



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**

**Civil Appeal 11 of 1999**

**KEN-KNIT (K) LTD:.....APPELLANT**

**VERSUS**

**ALI BAKARI:.....RESPONDENT**

**R U L I N G**

This appeal was filed in January 1999 by Ken-Knit (K) Ltd who were the defendants in the trial court against **ALI BAKARI**. It was heard before Juma **J** on 29<sup>th</sup> September 2003 when the counsel for appellant and respondent submitted. Judgment was reserved for 25<sup>th</sup> November, 2003 but unfortunately by then Justice Juma had been suspended before judgment was delivered. Counsel appeared before Ibrahim **J** on 17<sup>th</sup> October 2006 when it was intimated that the respondent had died. The court directed that the Estate of the deceased respondent may apply for substitution after which the hearings of the appeal start De Novo. It seems that the Estate of the deceased did not apply for substitution in this appeal though the court was told that the administrator of the Estate applied for substitution in the lower court and was made a party. He then tried to execute the judgment and hence this application.

The appellant applied for the court to revive the appeal and then substitute CHARLES N. TIMBA the administrator of the respondents Estate as the respondent herein. He said the said Charles N. Tsimba obtained Letters of Administration on 31<sup>st</sup> October, 2006 and as such they could not make the application earlier.

Application was opposed by Mr. Magare for the respondent. He submitted that the appeal abated after one year. The applicants were aware of the respondents death all along and they cannot now revive the appeal. The respondent had died on 21<sup>st</sup> April 2001. He submitted that provisions of order 23 rule 8 CPR talks of suit being revived for deceased's plaintiff and not defendant.

I have carefully considered the application and find that it has merit. As it has been stated the deceased died in 2001 and the appeal abated a year later. However as late as September 2003 counsel for the respondent appeared before the judge and participated in hearing of the appeal well knowing the deceased was dead. He never informed the court about his client's death. It is also obvious that the appellant was not aware of the death otherwise he would not have proceeded with the appeal. There in September 2006 he was made awry that the respondent was dead. The court directed there be substitution but the personal representative of deceased's estate did not make any application to do so. That is understandable for he had no interest in the raising of the appeal. The respondent was the one who got judgments in the lower court which was appealed against by the applicant. The Estate therefore would be comfortable if there was no appeal pending. This is clear from the fact that the personal representative of the Estate applied to be substitute in the lower court file and not in this appeal. He sought to execute the decree in the lower court on the strength that the appeal had abated. That is being cheek and clever by a half.

As for the provisions of order 23 rule 8(2) CPR alluded to by Mr. Magare it is true they provide for a suit to be revived by a plaintiff or his legal representative. However an appellant is the same as a plaintiff otherwise the provisions of the whole of that order would not apply to appeals and that would mean that appeals would not abate if one party passes away. The arguments of Mr. Magare therefore do not hold.

From the foregoing therefore I find the applications well grounded and I allow the same as prayed.

Dated and Delivered at Eldoret on 5<sup>th</sup> March, 2008.

KABURU BAUNI

JUDGE

IN PRESENCE OF:-

C/C - David

.....for applicant

.....for respondent