REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Misc Appli 36 of 2001

EUNICE MUMBI KIAGO ..... APPLICANT/DECEASED

VERSUS

DANIEL MUTUA KIREBETA ..... RESPONDENT

AND

MWANGI KIAGO ..... APPLICANT

R U L I N G

In this application, one **Mwangi Kiago**, hereinafter referred to as the applicant seeks that his court be pleased to revive the instant miscellaneous application and that he be substituted in the application in place of **Eunice Mumbi Kiago – deceased**. The basis for the application is that **Eunice Mumbi Kiago** who had filed the miscellaneous application died on 14th February 2002 and the applicant who is her son survived her. That the application abated one year after the death of the deceased by operation of the law. That the deceased's son, the applicant has obtained a grant of letters of Administration to enable him proceed with this matter where the deceased left. Finally that one **Daniel Mutua Kirebeta,** hereinafter referred to as the respondent will not be prejudiced in any way if the orders sought are granted.

The application was further supported by an affidavit sworn by the applicant who in the main deponed that the author of the miscellaneous application was his mother who passed on sometimes on 14th February 2002 whilst the application was pending hearing in this court. That in the year 2002 he filed and obtained a limited grant of letters of Administration in respect of the estate of the deceased whereupon he filed a similar application as the instant one. However he was forced to withdraw the said application as the limited grant related to another case. Thereafter he applied for yet another limited grant but was rebuffed by the court which insisted that this time around he should apply for a full grant. He did so in March 2006 and thereafter filed the instant application. That the delay in bringing the instant application was occasioned by his pursuit of a full grant to his mother's estate. That the intended appeal which the deceased was seeking to file out of time is merited and that the respondent will not be prejudiced in any way if the orders herein sought are granted.

The application was strenuously opposed by the Respondent. In a 14 paragraph replying affidavit, the Respondents depones that there was no sufficient cause that prevented the applicant from continuing with the application since the death of his mother six years ago, that the indolence of the applicant is clearly demonstrated by the fact that even after getting the full grant, it has taken him 22 months to file this application, that the applicant had all along been represented by counsel, that the Respondent will be prejudiced if the orders sought were granted as the decree arising from the judgment of the court for which the applicant is seeking leave to file an appeal against out of time has already been executed, that litigation must come to an end and this dispute should be brought to a close rather than be perpetuated by granting application. That the decree of the lower court, having emanated from a reference to arbitration under Order 45 of the Civil Procedure Rules, It is not appealable and this application and the intended

appeal are therefore untenable in law.

In his oral submissions in support of the application, **Mr. Mugo**, learned Counsel for the applicant merely reiterated and expounded on the grounds in support of the application as well as what the applicant had deponed to in his supporting affidavit to the application. As for the respondent's contention that the decree arising out of the proceedings in the magistrate's court had been executed, Counsel conceded that much but added that once this application was granted he will move the court for appropriate orders. Finally counsel submitted that an appeal lies against the order of dismissal of the learned magistrate.

Mr. Macharia, learned counsel for the Respondent in response also merely reiterated and expounded on what had been deponed to by the Respondent in his replying affidavit to the application. He only added that the Miscellaneous application was misconceived as there was no appeal filed. There was no record of appeal to file out of time and that the appeal sought to be filed was not against the ruling of the learned magistrate as claimed by the applicant, rather, it was against the subsequent judgment.

I have carefully considered the application, the respective supporting and replying affidavits and submissions of respective counsel. As can be gleaned from the record, the brief history of this matter appear to be that there was a land dispute between the deceased mother of the applicant and the respondent which resulted in Nyeri Senior Principal Magistrate's Court Civil Case Number 179 of 1994 in which the deceased was the plaintiff and the respondent was the defendant. The matters in dispute were referred to Arbitration by the District Officer, Othaya by court. After hearing the parties an award was made and filed in court. It was read to the parties on 5th February 1998. The deceased was unhappy with the award hence gave instructions to her lawyers on record to apply to have the award set aside. The application was filed and upon hearing, it was dismissed on 11th February 1999. Not deterred by the set back, the deceased instructed her lawyers yet again to file an appeal to this court against the order of dismissal. Her lawyers applied for the certified copies of the proceedings and ruling for that purpose. It was not until 7th March 2001 that the said documents were availed to them by which time, time limited for the filing of the appeal had expired. It was then that the deceased filed this miscellaneous application seeking that this court does extend time within which the deceased may file record of appeal. However she passed on before the application was heard and determined. As no substitution of the deceased was undertaken within a year, the miscellaneous application abated automatically by operation of law. The applicant now wants me to intervene in this state of affairs by reviving the suit and also ordering for his substitution in the application in place of her deceased mother.

