



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 58 OF 2013

GRACE WANJIRU KIMANI.....APPELLANT

V E R S U S

JACKSON MURIUKI.....RESPONDENT

PETER MUTHII KANGANGI....INTERESTED PARTY

RULING

The appellant Grace Wanjiku Kimani filed an application dated 20/12/2017 under Rule 14 of the Fifth Schedule of the Law of Succession Act seeking orders that Jackson Muriuki Gathu be issued with Limited Letters of Administration Limited to substituting and representing the deceased respondent herein.

The application is supported by the affidavit of the appellant sworn on 20/12/17. She avers that the respondent John Mwai Gathu died on 29/5/16 and no one has been willing to take out Letters of Administration in respect of the estate of his brother. She contends that the intended substitute was close to the deceased when this matter was proceeding and hence he is conversant with the issues involved.

In response Jackson Muriuki Gathu states that he is not willing to take the Limited Grant on the ground that the deceased left behind a wife and children who can take up the matter.

This is an appeal in Succession No. 115 of 2010 involving the estate of Simon Wakathu Kararo. The applicant was the petitioner while the deceased John Mwai Gathu was a protestor therein. The parties were siblings together with Jackson Muriuki Gathu. The petitioner had sought to distribute Mwerua/Kanyokora/721 among the daughters of the deceased but the protestor sought to include the sons too. The court ordered that the estate be shared equally between both the sons and daughters of the deceased. The petitioner proceeded to file an appeal against the said judgment with the deceased being the respondent.

I have considered the application which is brought under **Rule 14 of 5th Schedule of the Law of Succession Act**. The rule provides:-

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at the cause or suit, and until a final decree shall be made therein, and carried into complete execution”.

The party intended to be substituted has stated that he is not willing to be substituted and this is for a good reason as he depones that the deceased has close family members, that is wife and children who can substitute. I am of the view that the respondent is not the right party to substitute the deceased in view of the fact he has close relatives who can take out Letters of Administration in his estate. Paragraph 14 of the 5th schedule does not apply.

Substitution:

This appeal involves the estate of Simon Wakathu Kararo who was the father of the parties herein. Any orders issued herein would affect all the dependants including Jackson Muriuki Gathu.

However, the respondent having passed away on 29/02/2016, the appeal automatically abated one year later on 29/02/2017. This is also supported by annexure ‘**GWK 1**’ where the appellant’s advocates were duly informed that the appeal had abated. This application was filed on 20/12/17 over one year after the death of the deceased which means that at the time of filing the application the suit had abated.

Order 24 Rule 4 (1) and (3) of the Civil Procedure Rules provides;

(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant.

It is worthwhile to note that Order 24, rule 4(3) has been framed in mandatory language, that is, **“...the suit shall abate...”**.

The suit having abated, the only remedy in law, was to apply for revival of the abated suit under **Order 24 rule 7(2) of the Civil Procedure Rules**;

The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.

The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own course by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased respondent. Once the suit has abated, there is no suit, there is nothing and out of nothing you can derive nothing, hence the requirement to apply to revive the suit first, albeit the order for substitution will ordinarily saddle upon the one for revival of suit.

But in so applying for revival of suit, the applicant must prove to the court that she had been prevented by a sufficient cause from applying within the one year provided in the rules.

In Conclusion:

I find that the application lacks merits and is dismissed with costs.

Dated at Kerugoya this 28th day of September 2018.

L. W. GITARI

JUDGE