



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND CIVIL APPEAL NO. 56 OF 2008

CHARLES GICHANA ANGWENYI.....APPELLANT

VERSUS

ISAAC MORACHA ONGWACHO (DECEASED).....RESPONDENT

AND

JOSEPHAT MWANGI MORACHA.....APPLICANT

RULING

1. Background

On 5th May 2008, judgment was entered for the respondent against the appellant by C. G Mbogo, SPM in Kisii CMCC No. 899 of 2006. Following the said judgment, a decree was issued on 11th November, 2008 by which the appellant was ordered to pay to the respondent a total sum of kshs. 1,376,080/= together with interest and costs of the suit. The suit in the lower court arose out of an agreement for sale of land that the appellant had entered into with the respondent on 4th December 2006 in which the appellant was the vendor and the respondent was the purchaser. The parties accused each other in the lower court for breaching the said agreement for sale. There was a claim by the plaintiff and a counter-claim by the defendant. The lower court as I have stated above, found for the respondent and dismissed the appellant's counter-claim.

2. The appellant was dissatisfied with the said decision of the lower court and lodged this appeal on 20th May 2008 through a memorandum of appeal dated 19th May 2008 in which he challenged the decision of the lower court on several grounds. The appeal was admitted by Musinga J. (as he then was) on 18th March 2009. The respondent died on 13th May 2009 soon after the admission of the appeal. The appeal came up for directions before Sitati J. on 4th February 2011 when the respondent's advocate notified the court that the respondent was deceased. The appellant's advocate was not in court on that day. The court stood over the matter to 11th February 2011 for mention for further direction. On 11th February 2011, the matter was mentioned in the presence of the advocates for both parties. The appellant's advocate told the court that the appellant was not aware that the respondent had died. He asked the court for time to make an application for the substitution of the deceased respondent. The respondent's advocate on the other hand informed the court that the respondent had died on 13th May 2009 and expressed doubt on whether the appellant had a right to apply for the substitution of the deceased respondent. The appeal was stood over generally on that day.

3. The applications before the court;

On 13th January 2012, the appellant brought an application by way of Notice of Motion of the same date seeking; enlargement of time to apply for the substitution of the deceased respondent with his legal representative, one, **Josephat Mwangi Moracha** and for the said legal representative to be substituted in this appeal in place of the deceased respondent. The appellant's application that was brought under the provisions of Order 24 rule 3 and Order 50 rule 5 (sic) of the Civil Procedure Rules, 2010 and section 95 of the Civil Procedure Act, Cap 21 Laws of Kenya was supported by the appellant's affidavit sworn on 13th January 2012. The application was brought on the grounds that the respondent died on 13th May 2009 while the appeal herein was pending and the grant of letters of administration of his estate was issued to Josephat Mwangi Moracha on 29th October 2010. The appellant deposed in his affidavit that he learnt of the death of the respondent in March, 2011 and that, it was not until 5th April 2011 that the respondent's advocates furnished him with a copy of the death certificate of the deceased. Upon receipt of the death certificate as aforesaid, his advocates started making inquiries to find out the legal representative of the estate of the respondent. It is from this inquiry that his said advocates learnt that grant of letters of administration had been issued to Josephat Mwangi Moracha. This application was not opposed. When it came up for hearing on 16th May 2013, the respondent's advocate then on record informed the court that he had no further instructions on the matter. He sought time to consult the respondent's legal representative on the way forward.

4. On 24th May 2013, Josephat Mwangi Moracha, (hereinafter referred to only as "**Moracha**" or "**the legal representative of the respondent**" where the context so admits) the aforesaid legal representative of the deceased respondent, brought an application by way of Notice of Motion dated 3rd May 2013, through the firm of Kimanga & Co. Advocates seeking; leave and/or liberty for him (**Josephat Mwangi Moracha**) to be joined in this suit in place of the deceased respondent, a declaration that this appeal has abated and an order dismissing the appeal. The application was brought under Order 24 rule 4 (1) (3), (7) and (9) of the Civil Procedure Rules, 2010, Sections 1A, B and 3A of the Civil Procedure Act, and Article 159 of the Constitution of Kenya, 2010. The application was supported by the affidavit of Josephat Mwangi Moracha sworn on 3rd May 2013. The application was brought on several grounds. The legal representative of the respondent contended that the respondent died on 13th May 2009 while this appeal was pending and the information regarding his death was promptly communicated to the appellant who failed to take appropriate steps with a view to proceeding with this appeal. He contended further that the inaction on the part of the appellant was intended to frustrate the realization of the decree that was issued in favour of the respondent in the lower court. He contended that since one year had lapsed since the death of the respondent and the appellant had not taken appropriate steps to join the respondent's legal representative in the appeal with a view to having the appeal heard, the appeal had abated and should be dismissed. The application by the respondent's legal representative was opposed by the appellant by way of grounds of opposition dated 30th January 2014. The appellant contended that the said application is bad in law, frivolous, vexatious, and misconceived.

5. On 3rd February 2014, I directed that the appellant's application dated 13th January 2012 and the application dated 3rd May 2013 by the legal representative of the respondent be consolidated and heard together. The two applications were subsequently listed for hearing on 13th November 2014 when only Mr. Ochwangi, the advocate for the legal representative of the respondent appeared in court. The advocates for the appellant did not appear. Mr. Ochwangi informed the court that in order to save time, he had filed on behalf of the legal representative of the respondent written submissions on 11th August 2014 on which he wished to rely. In the absence of the appellant's advocates, he urged the court on the basis of the said submissions to grant the prayers sought in the application by the legal representative of the respondent dated 3rd May, 2013.

