



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 205 of 2001**

**JAMES GITAU GIKOBE .....APPELLANT**

**V E R S U S**

**MICHAEL HENRY KIPCHIECHIE.....RESPONDENT**

**J U D G M E N T**

There has been considerable delay in preparation and delivery of this judgment. The same was occasioned by an oversight and is regretted.

The Appellant herein is actually EUNICE WANGARI GITAU, the legal representative of the deceased plaintiff in the lower court. This is an appeal against an **order of the lower court dated 10<sup>th</sup> April 2001**, by which the Appellant's application under **Order 23, rule 8(2)** of the **Civil Procedure Rules** (the **Rules**) was dismissed. An earlier application by the Appellant to substitute her in place of the deceased plaintiff had been dismissed on 30<sup>th</sup> October 2000, principally upon the ground that there was no longer any suit as it had already abated under **Order 23, rule 3(2)**. The **plaintiff had died on 21<sup>st</sup> November 1998**, and the **application for substitution was filed on 25<sup>th</sup> August 2000**, more than one year after the plaintiff died.

The appeal is opposed by the Respondent, who was the defendant in the lower court. The suit was filed on 14<sup>th</sup> May, 1997. It is a claim for damages based on the tort of negligence following a road accident. The cause of action accrued on 27<sup>th</sup> October, 1995.

**Rule 8(2)** aforesaid of Order 23 provides as follows:-

**“The plaintiff or the person claiming to be the legal representative of a deceased plaintiff,**

**or the trustee, or the 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.”**

The learned chief magistrate, J. W. Lesiit (who is now a learned judge of this court) found that the Appellant had shown that she was prevented by a sufficient cause from continuing the suit, that sufficient cause being her advocates’ tardiness. Nevertheless, the chief magistrate refused the application to revive the suit upon the grounds:-

- (i) that the application had been brought after inordinate delay that was not explained; and
- (ii) that “...no useful purpose will be served in reviving the suit...”.

I think, with the greatest respect, the chief magistrate (as she then was) erred in law. Once an applicant proves that he was prevented by any sufficient cause from continuing the suit,

**“the court shall revive the suit... upon such terms as to costs or otherwise as it thinks fit”.**

Having accepted that the advocates’ negligence was a sufficient cause that prevented the Appellant from continuing the suit, the lower court’s discretion ended, and it had no alternative but to revive the suit. That is why the mandatory injunctive term **“shall”** is used in the rule.

Upon this ground alone I must allow this appeal. The order of the lower court dated 10<sup>th</sup> April, 2001 is hereby set aside. There will be substituted therefor an order allowing the notice of motion dated 22<sup>nd</sup> January 2001. The suit in the lower court, **MILIMANI SPMCC NO. 3621 OF 1997** is hereby revived. The Appellant, EUNICE WANGARI GITAU, is hereby substituted in place of the deceased plaintiff.

Regarding costs, it is to be noted that the appeal has not been allowed upon any of the grounds contained in the amended memorandum of appeal dated 5<sup>th</sup> November 2002, all of which I consider to be periferall to the main issue in this appeal. I will therefore order that the parties do bear their own costs of this appeal.

Those will be the orders of the court.

**DATED, SIGNED AND DELIVERED IN OPEN COURT**

**THIS 12<sup>TH</sup> DAY OF FEBRUARY, 2010**

**H. P. G. WAWERU**

**J U D G E**

