



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL APPEAL NO. 118 OF 2009**

**MUSHA CHENGO KENGA**

**MBOGO CHENGO KENGA**

**(On behalf of CHENGO KENGA MBOGO).....APPELLANTS**

**VERSUS**

**LENOX KAHINDI FAKURO**

**(On behalf of the FAKURO RANDU) .....RESPONDENT**

**RULING**

1. By a Notice of Motion dated 12<sup>th</sup> November, 2018, the Applicants seek for orders:

**1. That this Honourable Court be pleased to substitute the Original Appellant, Chengo Kenga Mbogo (now deceased) with Musha Chengo Kenga and Mbogo Chengo Kenga as the Appellants.**

**2. That this Honourable Court in furtherance to the substitution order in 1 above, be pleased to revive the Appeal, being Appeal No. 118 of 2009 and deem the Amended Record of Appeal dated 9<sup>th</sup> March 2010, and amended on 12<sup>th</sup> May, 2017 as properly on record.**

**3. That costs of this application be provided for.**

2. The Application is premised on the following grounds:

**a. That the original Appellant, Chengo Kenga Mbogo in the present Appeal is dead.**

**b. That the Appellants/Applicants (Musa Chengo Kenga and Mbogo Chengo Kenga) in the present Appeal are the personal representatives of the deceased and granted authority pursuant to Limited Grant of Letters of Administration Ad litem issued on 24<sup>th</sup> March, 2017 hence vested with authority to prosecute and defend the instant Appeal, being ELC Civil Appeal 118 of 2009.**

3. The application is further supported by the affidavit of William C. Kenga Advocate for the Applicants. He deposes *inter alia*, that just when the Appeal was about to be heard, the original appellant passed away, necessitating the initiation of succession proceedings to substitute him with his personal representatives. That pursuant to a Limited Grant of Letters of Administration Ad Litem dated 24<sup>th</sup> March, 2017 the Applicants herein were granted permission to prosecute and defend the appeal herein. That following the issuance of the grant aforesaid, it was imperative to amend the record of Appeal to reflect the personal representative of the original appellant and that such amendments were timely done through the Amended Record of Appeal dated 12<sup>th</sup> May, 2017 and filed on 9<sup>th</sup> June 2017. He avers that pending the issuance of the Letters of Administration Ad Litem to the applicants, the Respondent applied to the court to declare that the Appeal had abated and a decree was issued to that effect on 27<sup>th</sup> May, 2017 with leave to the personal representatives of the deceased to revive the appeal, hence this application. That the delay in hearing of the appeal has been caused by eventualities unforeseen by either parties that is by the death of the original parties to the suit.

4. The application is opposed by the affidavit of Lennox Kahindi Fakuro, the son and legal representative of the Respondent who is also deceased. He avers that the amended record of Appeal dated 12<sup>th</sup> May 2017 is defective and incompetent since the Applicants had no *locus*

*standi* to amend and file the same. That the appeal stands abated and the Applicants waived their right of reviving the appeal by not complying with the court order made on 5<sup>th</sup> November 2018. It is the Respondent's contention that the Application has been made after inordinate delay.

5. The Application was canvassed by way of written submission which were duly filed by the advocates for the parties. I have considered the Application, the affidavits in support and against as well as the rival submissions. The issue for determination is whether the applicants have shown sufficient cause for granting of the orders sought.

6. Order 24 of the Civil Procedure Rules provides as follows:

***“1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.***

***2. Where there are more plaintiffs or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or defendant or defendants.***

***3. (1). 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 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.***

***2. Where within one year no application is made under sub rule (1), the suit shall abate so far as deceased plaintiff is concerned, and on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff.***

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***5. Where a question arises as to whether any person is or is not the legal representative of a deceased Plaintiff, or a deceased defendant, such question shall be determined by the court.***

6. –

***7 (1) Where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action.***

***(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.***

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***9. In the application for this order to appeals, so far as may be, the word “plaintiff” shall be held to include an appellant, the word “defendant” a respondent, and the word “suit” an appeal.***

10.- ”

7. From the foregoing, it is clear that a suit abates by operation of law. That means that no order is required to declare the suit abated. All that one needs to determine whether or not the suit has abated is evidence of death of the plaintiff (or appellant as the case may be) and that the plaintiff (or appellant) was not substituted within the time stipulated in law.

