REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 235 OF 2013

(Formerly High Court Civil Appeal No. 109 of 2008 – Embu)

JOHN GITHINJI GICHIRA.....APPLICANT

V E R S U S

BERNARD MUNENE GICHIRA.....RESPONDENT

RULING

The application pending before court is dated 18/09/2013 seeking orders that the Honourable Court be pleased to issue;

1. Inhibition orders inhibiting registration of any dealings on **Inoi/Kimandi 254** pending hearing and determination of the application.

2. Stay of execution of orders issued on 27/11/2008 and 25/01/2018 pending hearing and determination of the application.

3. Review and/or set aside orders issued on 25/01/2018, extend the time limit for substitution of the deceased appellant, the deceased be substituted with the applicant and the suit be revived and set down for hearing and determination of the application.

Applicant's case

The applicant states that he is the administrator of the estate of the deceased appellant. That the deceased passed away before her appeal could be heard and determined and he has been all along desirous and eager to pursue the appeal. However, the appeal abated before he could substitute the appellant and being a family matter, it would be mete and just to accord the parties a fair chance of being heard. That he has learnt that some beneficiaries of the estate of the deceased person have hired a gang of ruffians purporting to be land surveyors who are poised to commit acts of wastage on the deceased person's estate.

Respondent's case

The respondents responded by stating that the application was filed by an advocate who is not properly on record as he has breached provisions of Order 9 of the Civil Procedure Rules. That the order sought to be reviewed has not been annexed and there is no new ground or error on the part of the court to warrant review. That the application is a backdoor appeal and court is being asked to sit on appeal from its own judgment.

That the application was filed more than 9 years after the order sought to be reviewed was made. That the issue raised is res judicata since the court adjudicated on the suit having abated and declined to revive the suit. That since the appeal has abated, there is currently no appeal and the application is filed in non-existent proceedings.

This court vide its ruling dated 25/01/2018 dismissed the applicant's application dated 15/05/2017 seeking to revive the suit and to substitute the appellant. The court held that the applicant was guilty of latches. This court also stated that the applicant was not seeking extension of time to substitute the appellant.

I have considered the application. The issues which arise are as follows:

Prohibition Order:-

For the Court to grant an order of prohibition which is an injunctive order, the party must prove that he has a right, legal or equitable which requires protection by injunction. It is a discretionary remedy which must be granted based on cogent evidence and the well established legal principles. In **Giella –v- Cassman Brown & Co. Ltd** the principles are:-

1) The applicant must establish a prima facie case with probability of success.

2) He must show that he is likely to suffer irreparable loss which cannot be compensated by an award of damages.

3) If court is in doubt, it will decide the case on a balance of convenience.

It is the applicant's case that the appeal has abated. There is therefore no prima facie case leave alone one that has chances of success. The grant which was issued on 27/11/2008 shows that the deceased Beatrice Wakariko Ngumba got a share from the estate. The applicant is not likely to suffer irreparable loss or damage.

I find that the prayer for prohibition order is without merits.

1. Res judicata

Section 7 Civil Procedure Act;

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

These three conditions have to be satisfied for this doctrine to be applicable;

i) That there is a former suit or proceeding in which the same parties in the subsequent suit litigated

ii) That the matter in issue is directly or substantially in issue in the former suit

iii) That a Court of competent jurisdiction had heard it and finally decided the matter in controversy

In the current application the applicant Jonathan Mugweru Kago is seeking review and/or setting aside orders issued on 25/01/2018, extend the time limit for substitution, the deceased be substituted and the suit be revived. In the previous application he was seeking an order to revive the suit and to substitute the deceased appellant. The ruling was that the appeal abated and the application for substitution was dismissed.

The current application is therefore res judicata since the parties are the same, and the matters in issue are the same.

