REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO.51 OF 1994

ELIZA OLOO ARUM ……..……..……..……. 1ST

APPELLANT

HILL SCHOOL ……..……..……..….. 2ND

APPELLANT

VERSUS

KEZIAH KHAJEA VUDOYI]

PAULINE MBONE (minor suing thro'

Her next friend KEZIA VUDOYI **] …….……**

RESPONDENTS

BEATRICE ALIBISA

RULING

This is an application brought by way of Notice of Motion dated 18th October 2002. I was brought under certificate of urgency. It was brought under Order 44 Rule 1(b) and Order 50 Rule 1 of the Civil Procedure Rules. It seeks for orders that the court should review and set aside the ruling and order given on 5th July 2002 dismissing the appeal for want of prosecution. Secondly, that the appeal be reinstated and set down for hearing. Thirdly, that directions to be given by the court as to the conduct of the appeal as the first appellant is deceased. Fourthly, that costs be in the cause.

The application is based on 8 grounds that are listed on the face of the Notice of Motion and is supported by the affidavit sworn by Wilson K. Kalya advocate. The grounds of the application are that, there is no new and important matter that was not in the knowledge of the court at the time of making the order; that there is an error apparent on the record; that the first appellant was deceased at the time of making the order and an administrator of his estate had not been appointed; that the party who moved the court was not on record; that the respondents' Counsel (in the appeal) had been struck off the Roll of Advocates; that it was impossible to proceed with the appeal in the absence of the Counsel for the respondents and the respondents themselves; that some respondents are also deceased; and that it is fair, just and expedient that this application be allowed.

At the hearing of the application on 24th April 2004, Mr. Shivaji for the applicant submitted that when dismissing the appeal, the court was dealing with a stranger to the suit i.e. Kezia Vutohi. The said Kezia

Vutohi moved the court a number of times, first to constitute a skeleton file and later by an application dated 31st December 2001 seeking for orders that Counsel do pay out money deposited in court. This was in spite of the fact that the firm of advocates on record i.e. Khan and Saisi Advocates, had been representing the plaintiff in the matter. It was not until 21st February 2001 that the applicant in that application i.e. Kezia Vutohi filed a Notice of Intention to act in person. The notice was filed to replace the firm of Ms. Karani and Company Advocates who are not on record. That notice was filed by one person on behalf of the other respondents, when that person had not been recognized as the agent of the other parties as required under Order 3 of the Civil Procedure Rules. The said Kezia Vutohi should have sought leave of the court to come on record under Order 3 Rule 9(a) as judgement had already been entered at that time. Also, the first appellant had passed away on 6th May 1997 and under Order 23 Rule 10 of the Civil Procedure Rules, the issue of abatement of the case against the deceased had not been resolved. The court did not issue directions as to how the matter should proceed. He submitted further that the appellant's advocate did not receive any instructions from Kenya National Assurance Company Limited to proceed with the appeal, as Kenya National Assurance Company Limited was to be under liquidation. In his view, there was an apparent error on the face of the record as the court was dealing with a stranger in the name of Kezia Vutohi and therefore the court should set aside the order dismissing the appeal for want of prosecution.

Mr. Wanyonyi for the respondents opposed the application and submitted that this application was meant to deny the respondents the enjoyment of a valid judgement. He submitted that when the appeal was dismissed Counsel for the appellant/applicant was present while the respondent was not present. At that time, Mr. Kalya informed the court that his firm was no longer acting for Kenya National Assurance Company Limited, therefore this application has no basis. He further submitted that under the provisions through which the application was brought there is need to show an error on the face of the record that the applicant has discovered new evidence or there is other sufficient reason for the review. The so-called stranger, Kezia Vutohi was not a stranger. She was a party in the lower court as well as in the appeal. In any event if there was such an issue, Counsel should have raised it at that time. On the issue of one of the appellants being deceased, it was also not raised at the time of dismissal of the appeal. No information has been given that it was not known at that time that that appellant had died. He also submitted that under Order 23 Rule 2(2) an application to appoint an administrator or representative of a deceased person to come on record has to be made within 12 months, otherwise the suit automatically abates against that party. He further submitted that there was an inordinate delay at the time the appeal was dismissed. The appeal was filed in 1994 and it was dismissed in the year 2002. In his view, this application is only brought in order to stall execution in the lower court. He referred me to the case of **Bachu Vs. Wainaina Nairobi CA. No.140 of 1976 (CA)** where the court also dismissed an application for review and the case of **Ngure Vs. Gachoki Nairobi High Court (1979)** where the court dismissed the application. He also referred me to the case of **Kafuna Vs. Kimbowa Kampala HCC.1366 of 1972**. He submitted that counsel for the appellants at that time of dismissal of the appeal was still on record as he had not applied to withdraw from acting. He also referred me to the case of **Nyamogo & Nyamogo Advocates Vs. Moses Kipkolum Kogo Nairobi CA No.322 of 2000 (CA)** and asked that the application be dismissed with costs.

