



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Appeal 165 of 1999

MWENGA KAWALO APPELLANT

AND

FRANCIS NGINDU MBUU RESPONDENT

RULING OF THE COURT

1. The application before me is filed by the intended appellant/applicant seeking to substitute the appellant SAMSON MWENGA KAWALO (now deceased) with his legal representative, ELIZABETH NZUNI MWENGA and also prays for an order reviving the appeal which abated on 6/08/2004, a year after the death of the appellant. The application dated 2/03/2007, was filed on 5/03/2007. According to the limited grant issued to the applicant, (annexture marked “EWN1”) the appellant died on 6/08/2004.
2. The application is premised on four grounds on the face thereof:-
 - a. THAT the appellant is now deceased.
 - b. THAT ELIZABETH NZUNI MWENGA is the wife of the deceased appellant and also the legal representative of his estate.
 - c. THAT the legal representative did not take out Letters of Administration until 21/09/2004
 - d. THAT the appellant died on 6/08/2003 and the appeal abated on 6/08/2004.
3. The application is also supported by the sworn affidavit of ELIZABETH NZUNI MWENGA dated 2/03/2007 and from the averments therein, the following facts emerge:-
 - i. the appellant had, prior to his death, instructed the firm of MULU & COMPANY ADVOCATES to pursue this appeal on his (appellant’s) behalf;
 - ii. The appellant died on 16/08/2003 (or was it 6/08/2003?);
 - iii. the appeal herein abated on 16/08/2004;
 - iv. the applicant was granted Limited Letters of Administration on 21/09/2004 (see annexture “ENMI”.)

4. Though the applicant says she wishes to substitute the appellant with herself, she does not explain in her affidavit the reasons for the delay, and especially the delay between 21/09/2004 when she obtained the Limited Grant of Letters of Administration and 5/03/2007 when she eventually filed this application.

5. It was explained from the bar during the hearing of this application that the reason for the delay was the applicant's failure to instruct her advocates to file the application. No affidavit to that effect was filed by a partner in the firm of MULU & CO. ADVOCATES nor did the applicant herself allude to that reason in her sworn affidavit. It was further explained from the bar that the applicant had believed that the matter between the appellant and the respondent had been concluded until she received a letter (it was not indicated who wrote the letter to the applicant) informing her that the appeal was still alive. The applicant thus pleads ignorance in this case.

6. Order 23 Rule 4 (1) of the Civil Procedure Rules (CPR) provides that where a party to a suit dies, and where the suit survives or continues,

“...the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.”

Subsection (3) thereof provides that:-

“(3) Where within one year no application is made under sub-rule (1), the suit shall abate against the deceased defendant.”

7. Once a suit abates, as it is admitted in this case, no fresh suit shall be brought on the same cause of action.

8. The application herein was not opposed, though it is clear from the record that the firm of P.M.MUTUKU & CO. ADVOCATES filed their Notice of Change of Advocates on 5/10/2004, and thereafter on 15/10/2004, 8/11/2005 and 11/12/2006 write letters to MULU & COMPANY ADVOCATES inviting them to the High Court Civil Registry with a view to fixing an early hearing date for the appeal. When this matter came up on 5/03/2007, Mr Mwalimu Advocate, held brief for P.M. Mutuku during which he applied for adjournment and for time to file a Replying Affidavit. Though the adjournment was granted no Replying Affidavit was ever filed. Nor did Mr P.M. Mutuku appear on the hearing date which had been fixed in the presence of both advocates on 22/03/2007. The application thus proceeded uncontested.

9. The question that arises is whether the court should now exercise its discretion in favour of the applicant and allow the substitution of the appellant and the revival of the appeal which abated either on 6/08/2004 or 16/08/2004. (The applicant has given conflicting dates in her pleadings). Section 95 of the Civil Procedure Act provides that:-

“95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

10. Relying on the case of ANTHONY A NGOTHO T/A NGOTHO VIEGAS ASSOCIATES VS H. KAHOYA – Nrb H.C.C.C No. 5319 of 1989, Mr Mulu urged the court to allow the applicant's application. In that case, the court was given a long history of events that culminated in the delay and which clearly showed that the applicant therein actively pursued the issue of substitution.

11. In the present case, however, I am not persuaded that the applicant deserves the exercise of this court's discretion in her favour. If this application had been filed soon after the Limited grant was issued on 21/09/2004, I would have had no hesitation in finding that the orders sought are merited. Instead, the applicant did nothing thereafter, and she did not file the application until nearly four years later since obtaining the grant. The applicant was not vigilant. She was indolent and both the applicant and her counsel have not been candid about the reasons for the delay.

12. The application is therefore dismissed in its entirety with no order as to costs.

13. It is so ordered.

Dated and delivered at Machakos this 16th day of April 2008.

R.N. SITATI

JUDGE