

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 642 OF 2003

JANEN NJERI WACHACHA1ST APPELLANT

PETER KINUTHIA WAGACHA.....2ND APPELLANT

VERSUS

JAMES KARIUKI NG'ANG'A.....RESPONDENT

RULING

1. This ruling is the outcome of the motion dated 13.11.2012 in

which the Respondent is seeking to have this appeal dismissed on the basis that it has abated. The motion is supported by the affidavit of John Muturi Njoroge.. When served the Appellants filed a replying affidavit to oppose the motion. When the motion came up for interpartes hearing learned counsels recorded a consent order to have the motion disposed of by written submissions.

2. I have considered the grounds stated on the face of the motion,

the facts deponed in the affidavits filed for and against the motion plus the rival written submission. The main ground put forward by the Respondent is that the appeal has abated. The Respondent pointed out that on 24.11.2007 James Kariuki Ng'ang'a, the Respondent, passed away and no substitution has been made to this date. John Muturi Njoroge, the Respondent's advocate, annexed the Respondent's death certificate as an exhibit to the affidavit filed in support of the motion, the Respondent had passed on for about 6 years before.

3. In a lengthy replying affidavit, the Appellants expressed

surprise that the Respondent was dead. The 2nd Appellant averred that it is only through this motion, the subject matter of this ruling, that he came to know about the Respondent's demise hence there was no way he could have applied for substitution of the deceased. The Respondent's advocate did not controvert the Appellants' assertion that it is only through the motion that they came to learn about the Respondents' death. The learned advocate avers in the affidavit filed in support of the motion that he has no instructions from the next of kin to file an application for substitution. This averment to me appears to be curious, because the learned advocate does not disclose how he came to the possession of the Respondent's death certificate if it is true that none of the Respondent's next of kin has visited his office. In the circumstances this court can infer that the Respondent's advocate intended to use the provision of Order 24 of the Civil Procedure Rules to have the appeal technically collapse. I am convinced by the Appellants' averments that they only came to know about the Respondent's demise upon receipt of the motion dated 13.11.2012. There is no doubt that as a result of the Respondent's death the appeal has abated. However this court has a wide discretion to order for the revival of the appeal under Order 24 Rule 7 (2) of the Civil Procedure Rules if it is proved that the Appellant was presented by any sufficient cause from prosecuting the appeal. In this case, the Appellants have shown that they were not aware that the Respondent had passed on. About eight (8) years have passed since the Respondent died and there is no evidence availed to court to show that the Respondent's family or relatives have taken up letters of administration to substitute the Respondent. I have already stated that it would appear the Respondent's family have not done so because they want the appeal to abate. The motion is well founded, it is allowed as prayed but without costs.

Granted that the appeal has abated, this court is not without a remedy to see to it that justice is done. In exercise of the discretion alluded hereinabove, I hereby issue an order to have the appeal revived and further extend time to the Appellants for 6 months to take the necessary steps to have the deceased Respondent lawfully substituted.

Dated and delivered in open court this 2nd day of July 2015

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant