



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 78 OF 2008

JOSEPH KAMAU NJOROGI APPELLANT

VERSUS

THE HEALTH SERVICES BOARD

PCEA KIKUYU HOSPITAL. RESPONDENT

RULING

1. I have been called upon to determine the Appellant's application dated the 28th day of October, 2015. The same has been brought under Section 3A of the Civil Procedure Act and order 12 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules. The Appellant seeks for the following orders that:
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 - i. The Order of the Honourable Deputy Registrar A. K. Ndung'u made on the 8th June, 2015 dismissing the appeal filed herein on 21st February, 2008 together with all other consequent orders be set aside.
 - ii. The appeal filed herein on 21st February, 2008 be reinstated for hearing.
 - iii. The costs of the application be provided for.

The application is made on the grounds set out on the body of the same and it's supported by the annexed affidavit of **PATRICIA KHISA** sworn on the 28th October, 2015.

2. The Appellant/Applicant case is that the appeal herein was instituted on 21st February, 2008 by a memorandum of appeal dated the 19th February, 2009. On the 8th April, 2011, Hon. Justice Dulu directed the parties to file and serve written submissions and authorities within 30 days thereof and a mention to confirm compliance was fixed on 20th June, 2011.
3. In compliance with the court order the Appellant filed his submissions on 20th June, 2011 and subsequently directions were given on the 23rd September, 2011. The Advocate for the Appellant thereafter made efforts to fix the appeal for hearing but the Appellant died on the 6th December, 2012 while waiting for the matter to be fixed for hearing.
4. The deceased's Appellant's spouse obtained a grant of letters of administration and instructed the advocate on record to file an application for substitution in order to properly prosecute the appeal on behalf of the deceased to its finality which application was filed on the 18th day of March, 2015. In an attempt to fix a hearing date for the said application for substitution, the advocate on record learnt that the appeal was dismissed on the 8th day of June, 2015 and that his firm of advocates was not served with a notice to show cause.
5. That the order of dismissal was made without any fault on the applicant's part and he prays for

- review of the said order and reinstatement of the appeal. That the Appellant is still interested in pursuing the appeal. The Appellant relies on Article 159 (2) of the Constitution which enjoins this court to exercise its judicial authority without undue regard to procedural technicalities and also to Section 1A and 1B of the Civil Procedure Act which enjoins this court to apply the overriding objective for the Appellant believes that the delay in bringing this application is not inordinate as to be inexcusable and that the Respondent will not suffer any prejudice if the application is allowed.
6. In opposing the application, the Respondent has relied on the following grounds: -
 - a. The application is unmerited and not capable of being granted as the orders sought are incapable of being granted to the deceased, applicant.
 - b. There is no suit on record, the same having abated and no application to revive and/or substitute has been made.
 - c. No sufficient reasons have been shown for the delay by the Appellant to prosecute the appeal expeditiously.
 - d. The application is fatally defective, incompetent and bad in law, an abuse of the court process and the same ought to be dismissed ex-debito justitiae.
 - e. It is in the interest of justice that litigation must come to an end.
 - f. Allowing the application will greatly prejudice the Respondent.
 7. Both parties filed their list of authorities and before the application was argued counsel for the Applicant applied to amend prayer 1 of the application to read “**Hon. Justice A K Ndung’u**” instead of “**Deputy Registrar**” which amendment the Honourable court allowed as it was not opposed.
 8. The oral submissions by the learned counsels mirror the contents of the affidavit in support and the grounds of objection. In addition to the submissions by the learned counsel for the Appellants she relied on the following cases; **Ibrahim Athman Said Vs Ibrahim Abdille Abdullah & Another (2014) eKLR**, **Mwangi S. Kimenyi Vs Attorney General & Another [2014] eKLR**, **Kibwana & another Vs Jumbe [1990-1994] 1 EA 223 (CAT)**, and that of **Ngambi Muthira Meme Vs Patrick Musunga & anor [2006] eKLR**.
 9. On his part the Respondent relies on the case of **Ceres Estate Limited Vs Kieran Day & Others** and that of **Fran Investments Limited Vs G4S Security Services Limited**.
 10. I have carefully considered the materials before me and the submissions by the learned counsels together with the list of authorities filed herein. It is contended that the Appellant diligently made efforts to fix the appeal for hearing through his advocate on record but he died before the same was fixed for hearing thus slowing down the prosecution of the appeal.
 11. The Respondent in opposing the application has raised a very fundamental point of law regarding the competence of the application arguing that the appeal has already abated in that no application to substitute the appellant was made. He also argues that the application is an abuse of the court process.
 12. In my view the issues that the court has to determine are: -
 1. Whether the appeal has already abated.
 2. Whether the applicant has shown sufficient cause why the appeal should be reinstated.
 13. I will start with the first issue. It is not disputed that the Appellant (the Late Joseph Kamau) died the 6th December, 2012. The applicant herein who is the wife to the deceased obtained grant of letters of administration on the 25th May, 2014.
 14. Upon obtaining the said grant, she filed the application dated 5th November, 2014 seeking orders that her name be substituted with that of the Appellant. The Appeal was dismissed for want of prosecution while the said application was pending hearing meaning that the applicant’s name had not been substituted with that of the Appellant (deceased) it is against this background that the objection of the Respondent is grounded.
 15. From the record, it is noted that no application for substitution was filed within a period of twelve months as required by the law. The Application for substitution dated 5th November, 2014 and

filed on 18th March, 2015 which was a period of over two (2) years after the death of the Appellant by which time the appeal had abated. The application for substitution does not contain a prayer for revival of the appeal. If there was such a prayer in the said application, the circumstances would have been different but as things stand now, there is no appeal to be reinstated and for that reason, the Applicant's application dated 28th October, 2015 is hereby dismissed with costs.

16. Having made that finding, there would be no need for this court to consider the merits of the application dated 28th October, 2015.

Dated, signed and delivered at Nairobi this 2nd day of June, 2016.

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L NJUGUNA

JUDGE

In the presence

..... ***for the Appellant***

..... ***for the Respondent***