



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 2034 of 1987

1. RUTHARI KAMBAARU

2. VERONICA WANGARI RUTHARI.....SUBSTITUTED PLAINTIFFS

V E R S U S

POSTAL CORPORATION OF KENYADEFENDANT

R U L I N G

Judgment in this suit was **entered on 17th December, 1993**. The original Plaintiff died before she executed the decree. The present Plaintiffs were substituted in her place by an **order entered on 10th July, 2002**. By a **ruling delivered on 5th June, 2009** the court settled the terms of the decree. By another **ruling delivered on 25th September, 2009** the court refused an application by the Judgment-Debtor to set aside the settlement of the decree of 5th June, 2009.

The main ground for refusing that application was that it had not been urged that the decree as settled was not in agreement with the judgment. But the court also dealt with some three other issues that had been raised by the Judgment-Debtor, though the court considered them as not being germane to the core issue, which core issue was whether or not the decree as settled was in agreement with the judgment. Those peripheral issues were:-

1. **Whether or not the suit had abated?** The court held that as judgment had already been entered by the time the original Plaintiff died, there was no longer any suit pending that could abate under **Order 23, rule 3(2) of the Civil Procedure Rules (the Rules)** on account of her death.
2. **Whether or not the administrators of the estate of the deceased Plaintiff were duly substituted in his place?** The court held that if substitution was necessary (though in the court's view it was not), there was the order of substitution of 10th July, 2002 which had not been challenged or set aside on appeal or on application for review.
3. **Limitation in so far as it applied to interest.** The court held that this is an issue that ought to be taken up when calculating the outstanding decretal sum and had nothing to do with the terms of the

decree as set out in the judgment.

The Judgment-Debtor has now applied by **chamber summons dated 9th October, 2009** seeking leave to appeal against the decision of the court on those peripheral issues. The application is opposed by the Substituted Plaintiffs.

I have read the supporting and replying affidavits. I have also considered the written submissions filed on behalf of the parties, including the authorities cited.

It is urged for the Judgment-Debtor that the intended appeal is not frivolous and will raise pertinent points of law. However, no draft memorandum of appeal is annexed to the application. It has not been submitted for the Judgment-Debtor that the core issue in the ruling of 25th September, 2009 was not whether or not the decree as settled was in agreement with the judgment. It appears that the Judgment-Debtor has no issue at all with the decree as settled by the ruling of 5th June, 2009. It is also submitted for the Judgment-Debtor that it is not intended by the present application to stay execution of the decree, and that grant of leave to appeal will not deny the Substituted Plaintiffs the fruits of their judgment. They will thus not suffer any prejudice.

For the Substituted Plaintiffs it was submitted that the intended appeal will not merit any serious judicial consideration because:-

- (a) A suit that has already been determined cannot abate by the death of a party.
- (b) In any event, no appeal was filed against, or review sought of, the order of substitution of 10th July, 2002.

As already noted, judgment in this suit was entered on 17th December 1993, more than 16 years ago! The Judgment-Debtor does not seem to dispute the terms of the decree as settled by the ruling of 5th June 2009. It seeks to appeal against decisions on points that were not germane to the core issue. Permitting the Judgment-Debtor to appeal will merely delay the bringing to closure this long-standing matter. There appears to have been no appeal against the judgment. Litigation ought to come to an end at some point, and the sooner the better!

In the particular circumstances of this case I hold that permitting the Judgment-Debtor to appeal will not be in the interests of justice, and I must refuse the application by chamber summons dated 9th October, 2009. It is hereby dismissed with costs. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF FEBRUARY, 2010

H. P. G. WAWERU

JUDGE

DELIVERED THIS 12TH DAY OF FEBRUARY, 2010