

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 98 of 2002

M'MUCHEKE KIRAITHE APPELLANT

VERSUS

TYRES MBAE KIRAITHE RESPONDENT

APHAXARD NJUE MUCHEKE APPLICANT

RULING

The Chamber Summons dated 25th March 2009 is brought by Aphaxard Njue Muccheke who obtained grant of Letters of Administration in respect of the estate of M'Muccheke Kiraithe deceased appellant. The appellant died on 5th August 2006. The applicant in his affidavit in support of the application stated he was delayed in obtaining the grant because the respondent, in this appeal, interfered through the chief who in turn refused to issue the applicant with a letter which was required by the court's registry before his petition for grant of Letters of Administration be entertained.

He therefore prayed in his application that the court would revive the appellant's appeal and would appoint him the legal representative of the appellant. The latter part of that prayer in my view is misplaced. What I believe the applicant seeks from this court is that he be substituted for the deceased appellant. The fact that he did not specifically make that prayer does not in my view prejudice the respondent.

The respondent opposed the application. In his replying affidavit, he deponed that the application lacked merit and was filed to defeat his application dated 8th February 2008 seeking for the court's declaration that the appeal had abated. The respondent further denied interfering with the chief on the issue of chief's letter. The respondent's counsel in oral submissions argued that the reason given by the applicant for having failed to seek substitution was not good enough to lead to granting of orders sought. The applicant in support of the application relied on the case of **Soni Vrs. Mohan Dairy (1968) E.A. 58** where the Court of Appeal held that an applicant had shown sufficient cause for the court to revive a suit that had abated because during the period when the suit abated a legal representative had not been appointed. Order XXII Rule 4(2) provides:-

"Where within one year no application is made under sub rule (1), the suit shall abate so far as the deceased plaintiff is concerned....."

Sub rule (1) of Order XXIII Rule 4 provides that where one or two or more plaintiffs dies and the cause of action does not survive or continue to the remaining plaintiff(s) those surviving plaintiff(s) can be appointed to continue the action. Where the plaintiff is the sole plaintiff who then dies, that Rule provides that a legal representative of the deceased plaintiff can be made a party to the action.

Order XXIII Rule 10 provides that the word plaintiff in that Order applies to appellant. Order XXIII Rule 10 provides that the court can revive a suit that has abated on an application, where the applicant proves:-

"...that he was prevented by any sufficient cause from continuing the suit....."

The applicant before court has stated that his local chief refused to issue him with the letter required by the court registry when he sought appointment as a legal representative of deceased appellant's estate. That does, in my view, on a balance of probability, prove the applicant was prevented from continuing this appeal for sufficient cause.

Accordingly, I am of the view that the application for substitution is merited. I grant the following orders:-

- (1) *That this appeal is hereby revived.*
- (2) *That Aphaxard Njue Mucheke is granted leave to substitute the deceased appellant in this appeal*
- (3) *The costs of the Chamber Summons dated 25th March 2009 shall be in the cause.*

Dated and delivered at Meru this 16th day of July 2009.

MARY KASANGO

JUDGE