



**Njuguna v Njiriri & another (Civil Appeal 260 of 2006)
[2024] KEHC 3656 (KLR) (Civ) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3656 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 260 OF 2006

CW MEOLI, J

APRIL 11, 2024

BETWEEN

GACHOHI NJUGUNA APPELLANT

AND

MARTHA W. NJIRIRI 1ST RESPONDENT

CHARLES G. NJIRIRI 2ND RESPONDENT

RULING

1. For determination is the motion dated 11.04.2022 seeking inter alia that the court be pleased to substitute the Appellant herein, the late Gachohi Njuguna (the deceased) with Moses Gikanga Gachohi; and be pleased to review, vary and or set aside the order made on 28.07.2017 and order the reinstatement of this appeal for hearing on merit. The motion is expressed to be brought pursuant to Section 1A, 1B, 3A & 95 of the *Civil Procedure Act* (CPA), Order 24 Rule 3(2) and Order 51 Rule 1 of the *Civil Procedure Rules* (CPR).
2. It is premised on the grounds thereon as amplified in the supporting affidavit sworn by Moses Gikanga Gachohi, the Applicant herein. To the effect that the Appellant who was the deponent's father is now deceased and having obtained Letters of Administration the deponent is ready to prosecute the appeal on behalf of the Estate of the Appellant. That the deceased died before he could prosecute this appeal to conclusion and that the appeal survived the deceased. He states that the demise of the Appellant made it impossible for the matter herein to be prosecuted prior to substitution. That the subject matter of the appeal relates to a dispute over parcels of land being LR. No. Githunguri/Githunguri/499 and T.165, where the family of the late deceased resides and that Martha W. Njiriri and Charles G. Njiriri (hereafter the 1st and 2nd Respondent/Respondents) do not stand to be prejudiced if the motion were granted.



3. He goes on to state that the Appellant had instructed Mr. Onesmus Githinji Advocate to act for him in both the lower court suit and this Court, but the said counsel had relocated to the United States of America awhile ago. He further states that on 07.12.2021 a process server dropped pleadings in respect of Misc. No. E1723 of 2021, being proceedings brought against his mother seeking the removal of a caution in respect of LR. No Githunguri/Githunguri/499 (hereafter suit property). That out of abundance of caution he instructed his counsel to ascertain the position in the instant matter whereupon it was discovered that the appeal was dismissed on 28.07.2017, hence the instant motion.
4. He maintains that neither he nor the family of the Appellant were aware of the dismissal until 03.03.2022 when the court registry supplied copies of court proceedings. That attempts to contact erstwhile counsel in the matter, Mr. Onesmus Githinji Advocate have proved futile and in the interest of the family of the deceased occupying the suit property, the appeal ought to be reinstated and heard on merit. In conclusion, he deposes that delay in filing the instant motion was not deliberate.
5. Despite directions being issued on 16.10.2023 to the Respondents to file a response, they failed to do so. Similarly, with the respect to directions on filing of submissions in respect of the motion, only the Applicant complied.
6. In his brief submissions, counsel for the Applicant reiterated the grounds and depositions in the Applicant's affidavit which he asserted warrant the substitution sought and reinstatement of the appeal. He claimed that the Notice to Show Cause (NTSC) why the appeal should not be dismissed resulting in dismissal of the appeal was not served on the Applicant and or the family of the deceased. He asserted that the instant application was filed expeditiously. In summation, the court was urged to consider that the dismissed appeal relates to a land dispute between family members. Hence it is in the interest of justice that the parties be accorded an opportunity to be heard.
7. The Court has considered the material canvassed in respect of the motion as well as the record herein. Alongside the prayer for reinstatement of this appeal, the Applicant has sought substitution of the Appellant. Nevertheless, it would be pertinent to first dispose of the latter before addressing the question of reinstatement. The Appellant was the sole proponent of his case prior to his demise. Order 24 Rule 3 of the CPR which in the absence of a specific equivalent provision in Order 42 CPR can be applied mutatis mutatis to appeals, pursuant to the generic definition of the term 'suit' in section 2 of the CPA, provides that:-

- (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.
- (2) Where within one year no application is made under sub rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

8. The above provisions prescribe the manner by which substitution by a legal representative and or extension of time within which to apply for substitution is to be done in a case where the deceased party was the sole proponent in a cause of action that survives his death. Where no application by the legal



representative of the estate of the deceased party is made within one year of death, the suit automatically abates. However, on application and good cause being shown, the court may extend time for applying.

9. The Court of Appeal in *Said Sweilem Gbeithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others* [2015] eKLR discussed the sequential application of the above provisions as follows; -

“There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the plaintiff or within such time as the court may in its discretion for “good reason” determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The “good reason” therefore relates to application for extension of time to join the plaintiff’s legal representative to the suit. Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action. Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by “sufficient cause” from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff.”

10. The same court in *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR stated that;-

“[I]t is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff’s legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. *Order 24* must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to *rule 3(2)* to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again, it is only after the legal representative has been joined as a party that he can apply for the revival of the action.”

11. In this case, the dismissed appeal arose from the judgment of Hon. E. N. Maina (as she then was) delivered on 29.03.2006 in Nairobi Milimani CMCC No. 7018 of 1992. The Appellant died on 01.10.2002, more than four years before the said lower court decision was delivered. The appeal was inexplicably purportedly filed by the deceased Appellant in 2006. The Applicant was issued with letters of administration on 18.04.2016, some fourteen years after the deceased has passed on. It is questionable whether the appeal filed directly by a deceased party is a valid appeal. Moreover, even if valid, the appeal automatically abated for want of substitution of the deceased within one year of his death. The motion before the court is seeking substitution of the Applicant and reinstatement of the appeal. No prior grant of extension of time to apply for substitution has been demonstrated, or sought.
12. The motion has been filed close to twenty (20) years after the Appellant’s death. Given the abatement of the appeal herein, if indeed such appeal was competent, the Applicant was required to first seek



extension of time before applying for substitution, and reinstatement. This position was recently reiterated by the Court of Appeal in *Gachubi & another ((Suing as the Managers of the Estate of Margaret Wanjiru Gachui)) v Wanjohi & 5 others* (Civil Appeal 335 of 2017) [2022] KECA 473 (KLR).

12. The motion herein is misconceived. It put the cart before the horse, by presenting prayers that could only be made upon time to apply being extended. Without an order extending time to apply, the Applicant had no basis upon which to bring the prayer seeking his joinder. Without being enjoined as a party in the matter, he could not seek reinstatement of the appeal. In addition to these lapses, the court cannot shut its eyes to the glaring fact that the lower court suit itself may well have abated prior to delivery of the lower court judgment. Which fact also raises the question of the validity of an appeal apparently filed on the instructions of a litigant, who had died four years previously!
13. To my mind the motion dated 11.04.2022 is incompetent *ab initio* and it is hereby dismissed. The Respondent not having participated in the canvassing thereof, the court will make no order as to costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 11TH DAY OF APRIL 2024.

C.MEOLI

JUDGE

In the presence of:

For the Advocate /Applicant: Mr. Mogikoyo

For the Respondent: N/A

C/A: Erick

