



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 158 OF 1999

SHRIJI BUILDERSAPPELLANT

VERSUS

JOSEPH OGADARESPONDENT

JUDGMENT

The appeal is against the ruling of the Resident Magistrate (M.A. Mlangi) delivered on 8th September, 1999 wherein he allowed an application to extend time for the substitution of the deceased plaintiff with his wife.

The case out of which the ruling subject to this appeal arises was going on in the lower court when the deceased died on 7th April 1997.

His wife Leah Atieno Ogada made an application for letters of administration intestate which were issued on 19th March 1998.

In the meantime the case abated on 8th April 1998.

Then the application giving rise to the ruling subject to this appeal was made on 30th July 1998.

The application was for extension of time within which to substitute the deceased with his said wife which was allowed.

The appellant states in this appeal that the learned magistrate made a mistake in allowing the application as he failed to appreciate the mandatory provisions of order XXIII Rule 3(2) of the Civil Procedure Rules and/or that the trial court had no jurisdiction to revive the suit after it had long abated and/or that the learned magistrate did not exercise his discretion judicially.

The Appeal was fixed for hearing on 11.3.003 when only counsel for the appellant appeared and submitted on the appeal.

I allowed this counsel to submit on the appeal *ex parte* because though counsel for the respondent had been properly served with a hearing notice, neither the counsel nor the respondent appeared.

Counsel for the appellant stated that by the time the application for substitution was heard there was

no case in existence and that the order made by the learned magistrate was not practicable.

Order XXIII Rule 3(1) of the Civil Procedure Rules gives the procedure for appointing a legal representative where a sole plaintiff dies.

Rule 3(2) of the same order provides for the abatement of the suit where an application is not made for legal representation of a deceased plaintiff within one year of such death.

Paragraph 5 of the supporting affidavit to the application subject to this appeal states clearly that the suit abated on 8th April 1998 and if this was the position then an application for substitution could not have been made on 30th July 1998 and/or an order made in that behalf on 8.9.99 in a non-existing suit.

The best way out would have been for the respondent to utilize rule 8(2) of the order to revive the suit before applying for the substitution.

The appeal is merited as the order made by the learned magistrate was not practicable. I allow this appeal and set aside the order of the lower court, thus confirming that the suit subject to this appeal had abated.

There will be no order as to costs.

Delivered this 9th day of April, 2003.

D.K.S. AGANYANYA

PRINCIPAL JUDGE