



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Appeal Case 177 of 2002

PETER W. MIGWI KANGETHE.....APPELLANT/APPLICANT

Versus

JON KARANJA MWANGI.....RESPONDENT (DECEASED)

AND

JOYCE MWIHAKI KARANJA.....RESPONDENT

RULING

The Chamber Summons dated 16th May 2005 is brought by the Appellant in this appeal. The application is brought under *Order XXIII Rule 3 and 10* of the Civil Procedure Rules. The Chamber Summons seeks two prayers.

“(a) That the Respondent Joyce Mwihaki Karanja be substituted in place of the deceased respondent John Karanja Mwangi.

(b) That this appeal be revived.

The Appellant by his affidavit in support, deponed that John Karanja Mwangi died on 6th March 2003. He annexed a copy of the death certificate. Joyce Mwihaki Karanja was appointed as a personal representative for the purpose of prosecuting this appeal on 16th February 2005. The grant so appointing Joyce Mwihaki Karanja was annexed to the affidavit. The deponent further stated that the appeal herein is still pending and that it survived the death of John Karanja Mwangi. For that reason he sought that the order for substitution be allowed. The deponent further stated that since he was not a relative of the deceased he had to enter into correspondence with the personal representative seeking to get a copy of the death certificate. He further stated that the family of the deceased were uncooperative and that none were willing to take out letters of administration. The deponent stated that he had to apply for the limited grant to be issued to the Respondent.

In the replying affidavit Joyce Mwihaki Karanja stated that she is the wife of the late John Karanja Mwangi. She stated that prior to the death of her late husband the Appellant and her late husband were carrying out business on the suit land. She therefore concluded that the Appellant knew of the death of her late husband. She added that he indeed participated with the funeral arrangements. She stated that the Appellant was served by the court with a letter requesting him to seek directions in the appeal in accordance with *Order XLI Rule 8B*. That the Appellant ought to have sought directions as requested by the court since such an application could be done even if her husband had died.

In submissions in opposition to the application counsel for the Respondent analyzed the delay

occasioned by the Appellant's failure to make the present application. Counsel concluded by saying that the Appellant had failed to explain the delay. I confirm that I have considered the Appellant's application, the affidavit in support, the Respondent's Replying Affidavit and submissions made by counsel. *Order XXIII Rule 10* provides that in the case of substitution in an appeal where in that order the word Plaintiff is used, it is to be taken to apply to the Appellant and where the word defendant is used it applies to the Respondent in the appeal. Having that in mind rule 2 provides a procedure whereby either a Plaintiff or defendant dies and the right to sue survives.

In opposing the present application the Respondent is of the view that there has been inordinate unexplained delay in making the present application. However the Appellant stated in his affidavit in support that the family of the deceased failed to cooperate with regard to making an application for Letters of Administration. In that regard the Appellant annexed a letter written on his behalf to the Respondent and other members of the family requesting them to apply for letters. If the court is to consider the delay which needs explanation from the Appellant, it can only be the delay from the date when the letters of administration were issued to the Respondent, that is on the 13th April 2005 and when the present application was made. As it will be noticed the application was filed a month later. In my view that is not inordinate delay for indeed delay for one month is excusable in the circumstances. I therefore reject the submissions made by the Respondent in that regard.

Order XXIII Rule 8(2) gives the court power to revive a suit which has abated. This appeal abated a year after the death of John Karanja Mwangi who died on the 6th March 2003. I am of the view that the explanation given by the Appellant shows sufficient cause why this court should be moved to revive this appeal. I therefore make the following orders:

1. That this appeal be and is hereby revived.
2. That the Respondent Joyce Mwhaki Karanja be and is hereby substituted in place of the deceased Respondent John Karanja Mwangi.
3. That the costs of the Chamber summons dated 16th May 2005 shall abide with the appeal.

Dated and delivered at Nyeri this 6th day of July 2007.

MARY KASANGO

JUDGE