REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Case 145 of 2003

WEKESA SININO……PLAINTIFF

V E R S U S

MARKO KUSIENYA SININO……...……DEFENDANT

R U L I N G

On 17-11-2003, Wekesa Sinino, (now deceased) filed in this court a memorandum of appeal dated 12.11.2003 in which he described himself as "**plaintiff"** and Marko Kusienya Sinino, (the Respondent) as **Defendant**. The said appeal was against the Ruling said to have been delivered on 22/10/2003 by the learned Senior Resident Magistrate, K. Mogambi Esq., in CMC Misc. Civil Application No.106 of 2000 in which the said trial magistrate dismissed an application dated 21/3/03 seeking to restore a dismissed application dated 26-5-2000 which had sought an order for adoption of an award of elders as a judgment of the court. The application dated 26.5.00 was dismissed for want of prosecution and the formal order extracted was issued on 18.12.2002. The effect of the dismissal of the application dated 26.5.00 was that the award of the elders was not endorsed as a judgment of the court. That is why in ground 2 of the said memorandum of appeal the applicant submitted that-

"***the learned trial magistrate grossly erred by failing to hold that in any event an application for adoption under the Land Disputes Tribunals Act No.18 of 1990 could not be dismissed for want of prosecution."***

The application dated 12.7.06 by Belida Waliambila Wekesa, the widow of the deceased, sought to have the deceased's name substituted in the appeal herein with her own name as the administratrix of the estate of the deceased. Mr. Kiveu, learned counsel for the applicant, submitted that the appeal could not proceed before substitution. He contended that the appeal had not abated under Order XXIII. The applicant's affidavit in support of the application showed that the deceased died on 2-6-2005.

Mrs. Lusinde, learned counsel for the Respondent who had filed grounds of opposition contended that the application had no merit. She told the court that the application was improper as the appeal had abated because the application for substitution was made on 26.9.06 after one year of the death of the deceased.

I have duly considered the application and the arguments proffered by both counsel. Rule 3 (2) of Order XXIII of the Civil Procedure Rules stipulates that where within one year no application is made for the legal representation of the deceased plaintiff to be made a party, **the suit shall abate.** Rule 10 of Order XXIII defines "Plaintiff" as including "an appellant" and "suit" as including an appeal. Clearly the application for substitution, made as it was on 26.9.2006, came after the abatement of the appeal. The effect of the abatement was that the appeal ceased to exist. As at the time when the application for substitution was made on 26.9.06, there was no appeal in being. The application was therefore made in vacuo. It was incompetent. For this reason, I hereby strike it out. I award the costs to the Respondent. Perhaps the applicant should have utilized the provisions of Rule 8(2) of Order XXIII to revive the appeal first before seeking substitution.

Delivered, dated and signed at Kakamega this 29th .day of November, 2006

G. B. M. KARIUKI

J U D G E