REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Appeal 145 of 2005

WEKESA SININO……...……..APPELLANT

V E R S U S

MARKO KUSIENYA SININO…….....RESPONDENT

R U L I N G

The Application dated 15/12/2006 in respect of this ruling was made on 19th December, 2006 by Belina Waliambila Wekesa, the administratrix of the estate of the late Wekesa Sinino Alfunzi who before he died on 2-6-2005 had filed the appeal herein on 17-11-2003. On 29.11.2006, this court struck out an application for substitution made in the appeal on 26.9.2006 by the applicant after the appeal had abated.

In her application dated 15.12.2006 premised on Order XLIV Rules 1, 2 & 3 and Order XXIII Rule 2 of the Civil Procedure Rules and sections 63 (e) of the Civil Procedure Act, the Applicant seeks the following orders:-

1. That pending the hearing and determination of this application the status quo pertaining the land parcel No. Kakamaeg/Lugari/101 and all sub-divisions derived there from be maintained.

2. That the court be pleased to set aside and/or vary the orders made on 29/11/2006 dismissing the application be reinstated for hearing.

3. That the court be pleased to order the revival of this appeal which abated on 2/6/2006.

4. ***That costs of this application be provided for.***

Clearly the application is premised on the wrong provisions of the law. The correct provision should have been Rules 8 (2) and 12 of Order XXIII of the Civil procedure Rules. The appeal abated a year after the death on 2.6.2005 of the Appellant. That period elapsed on 2.6.2006 or thereabouts. When the application to substitute was made on 29.6.2006, it was made in vacuuo as the appeal was not in being and that is why the application was struck out.

The present application seeks in prayer 2 to set aside or vary the dismissal orders made on 29.11.2006 and in prayer 3 it seeks to revive the appeal. If the orders made on 29.11.2006 are set aside, the effect would be to revive, not the appeal, but the application seeking substitution. Ideally, if the dismissal orders were set aside and the application revived, it would need to be amended to incorporate in it a prayer for revival of the appeal for the simple reason that there cannot be substitution before revival of the appeal.

The present application seeks revival of the dismissed application and of the appeal that has abated. It does not seek substitution after revival of the appeal in prayer (3). Without substitution, there will be no party. The Applicant has to seek setting aside of the orders dismissing the application and revival of the appeal and substitution in that order under Order XXIII Rule 8 (2) of the Civil Procedure Rules.

The Applicant's omission to seek to be made a party through substitution and the invocation of the wrong provisions of the law are fatal flaws. And it is not possible to grant interlocutory orders sought in prayer 1 in a matter where the appeal has not been brought back to life and the applicant has not sought to be

joined as the person now standing in the shoes of the deceased. An application that is struck out as incompetent does not give rise to the doctrine of ***res judicata*** as the matter has not been heard and determined on merit.

For these reasons, in its present form, the application must fail. It is struck out in part because it is premised on the wrong provisions of the law, and in part because the legal representative of the deceased has failed to seek substitution without which it would be pointless to revive the appeal. There will be no order as to costs.

Dated at Kakamega this 11th day of October, 2007.

G. B. M. KARIUKI

J U D G E