



**IN THE COURT OF APPEAL
AT NYERI**

(CORAM: AGANYANYA, J.A. (IN CHAMBERS))

CIVIL APPEAL NO. 155 OF 2005

BETWEEN

GACIHI WANG'OMBEAPPELLANT

AND

1. JAMES MURIUKI MAINA

2. ERASTUS WANG'OMBERESPONDENTS

(An appeal from the ruling of the High Court of Kenya at Nyeri (Khamoni, J.) dated 26th July, 2004

in

H.C. Succ. Cause No. 105 of 1999)

RULING

This application expressed to have been made under **rule 99(1)(2)** and **3** of the Court of Appeal Rules seeks two orders, namely:-

“1. That the Honourable Court be pleased to revive this appeal which has abated.

2. That the Honourable Court be pleased to substitute the appellant Gachihi Wang'ombe by Margaret Gachiu Gachihi.”

The application is based on the grounds set out thereon as follows:

“1. That this appeal was filed by Gachihi Wang'ombe on 17th June, 2005.

2. That the appellant died on 16th September, 2006 and left this appeal pending in this Court.

3. That his wife was unable to take up the appeal because she is old and ailing.

4. That it took time for her to get better to engage another advocate because the previous advocate just disappeared without disclosing where he went.

5. That she managed to get the services of the current advocate who advised her to obtain letter of

administration for her husband's estate which she did in 2010.

6. That by the time she obtained the grant of Administration the appeal had abated.

7. That she is seeking revival of the appeal and substitution to enable her to prosecute the appeal.

8. That the delay in bringing this application is explainable and the same is not inordinate.”

The application is supported by the applicant's affidavit which repeat in material particulars the grounds just referred to above; except to attach some documents indicating that the applicant was on medication sometime in the years 2003-5 and 2009 and also applied for a limited grant of letters of administration *ad litem*.

There was a replying affidavit filed in Court on 19th October, 2011 by the 2nd respondent which opposed the application on the ground that it had been inordinately delayed and was thus an abuse of the Court's process; and that failure to engage another advocate when the previous one allegedly disappeared was the applicant's own mistake.

He stated further the applicant should have used her adult sons to pursue the appeal other than waiting until she was well in order to come on record and that there is no provision in law for the revival of an abated suit or to allow the applicant to be substituted to prosecute an abated appeal.

The application was heard by this Court on 24th October, 2011 when **Mr. Kebuka Wachira**, learned counsel for the applicant gave the history of the matter as set out in the grounds set out on the face of the application and the supporting affidavit. He stated further that when the applicant came to Court on 27th October, 2010 to inform it that the appellant had died and the same Court advised her to seek legal advice. She went and instructed him and he first filed an application for limited letters of administration to enable her to file this application. He submitted that the delay in making this application resulted from the applicant's illness and the disappearance of her previous lawyer.

Mr. Wamahiu, learned counsel for the respondent opposed the application and relied on the averments in the replying affidavit, adding that as the deceased passed on six years ago, the application was inordinately late.

In reply, Mr. Wachira submitted that since the Court gave the applicant time on 27th October, 2010 to seek legal advice, this application was not delayed inordinately.

I have heard submissions of counsel for the parties in this matter and considered them. The deceased was represented by legal counsel, **Gacheche Wa Miano** who filed this appeal. He died on 17th June, 2006 and his said counsel relocated without the applicant.

I do not think the applicant; a rural wife would be in a position to know requirements that she files an application to obtain letters of administration intestate to the his estate or for his substitution. She would expect the deceased lawyer to do all these and when she came to this Court on 27th October, 2010 and informed it about the deceased death she was advised to seek further legal advice on the matter. This is how her present counsel came on record on 15th April, 2011. It is true he came on record late but given the applicant's medical history and that she is fairly old and that she had first to get letters of administration intestate to her husband's estate, this Court has the requisite jurisdiction under **rule 99(3)** to consider and make the order sought in her favour. In the circumstances I allow this application and grant the applicant the two orders sought. That costs thereof shall abide the outcome of the appeal.

Dated and delivered at Nyeri this 1st of December, 2011

D. K. S. AGANYANYA

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

DEPUTY REGISTRAR