I have perused documents in the file and I have considered the submissions of both Counsels. This being an application for me to consider setting aside the ruling of the court because of an error on the face of the record, I have to consider some case authorities on the matter. In the case of Bachu Vs. Wainaina, Civil Appeal No.14/1976, Nairobi, the court held that "*The granting of an application for review, the person considering himself aggrieved by the decree or order should strictly prove the allegation of discovery of a new matter or evidence which was not within his knowledge or could not be adduced by him when the decree was passed*." In the case of **Nyamogo & Nyamogo Vs. Moses Kipkolum Kogo, Nairobi Civil Appeal No.322 of 2000 Court of Appea**l, the court held that

"*There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face an d there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.…… A*

mere error or wrong view is certainly no ground for a review although it may be for an appeal." In the case of **Shah Vs. Dharamshi HCCC.No.370/1978 Mombasa**, it was held that an application for review can succeed only if the applicant proves an error or mistake apparent on the face of the record, discovery of new evidence or any other sufficient reason. In this present application, the applicant states that the one who applied for the dismissal of the suit was a stranger. According to the records the said Kezia Vutohi was the next of kin who filed the suit on behalf of the minors. At the time of making the application, judgement had already been entered. Counsel for the applicants stated in their affidavit that the advocate for the plaintiffs had been struck off the Roll of Advocates. The application for Kezia Vutohi to act in person did not follow the requirements of the Civil Procedure Rules. However, I note that the application dated 31st December 2001 was for payment of money from advocates rather than for dismissal of the suit and, from the records, that application was not heard. Kezia Vutohi wrote to the Registrar a letter dated 14th May 2002 requesting that the mandatory provisions of Order 41 Rule 31(2) of the Civil Procedure Rules be applied. Consequent upon that, the Deputy Registrar did write to Messrs. Kalya and Company Advocates vide his letter dated 19th June 2002 informing them that the appeal had been listed for mention on 5th July 2002 for the purpose of dismissal under Order 41 Rule 31 (2). On that day Kezia Vutohi did not appear nor did the advocates for the plaintiffs. Mr. Kalya was present and he is on record as having said that he had not received any instructions from Kenya National Assurance Company Limited and stating that his law firm was no longer acting in the matter. The judge dismissed the appeal in accordance with Order 42 Rule 31(2) and not on the basis of the application of 31st December 2001. Therefore, in my view, the action of the judge is not an error on the face of the record. On the issue of whether Kezia Vutohi was properly on record, I have already ruled that the appeal was dismissed under Order 41 Rule 31 (2) which gives the court power to dismiss an appeal if within one year after service of the Memorandum of Appeal, the appeal has not been set down for hearing, and the Registrar has issued notice to the parties and listed the appeal before a judge in Chambers for dismissal. Therefore, on that score, I also find no error on the face of the record. It was the Deputy Registrar who issued notice to the parties for the dismissal of the appeal.

If the applicant considered that the judge did not take into account the right considerations in dismissing the appeal, then he is at liberty to appeal to a higher court, but I find no justification for reviewing the orders made by the judge on the ground of error on the face of the record, as I am not persuaded by the reasons advanced in support of the said error. As to whether the death of one of the appellants should make me exercise the discretion to set aside the ruling of the judge, I decline to do so. The law is very clear. Under Order 23 Rule 3(2) of the Civil Procedure Rules, if an application has not been made to court within 12months of the death of a party to substitute the personal representative, then the action abates against that party. If there are other existing parties then the suit may subsist against those existing parties. Therefore, Eliza Oloo Arum having died, Hill School will continues to be a party but for Eliza Oloo Arum, as no application has been made to substitute a personal representative for him, the suit relating to him has abated after the lapse of 12 months from the date of death.

In the result I dismiss this application with costs to the respondents.

Dated and Delivered at Eldoret this …… Day of …….. 2004

George Dulu

Judge