



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Civil Appeal 46 of 2003**

**SALOME KANINI MULU:.....APPELLANT/APPLICANT**

**AND**

**MUTULA MUNGUTI:.....RESPONDENT**

**(Being an application for stay of execution pending hearing and determination of appeal)**

**RULING OF THE COURT**

1. The application before me is a Notice of Motion that is not dated but filed in court on 23/04/2007 and seeks the following orders:-

- i. That this application be certified urgent.
- ii. That service of this application be dispensed with in the first instance.
- iii. That there be a temporary stay of execution of the decree herein pending the hearing and determination of this application.
- iv. That this Honourable Court be pleased to stay the execution of the decree herein pending appeal by the appellant/applicant.
- v. That costs of this application be provided for.

2. The application is based on five grounds on the face thereof, namely:-

- a. That the appellant/applicant is aggrieved and dissatisfied with the judgment delivered on the 18<sup>th</sup> November, 2003 and has appealed to the High Court against the said judgment and decree.
- b. That the appellant/applicant's appeal in the High Court has high chances of success.
- c. That the applicant has moved to this Honourable Court expeditiously and timeously. The apparent delay between the date of the decree and this application is excusable for the reason that the applicant filed an application for stay in the lower court which was decided only on 22/01/2007.
- d. That the appellant/applicant may suffer substantial loss unless the stay of execution is granted.

e. That it is in the interests of justice that the stay be granted.

3. The applicant has also sworn an affidavit dated 19/04/2007 in support of the application. She says that judgment against her in Machakos CMCC No.39 of 2001 was entered on 28/05/2003 as per annexure marked "SKMI", though the pleadings do not contain the said annexure; and that being aggrieved by the judgment aforesaid, she instructed her advocates to file, and they did file an application for stay pending appeal in the lower court as per annexure marked "SKM2". She says that the application to the lower court was dismissed on 13/11/2006.

4. She also says that the ruling dated 13/11/2006 is flawed and that the appeal herein is intended to address the triable issues of law that have arisen from that ruling. As to whether or not the application has been brought without undue delay, the applicant says that she brought the application timeously and that any delay in bringing the application has been adequately explained. She also says that she is ready to furnish security in such terms as this court may direct. Finally, the applicant says that unless the order of stay is granted to her, she is likely to suffer irreparable loss.

5. This application was filed under an undated Certificate of Urgency and brought under Order 21 Rule 22(1) and Order 41 Rule 4 of the Civil Procedure Rules (CPR) and all other enabling provisions of the law.

6. Before the hearing of the application as filed, Mrs Nzei for the respondent raised a Preliminary Objection on a point of law and stated that the respondent against whom the appeal is directed died on 2/11/2003 and that the appeal which was filed on 16/06/2003 was thus against a dead respondent since there was no proper evidence that the respondent, Mutua Munguti was properly substituted. Mrs Nzei contended that Order 41 does not clearly state what should happen to an appeal if a party to the appeal dies, and that in this regard the court should be guided by the provisions of Order 23 4(2) of the Civil Procedure Rules regarding the death of a sole defendant.

7. Order 23 Rule 4 of the CPR provides as follows:-

**"4(1) Where one of two defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action 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."**

**(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.**

**(3) Where within one year no application for substitution is made under sub rule (1) the suit shall abate as against the deceased defendant.**

8. It was contended by Mrs Nzei that within the meaning of section 2 of the Civil Procedure Act, the appeal herein which is a "suit" as thereunder defined died or abated on 2/11/2003 with the death of the applicant unless the same is revived in accordance with the law.

9. On this point, the applicant contended by her affidavit that the respondent herein died after the appeal had been filed; that by an application dated 9/11/2005, one Serah Mbinya Munguti applied to the court for substitution of Mutula Munguti who had died on 2/11/2003 as per the Certificate of Death dated 28/11/2003. It is to be noted that by the time the application for substitution was made on 4/01/2006, the respondent had already been dead for two (2) years. Under the provisions of Order 23(3) the appeal against the respondent lapsed on 2/11/2004. The relevant sub-rule is couched in such mandatory language that there is no way of escape. In essence therefore, the purported substitution was null and void since the same was made more than one year after the death of the respondent.

10. The second point raised by Mrs Nzei regards the supporting affidavit in support of the present

applications. She argued that the said affidavit is invalid for citing the wrong parties and also the wrong case number. She urged the court to strike out the affidavit on that score.

11. It was also contended on behalf of the respondent that once the affidavit in support is struck out, then the application is left without any legs to stand on and that the same must fail for contravening the provisions of Order 50 Rule 3 of the Civil Procedure Rules which provides that:-

**“ (3) Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”**

12. On his part Mr. Juma for the applicant submitted that even as at 6/01/2006 when the application for substitution was made, the whole appeal had abated since the respondent had been dead for more than two years. I think in my view that both counsels are correct on this point – that by 6/01/2006 the appeal had abated and the substitution was thus of no consequence.

13. In the result, I find that the Preliminary Objection on points of law has merit. The same is allowed. The affidavit in support of the application is struck out and consequently the applicant’s whole application is struck out.

14. I make no order as to costs because the substitution by the respondent was null and void, as the same was filed long after the period of one year allowed for substitution.

15. Orders accordingly.

Dated and delivered at Machakos this 29<sup>th</sup> day of November, 2007

**R.N. SITATI**

**JUDGE**