 27, 2024**

BETWEEN

JOSEPHINE WAMWATHI APPLICANT

AND

STEPHEN MWANGI NDIRANGU 1ST RESPONDENT

ZACHARY NGANYE NDIRANGU 2ND RESPONDENT

(An application for leave to substitute the appellant (deceased) in an appeal against the judgment of the High Court at Nyabururu (Wendoh, J.) dated 11th June 2020 in The matter of the Estate of Ignatius Ndirangu (deceased) SUCC CAUSE No. 28 OF 2017)

RULING

1. By a notice of motion dated 11th June, 2024, brought under Rule 49 and the Probate and Administration Rules, the applicant, Peter Kamau Ndirangu seeks to substitute the deceased appellant in the appeal before this court.
2. The application is anchored on the grounds that the appellant died on 29th August 2020, on 4th July 2022, the applicant being the son of the deceased appellant and Ignatius Ndirangu (deceased) was appointed co-administrator of the estate of Ignatius Ndirangu representing the 2nd house together with the 1st respondent representing the 1st house, that the applicant has obtain a limited grant ad litem to represent the deceased appellant in this suit and all the beneficiaries of the 2nd house have consented to the substitution.
3. In opposition to the application, the respondents' Advocates filed a replying affidavit dated 8th August 2024 sworn by Charles Gakuhi Chege who avers that the appeal is incompetent as the notice of appeal was not served on the respondents, the memorandum and record of appeal were served out of time



and after the demise of the appellant, that the instant application was incompetent as it has been made almost 4 years after the appellant's demise and that the appeal had abated.

4. It is apparent that the appellant died on 29th August 2020.

Consequently, the appeal abated one year after her demise being 29th August 2021.

5. The relevant provisions of the Court of Appeal Rules 2022 provides:

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. Death of party to appeal.
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.
6. The applicant, who is not the legal representative of the appellant's estate, has brought this application 2 years and 9 months after the appeal has abated as an interested person. However, this Court's cannot substitute a party in an appeal which is non-existent. Abatement of suit is a matter of law, and a suit which has abated ceases to exist in the eyes of the law, consequently, proceedings taken when a suit has abated are a nullity. (See *Mehta vs. Shah* [1965] EA 321 and *Said Sweilem Gheithan Saanum vs. Commissioner of Lands (being sued through Attorney General) & 5 others* [2015] eKLR)
7. In the end, I find the application incompetent and I dismiss it accordingly with costs to the Respondents.

DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF SEPTEMBER, 2024.

M. WARSAME

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

