

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 155 OF 2012

B. N. SHAKO.....1ST APPELLANT

INDUSTRIAL COMMERCIAL DEVELOPMENT CORP...2ND APPELLANT

- V E R S U S -

J.P.K. GATERI.....RESPONDENT

RULING

1. On 18th March 2016, this court delivered its judgment in which it dismissed this appeal. Pursuant to the provision of Order 24 Rule 4 and Order 45 rule 1 & 2 of the Civil Procedure Rules 2010, the appellant took out the motion dated 20th February 2017, in which it sought to have this court's judgment reviewed and set aside since the suit had abated by the time of delivery of judgment. The motion is supported by the affidavit of Jamuel Mwakandana Kiwinga. When served with the motion, the respondent's advocate filed grounds of opposition.

2. When the application came up for interpartes hearing, learned counsels made oral submissions. I have considered the grounds set out on the face of the motion and the facts deponed in the supporting affidavit plus the grounds of opposition. I have also considered the rival oral submissions. It is the submission of the appellant that J. P. Gateri, the respondent herein passed away on 10th July 2014 and since no application to substitute the deceased was made within a year the appeal abated on 10th July 2015. The appellants through the averments of their advocate stated that by the time the appeal was being heard by this court i.e on 19th October 2015, the appeal had already abated since the respondent passed on 15 months earlier. The appellant attached to the affidavit of Jamwel Mwakandana Kiwinga copies of emails written to the advocate and a newspaper obituary indicating that the deceased had passed on. It is the submission of the appellant that the consequent judgment by law are void *ab initio* and hence should be nullified.

3. The respondent's advocate has argued that the appellant had made the application in bad faith. It is submitted that the motion is meant to stop payment of the decretal sum upon the dismissal of the appeal. The learned advocate further argued that the motion does not meet the requirements for an application for review. It is also pointed out that there is no conclusive proof of death on the part of the respondent since the appellant merely relied on a newspaper cutting.

4. Having considered the material placed before this court and the rival oral submissions, it is clear in my mind that the averments made by the 2nd appellant's advocate regarding the demise of the respondent has not been controverted. On a balance of probabilities, I am convinced that J. P. Gateri, the respondent herein, passed away on 10th July, 2014. What I am not sure is whether or not the respondent's advocate was informed of the death of the respondent. This is also a unique case where the appellants are fighting their OWN appeal. A careful reading of the provisions of Order 24 rule 4(3) as read with Order 24 rule 9 of the Civil Procedure Rules, 2010, will reveal that a suit or an appeal shall automatically abate where within one year no application for substitution of the deceased is made. In this appeal, the respondent passed away on 10.7.2014 and since no application to substitute the deceased with his legal representatives within a year i.e by 10th July 2015, the appeal abated. With respect, I agree with the appellants' advocate that by the time the appeal was being heard on 19th October 2015, the appeal had abated therefore no decision could have come out of an action which has abated. The main prayer sought

in the motion, the subject matter of this ruling, is for review and setting aside of this court's judgement delivered on 18.3.2016. The respondent has urged this court to find that the motion does not meet the requirements of an application for review. I earlier in this ruling stated that the appellant attached to the supporting affidavit of Jamuel Mwakandana Kiwinda a copy of an email and a newspaper obituary. The two documents indicate that the appellants got to know of the respondent's death in the month of July 2016. It is clear to me that the important information was not within the appellants' knowledge until the aforesaid date. One of the ingredients which must be considered in an application for review is evidence of discovery of a 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. I am convinced that this motion meets the requirements for an application for review.

5. Having come to the conclusion that the appeal had abated by the time of hearing and delivery of judgment, the appellant is entitled to the order sought. Consequently this court's judgment which dismissed the appeal is reviewed and set aside. In the circumstances of this case, I direct that each party meets its own costs of the motion.

6. In conclusion this court makes the following observations: First, it would appear the law envisaged some lapses may arise in cases of this nature and that is why the court is given power under the provisions of Order 24 rule 3(2) of the Civil Procedure Rules, 2010, to extend time for good reason for the making of an application for revival and substitution. Secondly, that a reading of the provisions of Order 24 rule 10 of the Civil Procedure Rules, 2010 shows that an existing decree like that of the trial court in this case, which is in execution is protected and does not abate.

Dated, Signed and Delivered in open court this 25th day of May, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent