



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 90 OF 2000

BEDAN GICHOYA KABARU.....APPELLANT/D'CD

VERSUS

CAROLINE MUTHONI JOSPHAT

PHYLIS WANJIRU MUCHIRA

ESTHER WANGECI KARIUKI.....RESPONDENTS

RULING

1. The application is dated the 1st March, 2019 and is a Notice of Motion brought under the provisions of Order 24 Rule 3(2), of the Civil Procedure Rules and Section 1A, 1B, 3A and 3B of the Civil Procedure Act; the application seeks the following orders;

(i) That this Honorable Court do dismiss the appellant's appeal for having abated;

(ii) The costs of the application be provided for.

2. Reliance is placed on the grounds on the face of the application and on the Supporting Affidavit made on the same date by **CAROLINE MUTHONI JOSPHAT** who deponed that the appellant filed an appeal herein; and he passed on the 20th September, 2015 and since then no substitution has been done and no good reasons have ever been advanced for the failure to substitute

3. The 2nd and 3rd respondents are also deceased and that the applicant was the sole surviving litigant; the suit was no longer tenable and it was in the interests of justice that the application be dis-allowed as the appeal had abated; that litigation should also come to an end;

4. The respondent had not filed any response and/or grounds of opposition and therefore the application that the appeal had already abated be allowed.

ISSUES FOR DETERMINATION

5. After reading the supporting affidavits filed herein and the written submissions this court finds one issue for determination which are;

(i) Whether the appeal has abated;

ANALYSIS

Whether the appeal has abated:

6. The applicants case was that the respondent had died on the 8/05/2016 and that no application was made to substitute the respondent within one (1) year of his death; therefore under the provisions of Order 24 Rule 4(3) of the Civil Procedure Rules the appeal had abated;

7. The court record shows that the dispute commenced in the lower court as a succession cause; the parties consented that it be referred to the District Officer Gichugu for arbitration with the assistance of 2 elders from each side; the arbitrator filed the award which was adopted by the subordinate court on the 27/08/99; thereafter an application to set aside the award was filed by the deceased appellant and the same was disallowed by the Hon.H.N.Njage and this gave rise to the instant appeal in which the deceased appellant faulted the trial court's ruling that there had been a valid adjudication of the matter by the arbitrator; this appeal filed herein on the 30/10/2000 is therefore as against the award rendered in Succession Cause No.16/1989 made in favour of the respondents therein the applicant herein being one of them;

8. In Nakuru HCCA No.91 of 2005 Cecilia Wachuka Muchuku & Anor vs KPLC the court held that abatement of suits also applies to appeals;

9. The relevant provisions of the law on abatement are found at Order 24 Rules 3,4 and 10; Rule 3 deals with the procedure in the event a sole surviving plaintiff dies and the cause of action survives or continues; Rule 4 deals with when a sole surviving defendant passes on and the cause of action survives or continues; Rule 7 deals with the effect of abatement or dismissal; Rule 10 rounds it off by stating that the aforesaid rules do not apply to proceedings in execution of a decree or order;

10. Upon perusal of the court record it is noted that there have been various attempts made by the son of the deceased to have the deceased appellant's name substituted with his name; the first attempt was made on the 26/02/2018 followed by another on the 12/07/2018; the efforts were thwarted as he had not been legally appointed as the legal representative and therefore had no '*locus standi*'; thereafter the son having successfully acquired a Limited Grant as the legal representative proceeded to file an application for substitution which application was filed in court on the 23/02/2018; this court notes that it is still pending for hearing and determination; this court is thus inclined in the interest of justice to grant this legal representative time to have the application fixed for hearing and determination;

FINDINGS AND DETERMINATION

11. In the light of the foregoing this court makes the following findings and determinations;

(i) This court finds that in the interest of justice the respondent be afforded an opportunity to prosecute the application for substitution;

(ii) For this reason the application is hereby disallowed;

(iii) The legal representative is directed to set down the pending application for substitution for hearing within ninety (90) days from the date hereof; in default the appeal shall stand dismissed;

(iv) The matter be brought up within ninety (90) days of the date hereof for directions on compliance and admission or dismissal of the appeal;

(v) Mention on the 21/01/2020; Mention Notice to Issue to the Respondent.

(vi) The costs shall be in the cause.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 3rd day of October, 2019.

HON. A. MSHILA

JUDGE