



REPUBLIC OF KENYA



**Opuya v National Bank of Kenya & another (Civil Appeal 56 of 2019)
[2023] KEHC 27472 (KLR) (21 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27472 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 56 OF 2019
MS SHARIFF, J
DECEMBER 21, 2023**

BETWEEN

STANLEY ANJIA OPUYA APPLICANT

AND

NATIONAL BANK OF KENYA 1ST RESPONDENT

COLINET AUCTIONEERS 2ND RESPONDENT

RULING

1. The Application before court is the one dated 2nd May 2023 in which Alice Anjia Opuyo (herein after the Applicant) is seeking leave to substitute Stanley Anjia Opuya (deceased), revival of this abated suit and take directions on the appeal.
2. In support of the application the applicant relies on the grounds apparent on the face of the application and the supporting affidavit she has sworn. In a nutshell she avers that the delay in filing this application has been occasioned by a multitude of reasons which she listed as; scaling down of the Judiciary due to COVID-19 pandemic and delay in discussions on who was to be the administrator. Additionally, she avers that she has been sickly and that counsel on record had failed to update her on the status of the case.
3. In her submissions dated 24th September 2023, the Applicant implored upon the court to exercise its discretion in her favour given the reasons she had advanced. She urged this court to take into consideration the reasons for the delay, the length of the delay and the chances of success of the intended appeal as outlined in the case of *Maina Johana Miano vs Leah Gichohi & Anor* (2019)Eklr.

Respondents' Case

4. In response the Respondents filed a replying affidavit sworn by Eric Ojuro (advocate) and written submissions. In the replying affidavit Counsel deponed that the Applicant was estopped from making



this application given that 2 years had elapsed since the Appellant's death the meaning the case had abated. It was his further contention that the application was similar to the one dated 14/11/2021 which had been withdrawn.

5. In the submissions dated 8th August 2023 the sole issue outlined for determination was whether the suit had abated. The Respondents submitted that this suit abated on the 3rd of August 2020. Having done so it was their contention that there was no valid appeal as per the provisions of Order 24 Rule 4(3) of the Civil Procedure Rules. It was the Respondents' further submission that no satisfactory reason has been given for the two-year delay in filing the substitution application. Furthermore, it was urged that the applicant was wasting the court's time having previously withdrawn a similar application seeking substitution.
6. In addition to the above the Respondents submitted that in the absence of letters of administration the applicant had no locus to file the application. He urges this court to dismiss the application with costs.

Analysis And Determination

7. After careful consideration of the application, supporting affidavit, replying affidavit and the submissions this court is of the opinion that the issues that emerge for determination are:
 - a. Whether the Applicant has the requisite locus standi to bring this application.
 - b. Whether the Applicant has met the threshold for revival of this appeal.
 - c. Whether the applicant should be substituted as the appellant.
8. The procedure for what is to happen upon the death of a party is found under Order 24 Rule 4 of the Civil Procedure Rules. The procedure is that where the cause of action survives the party, then an application for substitution of that party with his personal representatives is to be made within one year and where the application is not made within one year, the suit abates.
9. Evidently then the suit abated on 31/08/2020 when the applicant failed to file the requisite application. The applicant filed the current application on 4/5/2023, which is 2 years 9 months after the suit abated. The reasons advanced for the delay were; that there were disagreements about who should file for letters of administration, scaling down of court proceedings due to Covid-19 and sickness and ailments on the part of the applicant.
10. In the case of *Leo Sila Mutiso Vs Rose*, Ca Nai 255 Of 1997 (unreported) as restated in the Court of Appeal case of *Issa Masudi Mwabumba V Alice Kavenya Mutunga & 4 Others* [2012]EKLR it was held as follows:

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are, first, the length of delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted and fourthly; the degree of prejudice to the respondent if the application is granted.”
11. Before I can delve into the substance of this application, I must first and foremost determine whether the applicant has the requisite locus standi to bring this application. The respondent has submitted that the applicant lacks the legal capacity to file this applicant for reason of want of letters of administrations of the estate of the deceased. I have perused the applicant's pleadings and annexures and I have not encountered any limited letter of administration appointing the applicant as the legal administrator of



the estate of the deceased appellant for purposes of prosecuting this appeal. The applicant is therefore a stranger to these proceedings and at best a busy body.

12. In the case of *Kenya Farmers' Cooperative Union Ltd. Vs. Charles Murgor (deceased) t/a Kiptabei Coffee Estate* (2005) Eklr the Court held that a Court of law has no jurisdiction to Order for substitution where the suit has already abated by operation of law nor to hear and determine a suit that has already abated by operation of law.
13. I have perused the medical notes provided by the applicant and I note that there is no indication that the Applicant was suffering from a debilitating malady to the extent that she was rendered dysfunctional. Additionally, the dates on the notes range from sometime in August 2019 to August 2020. The issue of the applicant's sickness therefore does not explain the delay given that this application was filed on 4th May 2023. The applicant equally attributed her delay to the Covid 19 pandemic. In as much as there was scaling down of operations the court did not grind to a halt. It is common knowledge that the Judiciary took measures such as operationalizing filing through email and introduction of online court proceedings. Furthermore, the applicant did not provide proof that she made attempts to file the application and failed.
14. Premised upon the foregoing reasons I do hereby disallow the application with no orders as to costs.

DELIVERED, DATED, SIGNED AT KISUMU THIS 21ST DAY OF DECEMBER, 2023.

MWANAISHA. S. SHARIFF

JUDGE

