REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 65 OF 2008

MAURICE WASWA ..... APPELLANT

V E R S U S

WALTER W. OWAKA ..... RESPONDENT

R U L I N G

Judgment was on 20th May 2004 entered in favour of the respondent as against the appellant for the sum of KShs.11,500/= plus costs and interest. This was after the appellant had admitted owing the respondent the sum of KShs.30,000/=. The respondent's costs of the suit were assessed at KShs.18,955/= on 22nd September 2009. Before the decree could be executed, the respondent died on 24th December 2004. It is apparent that no one made an application to substitute the respondent in the proceedings before the subordinate court. There is no evidence that anyone applied to be granted letters of administration to administer the estate of the deceased respondent.

Interestingly, on 19th July 2007 the deceased respondent's advocate Mr. Fwaya, issued notice to show cause to the appellant to pay the decretal sum plus the assessed costs. The appellant resisted the execution process on the ground that the respondent was dead and had not been substituted by any administrator to his estate. When the matter was placed before the then Chief Magistrate, she overruled the appellant's objection and directed that the execution process proceeds to its conclusion. The appellant was aggrieved by this decision hence the present appeal.

Upon filing the present appeal, the respondent filed a notice of motion seeking the striking out of the appeal on ground that the appeal had been filed against a deceased respondent. On the other hand, the appellant filed notice of preliminary objection challenging the respondent's advocate's locus standi to appear on behalf of a deceased litigant. This conundrum was ventilated in court by Mr. Fwaya and Mr. Oyagi during the hearing of the application. It was clear to the court that valuable judicial time was lost by the two counsel litigating on an obvious issue which should have been settled long time ago. The issue is simple; where a litigant dies, at any stage of the proceedings, he must be substituted by a person who has been issued with letters of administration to administer his estate. In the present appeal, much energy was expended in addressing the question whether or not the deceased respondent could be substituted even after judgment had been entered in his favour as against the appellant. The question that can be asked in the circumstances is who is litigating in the case where the respondent is already dead? Who instructed Mr. Fwaya? Did the respondent instruct him from his grave? It was clear to the court that no one can litigate on behalf of a deceased respondent without obtaining letters of administration to administer his estate. Mr. Fwaya did not therefore have instructions to act for the deceased respondent without a living person obtaining letters of administration to administer his (the respondent's) estate.

In the premises therefore, the appellant had a point when he argued that he is being pursued in execution of a decree issued in the name of the deceased respondent by persons who were not authorised in law to take over proceedings from the deceased respondent. The appellant also fell in error when he filed an appeal against such a deceased respondent. The appeal was a non-starter *ab initio*. It ought not to have been filed in the first place unless the respondent was substituted by a living person. Such living person can only be the administrator of the estate of the deceased respondent.

In the circumstances of this case justice demands that the appeal herein be struck out but with no orders as to costs. The execution process instituted in the subordinate court i.e. in **Civil Suit No. 736 of 1999** is

stayed pending the substitution of the deceased respondent by the administrators of his estate or someone duly authorised by the court to administer his estate.

DATED AT KAKAMEGA THIS 21ST DAY OF JUNE 2011

L. KIMARU
J U D G E