

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
CIVIL APPEAL NO.93 OF 1988

FRANCIS MAINA MWANGI.....APPELLANT

VERSUS

DAVID WARUHIU WAINAINA.....RESPONDENT

RULING

This appeal came up for directions but Mr. Munoru of the firm of Kamau Kuria & Kiraitu Advocates raised a Preliminary Objection on the ground that the court has no jurisdiction to entertain the same as it has been filed against a dead party, namely the Respondent in respect of who substitution was ordered on 13th May 1986. Mr. Munoru in his submission informed the court that he is appearing as a friend of the court as his firm has no instruction to appear for the respondent. He submitted that the appeal was filed against the deceased instead of the administrator. The objection was raised on two grounds: (1) The respondent died in 1976 so that the appeal is filed against a wrong party i.e a dead party. Secondly the appeal was not filed against the correct party within 30 days from the date of the ruling. He urged the court to dismiss the appeal summarily.

Mr. Kingara in reply to the Preliminary Objection conceded that the defendant had died before the conclusion of the proceedings in the lower court. But he submitted that after his death, the firm of Kamau Kuria & Kiraitu Advocates applied to the lower court to have the respondent to this appeal substituted in place of the defendant. These orders were granted and the matter proceeded to the end. It is the respondent who was substituted after Kamau Kuria & Kiraitu Advocates had applied for the substitution of the defendant. Perusal of the record shows that the application for substitution is dated 8th September 1986 and the same was granted.

On the issue of lack of instructions, Mr. Kingara submitted that if the firm of Kamau Kuria & Kiraitu Advocates has no instructions, then they should not be heard. They either elect to get out of the matter or take responsibility and proceed with the matter. He further submitted that it was the same firm of Kamau Kuria & Kiraitu Advocates who represented the Respondent in the lower court and by virtue of Order III Rule 12 they are presumed to still be on record. The firm of Kamau Kuria & Kiraitu having acted for the respondent in the lower court and there being no withdrawal notice and having appeared before this court and urged the application, the issue of lack of instruction is neither here nor there.

The appeal was properly filed and has been admitted. The Preliminary Objection is therefore dismissed.

Having perused the record of appeal and having been satisfied that the same is proper and direct that the same be set down for hearing in Nairobi for one day.

It is so ordered.

Dated and delivered at Nairobi this 28th day of February 2006.

J.L.A. OSIEMO

JUDGE