6. I have considered the appellant's application dated 13th January 2012 and the application by the legal representative of the respondent dated 3rd May 2013. The two (2) applications were to be heard together as I have stated above. When the two applications came up for hearing before me on 13th November

2014, the appellant's advocates did not appear to prosecute their application. I have noted from the affidavit of service that was sworn by Joshua Otieno Okeyo on 13th November 2014 that the appellant's advocates were duly served on 2nd October 2014 with a notice for the hearing of the two applications on 13th November, 2014. Since the appellant's application was not prosecuted, I have no alternative but to dismiss the same for non-attendance. That leaves me with the second application dated 3rd May 2013 by Josephat Mwangi Moracha, the legal representative of the respondent. It is not in dispute that the respondent died on 13th May 2009 while this appeal was pending hearing before this court. It is also not in dispute that Moracha was appointed as the legal representative of the estate of the respondent on 25th February 2010. It is also a common ground that this appeal has abated as against the respondent the parties having failed to apply to court within one (1) year to substitute the deceased respondent with his legal representative pursuant to the provisions of Order 24 rules 4 (1) and (3) of the Civil Procedure Rules.

7. Moracha, who is the deceased respondent's legal representative, has sought leave to be substituted in this appeal in place of the respondent, the abatement of the appeal notwithstanding. Moracha's application should have been made within one (1) year of the death of the deceased respondent. The application was filed out of time. This court has power under Order 50 rule 6 of the Civil Procedure Rules, 2010 to extend time fixed for doing any act under the Civil Procedure Rules. The court therefore has power to extend the time within which Moracha should have made the present application and to deem the application to have been filed within time. Although Moracha has not expressly sought extension of time in the application before me, I would pursuant to the provisions of sections 1A, B and 3A of the Civil Procedure Act and Article 159 (2) (d) that have been cited by the advocates for Moracha extend the time within which the application should have been made and deem the application to have been filed within time. I have noted from the appellant's application dated 13th January 2012 that I have decided to dismiss for non-attendance that, the appellant had also sought an order for enlargement of time within which to apply for the substitution of the deceased respondent with Moracha. No prejudice or injustice would therefore be occasioned to the appellant if the prayer sought for the substitution of the deceased respondent with Moracha is allowed.

8. Moracha has sought a further order that after he is substituted in place of the deceased respondent, the court should declare this appeal to have abated and proceeded to dismiss the same. I am of the view that these orders cannot be granted. The substitution of the deceased respondent with Moracha who is his legal representative with leave of this court revives the appeal that had abated pursuant to Order 24 rule 4(3) of the Civil Procedure Rules. Moracha in his capacity as a respondent in the appeal cannot ask the court to declare the appeal as having abated. Under order 24 rule 4 (1) and (2) of the Civil Procedure Rules, once, Moracha is made a party to this appeal in place of the deceased respondent; he is supposed to proceed with the appeal in place of the deceased. In the circumstances, Moracha's prayer to be substituted as a respondent in this appeal in place of the deceased is inconsistent with his prayer seeking a declaration that this appeal has abated. For that reason, I am unable to grant prayers 3 and 4 in Moracha's application dated 3rd May 2013. I would wish to add that even if the said prayers were considered on merit, I would still not have granted the same. On the material before me, I am not satisfied that the appellant is to blame for not seeking to substitute the deceased respondent with his legal representative earlier.

9. There is no evidence that the appellant was promptly made aware of the respondent's death and the appointment of Moracha as his legal representative. The record shows that both the court and the appellant were made aware of the respondent's death after the expiry of more than one year from the date of the death of the respondent. By this time, the appeal herein had abated. How was the appellant expected to know that the respondent had died? With lack of knowledge of the respondent's death, how could the appellant be expected to apply to court for the substitution of the respondent with his legal representative? I am satisfied that the appellant acted with promptitude as soon as he was made aware of the death of the respondent and the appointment of Moracha as his legal representative to have the deceased substituted with Moracha through the application dated 13th January, 2012 that was filed herein on the same date.

10. Moracha's application herein seeking among others, the dismissal of the appeal was filed after a lapse

of over one year after the appellant had sought the substitution of the deceased respondent with Moracha. I am not persuaded that the delay on the part of the appellant to apply for the substitution of the respondent with his legal representative was deliberate. I am of the view that Moracha having failed to notify the appellant of the respondent's death and of his appointment as a legal representative of the respondent in good time to enable the appellant to apply to have the deceased respondent substituted with him cannot be allowed to turn that failure to his advantage. As was stated in the case of **Nabro Properties Ltd. vs. Sky Structures Ltd. & 2 Others [2002] 2 KLR 299**, "the author of a wrong who has put a person in a position in which he has no right to put him, shall not take advantage of his own illegal act, or in other words, shall not avail himself of his own wrong". I am of the view that considering the history of this appeal, justice would be best served if the same is heard on merit.

11. Conclusion;

For the foregoing reasons, I would dismiss the appellant's application dated 13th January, 2012 for non-attendance and allow Moracha's application dated 3rd May 2013 in part. Moracha's application is allowed in terms of prayer 2 thereof. The appellant shall amend the memorandum of appeal within twenty one (21) days from the date hereof to effect the substitution of the deceased respondent with his legal representative, Josephat Mwangi Moracha. In view of the age of this appeal, I direct further that the same be set down for directions within thirty (30) days from the date hereof. The cost of both applications shall be in the cause.

Delivered, signed and dated at KISII this 20th day of February, 2015.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Momanyi h/b for Bosire for the appellant

Mr. Bigogo h/b for Kimanga for the respondent

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE