



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAROK**

**ELC APPEAL NO. 9 OF 2018**

MARTINE OLE KUSAI (alias *MARITINE KUPAI*).....1<sup>ST</sup> APPELLANT

JACKSON LONGISA NGURUMWA.....2<sup>ND</sup> APPELLANT

JULIUS TIPATET KOROS.....3<sup>RD</sup> APPELLANT

**VERSUS**

NGUGI NDIBII WAMUTUA.....RESPONDENT

**RULING**

1. What is before this court for ruling is the Respondent's/Applicant's Notice of Motion application expressed to be brought under **Order 24 Rules 3 (1) (2) and 9 of the Civil Procedure Rules, Sections, 1A,1B,3 and 3A of the Civil Procedure Act** for orders: -

- (a) Spent
- (b) That The purported Appeal by the Appellants/Respondents dated the 3<sup>rd</sup> day of May, 2021 be struck out.
- (c) That The costs of this application be borne by the Appellant/Respondent.

The application is dated 26<sup>th</sup> January, 2021 and was filed in court on 27<sup>th</sup> January, 2021.

2. It is predicated on the grounds on its face and is supported by the affidavit of Ngugi Ndibii Wamutua, the Respondent/Applicant, sworn at Narok on 26<sup>th</sup> January, 2021.

3. The application is opposed by the Appellants/Respondents vide the replying affidavit of Julius Tipatet Koros the 3<sup>rd</sup> Appellant/Respondent, sworn at Narok on 15<sup>th</sup> February, 2021 on his own behalf and on behalf of the 2<sup>nd</sup> Appellant/Respondent.

4. The application was canvassed by way of written submissions. In their submissions, the counsel for the Respondent/Applicant framed three issues for determination namely: -

- (i) That the said appeal dated the 3<sup>rd</sup> May, 2019 has never been formally filed more than 1 (one) year down the line.
- (ii) That the purported appeal has never been formally served as required in law, more than 1 (one) year down the line.
- (iii) That the purported appeal has abated.

5. In answer to the first issue, the counsel submitted that on 7<sup>th</sup> May, 2019 when the court allowed the Appellant's/Respondent's Notice of Motion application dated 3<sup>rd</sup> May, 2019 no time frame for filing a Memorandum of Appeal was indicated thus a fall back on the Civil Procedure Act would therefore mean that the same ought to have been filed within 30 days. The counsel opined that the Memorandum of Appeal ought to have been filed by 7<sup>th</sup> June, 2019 and that to date no such appeal has ever been filed.

6. The counsel termed the Memorandum of Appeal filed at the same time with the application for leave to appeal out of time as "a draft Memorandum of Appeal" since the orders sought in the application filed on 6<sup>th</sup> May, 2019 were granted on 7<sup>th</sup> May, 2019. The counsel

added that in any case, there were no prayers in the application for the draft Memorandum of Appeal to be deemed as properly filed. The counsel pointed out no appeal has ever been filed almost 2 years down the line and hence it is illegal for the Appellants/Respondents to purport that they filed an appeal.

7. On whether there is any appeal (Memorandum of Appeal) that was formally served upon the Respondent/Applicant, the counsel submitted that there was no appeal to be served since what was filed was a draft which is yet to be amended.

8. On whether the appeal has abated, the counsel for the Applicant/Respondent submitted that the appeal (if there was any) the same has abated as against the 1<sup>st</sup> respondent who died more than a year and hence under **Order 24 Rule 3 (1), (2) and 9 of the Civil Procedure Rules**, the appeal against him has abated.

9. On their part, the counsel for the Appellant/Respondent submitted that the Record of Appeal and the Memorandum of Appeal dated 3<sup>rd</sup> May, 2019 and filed in court on 6<sup>th</sup> May, 2019 were served upon the Respondent's/Applicant's counsel on 9<sup>th</sup> May, 2019. The counsel added that the Supplementary Record of Appeal filed on the 6<sup>th</sup> July, 2020 was served upon the counsel for the Respondent/Applicant and in his view, the Record of Appeal, the Memorandum of Appeal as well as the Supplementary Record of Appeal were timeously filed and served thereby addressing satisfactorily the concerns raised by the Respondent/Applicant in his application.

10. It was also the counsel submission that notwithstanding the fact that the 1<sup>st</sup> Appellant/Respondent is deceased, the cause of action survives him in that the surviving Appellants/Respondents can continue with the appeal.

11. The counsel cited **Order 24 Rule 3 (1) of the Civil Procedure Rules** which provides that: -

**“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.”**

12. Having read the application, the supporting and replying affidavit as well as the submissions filed by the counsel on record for the parties herein, I am of the view that the Respondent/Applicant is out to re-open a matter that has already been adjudicated upon by the court vide its ruling dated 10<sup>th</sup> June, 2020. Whereas the court observed in its ruling that there was no Memorandum of Appeal, it nevertheless ordered the Appellants/Respondents to serve the record of appeal within 21 days from the date.

13. In the application before me, there is nothing to show that the Appellants/Respondents did not comply with the said direction and/or orders of the court. In my view therefore for one to state otherwise would be splitting the hair.

14. If the Respondent/Applicant was dissatisfied with the ruling of the court, then he ought to have appealed against it. Be that as it may, the Respondent/Applicant has not satisfied this court that notwithstanding the death of the 1<sup>st</sup> Appellant/Respondent, his co-appellants/Respondents cannot proceed with the appeal.

15. The upshot of the foregoing is that the application lacks merit and same is dismissed. Costs of the application shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 25TH DAY OF NOVEMBER, 2021.**

**MBOGO C.G**

**JUDGE**

**25TH NOVEMBER, 2021**

**IN THE PRESENCE OF: -**

**CA:CHUMA**