



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 51 OF 1998

KIMATU MBUVI.....APPLICANT/APPELLANT

VERSUS

PATRICK WAMBUA JOHN.....RESPONDENT/APPLICANT

RULING

The Applications

There are two related applications that are the subject of this ruling. The first application is by the Respondent, and he is seeking that the Court orders that the appeal herein has abated and that the costs of the appeal be borne by the estate of the Appellant. The said application is brought by way of a Notice of Motion dated 30th October 2015, and is supported by an affidavit sworn by the Respondent of the same date. The Respondent avers that on 15th October 2015 the Court gave the Appellant's counsel the last opportunity to substitute the deceased Appellant, and the said counsel has not taken any steps to do so and the Appellant's estate has clearly lost interest in the suit. Further, that since no steps have been taken to substitute the Appellant for over a year the suit has abated.

Edward Mutune Kimatu, a personal representative of the Estate of the Appellant responded to the application in a replying affidavit sworn on 15th February 2016, wherein he stated that after the Appellant died on 12th February 2012, his family was not able to agree on the personal representatives of his estate, and in the meantime the Appellant's insurer proceeded to file the present appeal. Further, that they were not aware of the appeal until 2014 which is when they applied for a grant of letters of administration with respect to the estate of the Appellant, which grant was awarded on 15th February 2015. He urged the Court not to declare the appeal abated and to give the personal representatives of the estate of the Appellant time to file for substitution and revival of the appeal.

The reasons given in the foregoing also formed the basis for an application filed by the personal representatives of the estate of the Appellant, namely Edward Mutune Kimatu and Geoffrey Kimatu Mbuvi, (hereinafter referred to as "the Applicants") by way of a Notice of Motion dated 15th February 2016. The said Applicants sought leave to be the personal representatives of the estate of the Appellant; to be granted time to apply to be substituted as personal representatives of the deceased Appellant since the suit had abated within one year from 12th February 2012, and for the Court to revive the appeal which abated on 12th February 2013.

The Respondent filed a replying affidavit he swore on 17th June 2016 in rejoinder, and contended that the failure by the Applicants to agree on the personal representatives of the Appellant and their delay in filing for letters of administration demonstrated a lack of interest in pursuing the appeal. Further, that the

Applicants had not given sufficient reason for the delay in substituting the Appellant, and revival of the appeal would inconvenience the Respondent to a process of another trial.

Upon direction by the Court, the Respondent's learned counsel, L. M. Wambua & Company Advocates, filed two sets of submissions dated 17th June 2016 and 9th July 2016 respectively, while Manthi Masika & Company Advocates, the learned counsel for the Appellants, filed written submissions on 12th July 2016. The learned counsel reiterated their respective arguments, with the counsel for the Respondent submitting that no substitution is possible as there is no appeal in existence under Order 24 Rule 3 of the Civil Procedure Rules, and cited various judicial authorities in this regard.

The counsel for the Appellant on the other hand submitted that sufficient cause for the delay in substitution had been demonstrated by the Applicants, and relied on judicial authorities where sections 3A and 3B and Article 159 of the Constitution were relied upon to extend time for substitution in the interest of attainment of substantive justice.

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed. The issue to be determined is whether this Court should extend the time within which the personal representatives of the estate of the Appellant should apply for substitution of the Appellant, and if so, whether the Court should substitute the Appellant and revive the appeal herein.

It is not contested that the appeal herein abated on 12th February 2013 in accordance with Order 24, Rule 3 of the Civil Procedure Rules which provides as follows:

“3 (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff 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 plaintiff to be made a party and shall proceed with the suit.

(2) 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”.

Under Rule 9, in the application of the Order to appeals, the word “plaintiff” shall be held to include an appellant, the word “defendant” a respondent, and the word “suit” an appeal.

Rule 3 which is reproduced in the foregoing gives the Court discretion to extend time for an application for the substitution of a deceased Appellant. Further, Order 24, Rule 7 allows a personal representative of a deceased Appellant to apply for the revival of an abated appeal as follows ;-

“(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) 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.”

From the foregoing provisions it is clear that the Court is given the discretion to revive a suit that has abated if sufficient cause is shown. The Applicants gave two reasons for the delay in substituting the Appellant,

being that there was no agreement as regards the personal representatives of the Appellant, and that they were not aware of the appeal as it had been filed by the insurer of the motor vehicle in which the Respondent was injured. They also availed copies of the grant of letters of administration intestate issued to them by this Court with respect to the estate of the Appellant on 26th February 2016.

It is my view that reasonable and sufficient cause for the delay has been shown by the Applicants, since the delay in succession proceedings may not have been contributed to exclusively by the Applicants' but also by other family members and the legal procedures involved, and there was also no evidence availed to show that they were indeed aware of the appeal. In addition the reasons given also negate the allegation made that the Applicants lacked interest in the appeal filed herein.

The concern by the Respondent that he will be inconvenienced by undergoing another trial while valid, must also be considered in light of, and balanced with of the imperative under Article 159(2) of the Constitution that Courts should dispense substantive justice. This is also a concern that can be mitigated by an award of costs of these applications.

I will consequently exercise my discretion in the Applicant's favour for the foregoing reasons. I therefore allow the Applicant's Notice of Motion dated 15th February 2016, which effectively also dispenses with the Respondent's Notice of Motion dated 30th October 2015.

I accordingly hereby order the revival of the appeal filed herein, extend the time for filing of an application for substitution of the Appellant, and hereby order that the Applicants, Edward Mutune Kimatu and Geoffrey Kimatu Mbuvi, being the legal representatives of the Deceased Appellant be substituted in place of the Appellant.

The Respondent shall however be awarded the costs of his Notice of Motion dated 30th October 2016 and the Applicant's Notice of Motion dated 15th February 2016, as the two applications resulted from the delay to act on the part of the Appellant.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 12th day of October 2016.

P. NYAMWEYA

JUDGE