



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 42 OF 2013**

**JAMES OMOLO NAMUTENDA.....RESPONDENT**

**VERSUS**

**KENYA POWER & LIGHTING CO. LTD.....APPELLANT**

**CONSOLIDATED WITH NBI HCCA NO. 47 OF 2013**

**FALCON SIGNS LIMITED.....APPELLANT**

**VERSUS**

**JAMES OMOLO NAMUTENDA.....RESPONDENT**

*(Being an appeal against the ruling of Mr. C. Abulutsa SPM given in the Nairobi CMCC no. 2356/06 on 15<sup>th</sup> December 2012)*

**JUDGEMENT**

1. This judgement is outcome of two consolidated appeal ie. H.C.C.A no. 42 and 47 of 2013. These appeals arose from Nairobi C.M.C.C 2356 of 2006 in which James Omolo Mamutenda, now deceased, sought for damages against Kenya Power and lighting Co. Ltd, Atlas Copco E. A Ltd and Falcon signs ltd, the Appellants herein, for injuries he allegedly suffered. It is said that the deceased had been assigned by Kenya Power and Lighting Co. Ltd to take measurements of an existing bill board on top of a building with the premises of Atlas Copco E. A. Ltd. While returning to the motor vehicle owned by Falcon signs Ltd the aluminium ladder the deceased was carrying was caught by live electric wires laid by Kenya Power and Lighting Co. Ltd. The deceased sued the trio jointly and severally James Omolo Namutenda passed away in 2007 before the suit was heard and determined.

2. Regina Mugidi and Cleophas Omunga took up limited letters of administration and Litem over the Estate of James Omolo Namutenda, deceased in 2012 about six years after the deceased's death. Upon obtaining the aforesaid letters of administration, the duo applied before the Chief Magistrate for inter alia the suit to be revived under Order 24 rule 3(1) and & (2) of the Civil Procedure Rules. The defendants (now appellants) strenuously opposed the application on the basis that the substitution should have been done within 1 year from the date of death or the date when the suit abated. Hon. Obulutsa, the learned Senior Principal Magistrate considered the rival arguments and in the end he ruled in favour of the applicants. Being aggrieved, the Defendants each preferred an appeal. Falcon Signs Ltd hereinafter referred to as the 2<sup>nd</sup> Appellant filed H.C.C.A no. 47 of 2013 while Kenya Power & Lighting Co. Ltd

hereinafter referred to as the 1<sup>st</sup> Appellant filed H.C.C.A no. 42 of 2013. The two appeals were consolidated since they arose from the same proceedings.

3. When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal to be disposed of by written submissions. The main ground which commends itself for the determination of this court is whether or not the learned Senior Principal Magistrate was justified in granting the order to revive the suit. It is the submission of the Appellant that the suit should not have been revived because the reason given could not justify the grant of the order. It is argued that the delay by six years by the Respondents to apply for revival of the suit was inordinate hence the orders were wrongly granted since there was no extension of time to file an application for revival. The Respondent opposed the appeal claiming that there was no express time limit within which to make the application and hence they could make it within the statutory limitation period of 6 years. According to the Respondents where there is no time limit a step or action is to be taken within reasonable time.

4. I have carefully considered the rival arguments and I have also taken into account the submissions presented by both sides. There is no dispute on the part of the Respondents that there was no application made for the extension of time to file an application for revival and substitution under Order 24 rule 3(2) of the Civil Procedure. Having dealt with the material placed before me, I'm persuaded that the appeal should succeed on the ground that the Respondents proceeded to file an application for revival of the suit and substitution without making an application for extension of time under Order 24 rule 3(2) of the Civil Procedure Rules. In the case of **Gachuhi Muthanji = vs = Mary Wambui** the court of Appeal stated inter alia as follows:

**“That the learned judge of the High Court had misdirected himself in this case by allowing the application for substitution. The Respondent in the said Court of Appeal case also conceded that an application for extension of time to revive the abated suit had never in fact been made.”**

5. It is clear in my mind that the Respondents missed a very important step before making the application for revival of the suit. The learned Senior Principal magistrate therefore misdirected himself when he made the application reviving the suit yet the Respondent had not sought for leave to do so prior to lodging the application.

6. In the end, the appeal is allowed. The order reviving the suit made on 18.12.2012 is set aside and is substituted with an order dismissing the application dated 11.10.2012 with costs to the Respondents. The Appellants are awarded costs of the appeal payable by the deceased's estate.

Dated, signed and delivered in open court this 29<sup>th</sup> Day of September, 2015.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Respondent

.....for the Appellant