



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Civil Appeal 43 of 2001

**JOSEPH MBAABU MARETE (*legal representative of MARETE M'RINGERA*)
..... APPELLAN**

VERSUS

PETER M'RIMBERIA 1ST RESPONDENT

JULIUS MUTHURI 2ND RESPONDENT

RULING

The memorandum of appeal in this matter was filed on 25th April 2001. The appeal is against the ruling in PMCC Meru No. 117 of 1988. The appellant failed to disclose in that memorandum the date when that ruling was delivered. The respondent by a notice of motion dated 3rd July 2009 brought under Section 79G of the Civil Procedure Act seeks an order to dismiss that appeal for having been filed out of time without leave. The respondent in the affidavit in support of that application stated that the ruling which is the subject of this appeal was delivered on 22nd February 2001. It should be noted that the appellant did not contradict that averment. The applicant counsel argued that by virtue of Section 79G the present appeal is incompetent for having been filed out of time. The appellant did not file a replying affidavit but instead filed ground of opposition which was to the effect that the application was itself incompetent because the appeal had abated as against the 2nd respondent who is now deceased. At first when I listened to the arguments of the appellant's counsel, I was not able to follow his line of argument. That is really because the appellant relied on grounds of opposition by which he cannot bring facts before court. I had to go through the file to understand the argument of the appellant. I found in the file that there was an application dated 23rd October 2004. That application had been brought on behalf of the estate of the 2nd respondent whereby the applicant Josephine Kinanu Muthuri sought to be substituted for the deceased 2nd respondent in this appeal. When the application came before court on 15th November 2005, the prayers were granted by consent of the parties. It was argued by the appellant before me that by the time Josephine substituted the deceased 2nd respondent, the appeal as far as it concerned the 2nd respondent had abated. The appellant argued that there was no prayer to revive the appeal as against the 2nd respondent. The appellant however in argument was of the view that the whole appeal had abated because of that failure to apply for its revival. In my view, that argument of the appellant is a miscomprehension of the provisions of Order XXIII Rule 1, 2 and 3 (2) of the Civil Procedure Rules. It

should be noted that Rule 10 provides that in case of an appeal whenever a plaintiff is mentioned, the same would relate to the appellant and where the defendant is mentioned would relate to the respondent. Rule 2 provides that the death of a plaintiff or a defendant does not cause a suit to abate. To better understand the provision of that Rule, I will reproduce it hereof:-

“2. Where there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.”

It ought to be understood that in this appeal, there were 2 respondents. It was not argued by the appellant that after the death of the 2nd respondent the appeal did not survive or continue with the first respondent. I do well understand the provisions of Order XXIII Rule 4(3) which provides that where a substitution is not done within one year of the deceased defendant, a suit would abate as against the deceased defendant. From the application of the substitution of the deceased 2nd respondent, it is clear that the 2nd respondent died on 17th October 2002. It would therefore seem that the suit abated, or rather the appeal abated on 18th October 2003. The application by Josephine was filed on 26th October 2004. The fact however remains that there is a 2nd respondent in this appeal. And the appeal would, in my case, continue as against the 1st respondent since the contrary was not shown to the court. The appeal from the evidence which is before me seems to be incompetent for having been filed out of time without the leave of the court contrary to section 79G. That section provides:-

“79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause of not filing the appeal in time.”

It is clear from that section that an appeal from the subordinate court should be filed within 30 days from the date the decree or order is issued. For that reason, this appeal is hereby dismissed for having been filed out of time without the leave of the court and the costs of this appeal and of the application dated 3rd July 2009 are awarded to the first respondent.

Dated and delivered at Meru this 26th day of November 2009.

MARY KASANGO

JUDGE