

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CIVIL APPEAL NO. 38 OF 2001

SALOME BAKARIAPPELLANT

VERSUS

SHARIF ABUBAKAR OMAR.....RESPONDENT

(From Original CM Kisumu Civil Case No. 131 of 1999)

RULING

Before me is an application dated 26th February 2004 brought by the respondent seeking an order for striking out this appeal on the ground that it has abated. The application is indicated to be brought under Section 3A of CPA and Order XX11 rules 4 and 10 of the CPR and is supported by some grounds on the body of the summons and an affidavit of Mr. Odunga the respondent's counsel who is in conduct of this appeal. The appellant opposes the application relying on a replying affidavit of Mr. D. Otieno his counsel.

The first issue which was raised in this application was brought under a wrong provision of Civil Procedure Rules. It is correct that it was indicated the application was brought under Order XX11 rules 4 and 10 but the correct provision should have been Order XX111 rule 3 (2) and 8(2) of CPR. However the error may be a typographical and one does not go to the jurisdiction of this Court and there is no prejudice to the appellant. This ground is therefore not sustainable I note that the consent letter dated 29th September 2003 was not acted upon by this Court and therefore there cannot be any valid substitution for the deceased on record of this case. In any case that consent letter which was filed after 2 years from the death of the appellant did not revive the appeal which at that time had in fact abated. On the the claim that the objection to the jurisdiction of the appellate Court should have been raised before directions were given as provided under Order XLI r 8 (2) of CPR, I note that directions do not appear to have been given by this Court, despite the fact that the matter has come up several times for such orders.

All in all I find that this appeal has abated and as there is no application for its revival I would strike it out with costs to the respondent.

Dated and delivered this 31st May 2004.

B.K. Tanui

JUDGE