The issues the applicant is raising substitution of the appellant after suit has abated and revival of the suit were adjudicated and ruling was given. The application for extension of time cannot be brought after the event, that is to say after the application to substitute and revive the suit. It is a back door appeal as the extension of time means he will then apply to substitute and to revive the suit when this has been heard and determined by this court. The application is resjudicata.

2. **Review**.

Grounds for applying for review

Review is provided under Section 80 Civil Procedure Act and Order 45 rule -1- C. P.R.

Review can only be allowed under certain circumstances. It is not in all cases that a party can apply for review. It is provided under **Section 80.**

Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit

This is further echoed under Order 45 rule 1 which provides:

"(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

The grounds are:

i) Discovery of new and important matter of evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the Order made

ii) Mistake or error apparent on the face of the record

iii) Any other sufficient reason which may make the court to review its order.

iv) The application must also be filled without unreasonable delay.

These are the circumstances under which a party desirous of seeking review must establish. Review is not an appeal and so a party must establish these grounds in order for the court to order review.

In the case of **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR**

The Court of Appeal in dismissing an application for review held;

It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are factus officio and have no appellate jurisdiction.

In addition it held that;

The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to.

As held in the Court of Appeal case above, discovery of new and important matter of evidence or mistake/error apparent on the face of the record or for any other sufficient reason relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The applicant has therefore not satisfied the grounds for review. There was delay in filing the application. This court gave ruling on 25/1/2018. This application was filed nine months later. A delay of nine months is no doubt unreasonable.

What the applicant has done is to file the application through a new Advocate. The said Advocate is not properly on record, that is C. S. Macharia & Company Advocates. The application was filed by the Advocate in breach of the provisions of **Order 9 Civil Procedure Rules.**

The application for review is without merits.

3. **Extending the time limit for substitution of the deceased**

Order 24, rule 3(2) of the Civil Procedure Rules;

Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

The court exercises discretion to extend time. Such exercise of discretion must be based on a good reason which the applicant must establish. The Court of Appeal addressed this issue.

Husamuddin Gulamhussein Pothiwalla v Administrator, Trustee And Executor Of The Estate Of Gulamhussein Ebrahim Pothiwalla & 32 Others [2007] eKLR

The Court of Appeal held;

> **In dealing with the application before him** *(an application to extend the time and substitution of the applicants in place of the deceased)* **what were the matters to be taken into account? As it has been stated many times by this Court for an applicant to succeed it must be shown to the satisfaction of the Court that the delay was not inordinate, the delay has been sufficiently explained, the intended appeal is arguable and lastly that no prejudice would be caused to the respondent if the application to extend time is allowed.**

These are the factor the applicant must establish when seeking extension of time. This was not done by the applicant. All he stated was that the matter involves Land and family and respondents will not be prejudiced. The delay of four years which was no doubt inordinate has not been explained. The applicant has not established the threshold for the exercise of discretion by this court to extend time.

Gopal Ramji Ladha Patel v City Finance Bank Limited [2008] eKLR

The Court of Appeal held while dealing with an application to extend time where a suit had abated.

> **The appeal having abated way back in 2005, there is no way that it can be revived under the Rules of the Court. It remains as dead as a dodo. This being the position, this application amounts to an exercise in futility since even if time to apply for substitution of a party was extended, that by itself would not revive the abated appeal. See Vyatu Limited & Another vs. Public Trustee Nyanza Province [2003] KLR 688 and Samwel Nyoike Nduati vs. Republic, Civil Application No. Nai. 292 of 2003 (unreported).**

This court ruled that the appeal abated on 8/9/2013.

Even if time for substitution was extended, it would be an exercise in futility the appeal has already abated. It would serve no purpose to extend time for substitution as the appeal to quote the Court of Appeal, is dead as a dodo as it has abated. There was inordinate delay in substituting the appellant as the application was filed on 15/5/17 four years after the suit abated. The application is without merits. I dismiss it.

Dated at Kerugoya this 25th day of October 2018.

L. W. GITARI

JUDGE

25/10/18