Order XXIII rule 8(2) of the Civil Procedure Rules grants this court wide latitude to revive a suit which has abated as long as it is proved that the applicant was prevented by any sufficient cause from continuing with the suit. The suit herein was a miscellaneous application. It was filed on behalf of the deceased by **Messrs Kebuka Wachira & Company, Advocates**; incidentally the same firm is still on record for the applicant. It cannot be denied therefore that the applicant has all along had the services of counsel and accordingly it can be assumed that he was aware that the miscellaneous application would automatically abate by operation of law if no steps were taken to substitute the deceased. The deceased herein passed on about 8 years ago. Accordingly the miscellaneous application abated about 7 years ago. The reasons in bringing the instant application are neither convincing or persuasive. To my mind there is no sufficient cause shown that prevented the applicant from continuing with the application following the passing on of his mother 8 years ago. There is no doubt that the applicant was aware that the application would abate exactly one year after his mother passed on yet took no steps to have himself substituted in time bearing in mind that all along he had legal representation. The applicant claims that he "**applied for a limited grant for purposes of this suit but the Honourable Court ruled that I apply for a full grant..**" The applicant does not disclose the reasons for that directive by the court if any. He has not annexed the said court's order. Accordingly it is difficult to say whether indeed there was such a ruling by the court. In the absence of any document showing that a court made such an order I am not prepared to accept the word of the applicant. It may well be that in fact there was no such an order. Further I note that the application for the limited grant was filed in court on 4th June, 2003. From the documents on record the deceased passed on, on 14th February, 2002. So that by the time the applicant was filing the petition for

the limited grant, one year had gone by following the death of the deceased meaning therefore that the application had automatically abated.

The application is not even aided by the subsequent conduct of the applicant upon obtaining a full grant. Having been issued with a full grant on 2nd March 2006, it was not until 31st January 2008 that the applicant saw it fit to lodge the instant application, a period of well over 22 months. To my mind this inordinate delay that has not been sufficiently explained, demonstrates lack of seriousness on the part of the applicant.

That being the case I do not think that the respondent should forever be shackled with the suit. If I was to allow the instant application I will exactly be doing that to the respondent. Litigation as it has been constantly stated must come to an end. It is an important general principle of high public importance. The law aims at providing the best and safest solution compatible with human fallibility and having reached the solution it closes the case. Though sometimes fresh material may be found which might lead to a different decision, it is normally in the interest of peace, certainity and security that once a case has been finalised it should not be re-opened. See generally **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others (2007) e KLR**. The conduct of the applicant in these proceedings can only lead this court to one conclusion that this dispute between the applicant and the Respondent should be brought to a rest. It should not be perpetrated by the granting of the prayers sought in the application.

It is conceded by all the parties herein that the decree arising from the judgment of the learned magistrate and which the applicant is now seeking leave of this court to file a record of appeal against out of time has been executed. There is uncontroverted evidence that the suit premises has been subdivided in terms of the decree and portions thereof with title deeds given to 3rd parties who are not parties to this suit and or intended appeal. The decree having been fully executed, I think that it will be prejudicial to the respondent and the innocent third parties to reopen the proceedings.

Considering all the facts and surrounding circumstances, I do not think that this is a good case for the exercise of this court's wide and unfettered discretion in favour of allowing the application as this will not serve any useful purpose and this court cannot make orders in vain. Yes, the applicant says that once the suit is revived and he is substituted he will move the court as appropriate on the issue of the executed decree, whatever that means. It is not lost on me however that the deceased had made a feeble attempt to stay the execution of the learned magistrate's order but it would appear that the application never saw the light of day.

In the result I have come to the inevitable conclusion that this application lacks merits and is accordingly dismissed with costs to the Respondent.

Dated and delivered at Nyeri this 14th day of April 2008

M. S. A. MAKHANDIA

JUDGE