



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL NO 99 OF 2009**

**SOPHIA MUSTAFA.....APPELLANT**

**VERSUS**

**ZULFA NGASIA JUMA.....RESPONDENT**

**RAMADHAN MUSTAFA.....APPLICANT**

**RULING**

1. Sofia Mmanule Mustafa, the appellant, died on 29<sup>th</sup> December 2012. She was 74. On 18<sup>th</sup> December 2013, her son, Ramadhan Mustafa, presented a motion to be substituted as the appellant. The motion was never prosecuted. By dint of Order 24 Rule 3 of the Civil Procedure Rules the appeal abated. The applicant, Ramadhan Mustafa, has now presented another notice of motion dated 10<sup>th</sup> March 2014 praying that the appeal be revived; and, that the appellant be substituted with the applicant.

2. The application is supported by an affidavit of the applicant. He deposes that the appeal is against the decree in Eldoret Kadhi's Court Succession Cause 14 of 2006. He says the estate is keen on prosecuting the appeal. He has since obtained a limited grant. He concedes at paragraph 6 that the appeal has abated. He however avers that he had presented a motion for substitution to court on 18<sup>th</sup> December 2013. He avers that the "*the appeal has abated due to a fault not of [his] own making*". Lastly, he contends that the estate will suffer irreparable loss if the motion is not allowed.

3. The respondent opposes the application. There are grounds of opposition dated 22<sup>nd</sup> May 2014. The respondent states the appeal has abated; that an abated appeal cannot be revived by substitution of the deceased appellant; that the motion is incompetent; and, that it is a stratagem contrived to delay justice.

4. On 21<sup>st</sup> July 2015, learned counsel for the applicant and respondent appeared before me and made brief oral submissions. I have considered the rival arguments. I have also paid heed to the records before me, the pleadings, deposition and grounds of opposition.

5. The starting point is whether the applicant has legal standing to bring these proceedings. The answer is in the *affirmative*. I have seen a limited grant issued to the applicant on 17<sup>th</sup> December 2013 under section 67 of the Law of Succession Act. The applicant is thus clothed with legal authority to represent the estate of Sofia Mmanule Mustafa.

6. The second important question is whether the cause of action has *survived* the deceased. The suit before the Kadhi's Court that I referred to earlier related to *distribution* of the estate of Mustafa Amunia Abdalla. The appellant had pleaded in the suit that she was a child or dependant of Mustafa Abdalla. The appellant was aggrieved by the decree distributing the estate. The appellant had lodged an appeal dated

17<sup>th</sup> July 2009. *Prima facie*, the cause of action in the appeal survived the death of the appellant. I cannot comment on the merits of the appeal at this stage.

7. I have then looked at Order 24 Rule 3 of the Civil Procedure Rules 2010 as read with Order 42 relating to appeals to this Court. From the language of Order 24 Rule 3 (2), the appeal would abate where an *application* is not *made* within one year of the death of the plaintiff or appellant. In this case, a suitable application for substitution was made within one year on 18<sup>th</sup> December 2013. It was *never* fixed for hearing. Strictly speaking, the applicant partially complied with the rules. But by failing to seek an order, it was futile. I would then agree with the respondent that as matters stand now, the appeal has abated. The applicant concedes as much.

8. The third question is whether the appeal can be revived. The Court has power, for good reasons, to revive an appeal or extend time for substituting the deceased. See generally, *Leo Sila Mutiso v Rose Mwangi*, Court of Appeal, Nairobi, Civil Application 251 of 1997 (unreported), *Issa Mwabumba v Alice Mutunga & 4 others*, Mombasa, Court of Appeal, Civil Appeal 287 of 2006 [2012] eKLR.

9. I have said that the applicant had presented a motion for substitution within one year. He never prosecuted it. He obtained a limited grant of letters of administration on 17<sup>th</sup> December 2013. On 10<sup>th</sup> March 2014, he lodged the present motion. I *cannot* then say there was *substantial* delay. I find the present motion is properly before the court.

10. This court is now enjoined by article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. That is the overriding objective. *Harit Sheth Advocate v Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR, *Stephen Boro Gittha v Family Finance Bank & 3 others*. Nairobi, Court of Appeal, Civ. Appl. 263 of 2009 (UR 183/09) [2009] eKLR. In a synopsis, the present legal regime frowns upon technical justice.

11. The present motion combines prayers for revival of the appeal; and, for substitution of the deceased. At the root of this matter is a family *succession* dispute. I stated that the primary suit before the Kadhi's Court related to *distribution* of the estate of Mustafa Amunia Abdalla. The appellant was aggrieved by the decree distributing the estate. The appellant lodged an appeal dated 17<sup>th</sup> July 2009. If the appeal is not revived or time is not extended within which to substitute the appellant, the ends of justice will be defeated. True, the respondent is prejudiced. But the prejudice can be remedied in costs. And I am prepared to grant the respondent sufficient thrown away costs.

12. I will accordingly exercise my discretion in fairness to the applicant. But I will place some conditions to ensure the applicant does not go to sleep; and to assuage the respondent. I order that the appeal be and is hereby *revived*. The appellant shall be *substituted* by the applicant. Those two orders are *conditional* upon the applicant paying the respondent thrown away costs of Kshs 10,000 within the next *thirty days*; and, he sets down the appeal for *directions* or *hearing* within the next *ninety days* of today's date. If the applicant fails to meet any of the *two* conditions within the set *time*, the appeal shall stand dismissed.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 13<sup>th</sup> day of October 2015.

**GEORGE KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Miyienda for Mr. Nyachiro for the applicant instructed by Nyachiro Nyagaka & Company Advocates.

Ms. Kipsei for Ms. Asunah for the respondent instructed by Stauss & Asunah Advocates.

Mr. J. Kemboi, Court clerk.