8. In the case of **Titus Kiragu – v- Jackson Mugo Mathai (2015)eKLR** it was held that:

***“It is not the act of the court declaring the suit as having abated that abates the suit but by operation of law.”***

In **Kaboi Mucheru –v- Gakua Mucheru Mbugi (2015) eKLR** it was held:

***“As indicated earlier, this suit abated and the court did declare so. It is indeed clear from the provisions of Order 24 rule 3 (2) of the Civil Procedure Rules that in the case of a deceased plaintiff as is that position in this case, abatement is by operation of the law unless substitution of the plaintiff is made within one year of the plaintiff's death. There is therefore no requirement that a court should make a declaration to that effect.”***

9. In the case of **Said Sweilem Gheithan Saanum –v- Commissioner of Lands (being sued through the Attorney General) & 5 Others (2015)eKLR**, the Court of Appeal explained the provisions of Order 24 of the Civil Procedure as follows:

***“There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within such time as the court may in its discretion for “good reason” determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The “good reason”***

therefore relates to application for extension of time to join the plaintiff's legal representative to the suit.

Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.

Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by "sufficient cause" from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff. "

10. Rule 9 of Order 24 is expressly clear that the Order applies to appeals. In this case, the appeal was filed vide the memorandum of Appeal dated 26<sup>th</sup> June, 2009. It is apparent from the court record that during the pendency of the appeal, both the original Appellant and the original respondent passed on. The original respondent was substituted with his legal representative on 15<sup>th</sup> May, 2013.

11. The record indicates that on 26<sup>th</sup> October 2015, the court was informed that the Appellant passed away in May, 2015. The court then directed the Appellant to secure limited grant within 30 days from 26<sup>th</sup> October 2015 and to secure limited grant and file an application for substitution. However, by 8<sup>th</sup> December 2015, the Appellant had not taken any steps towards substitution. Consequently, the court granted the appellant a further 30 days to commence succession proceedings and obtain a grant and thereafter file an application for substitution within 14 days, in default, the orders of stay of execution which were in place would be vacated, not to mention that the appeal shall abate if one year would by then have lapsed from the time the Appellant died. Again, the Appellant did not comply with the orders of the court and on 23<sup>rd</sup> February, 2016 the stay orders in place were vacated and the appeal treated to have abated. The court further stated that the relatives of the Appellant were at liberty to move the court to revive the appeal when ready and if still interested to prosecute the appeal.

12. The Applicants did not file the application to revive the appeal until 12<sup>th</sup> November, 2018, even though the Limited Grant of Letters of Administration Ad Litem was issued on 24<sup>th</sup> March 2017. In the affidavit in support of the motion, it is deponed that following the issuance of the Limited Grant aforesaid, it was imperative to amend the record of appeal to reflect the personal representatives of the deceased appellant. I do not agree with the Applicants explanation. This is because the Applicants, upon obtaining the grant, ought to have sought for substitution before taking any other step in the matter. The filing of an amended record of Appeal over an appeal which had abated prior to substitution and revived was in my view, an exercise in futility. As was held by the Court of Appeal in the case of **Said Sweilen Gheitan Saanum -v- Commissioner of Lands & 5 Others (supra)**, the effect of an abated suit is that it ceases to exist in the eye of the law. The Applicants could not purport to have been amending what had ceased to exist in the eye of the law. Moreover, the court had made it clear on 23<sup>rd</sup> February, 2016 that the appeal had abated. In my view, no good reason has been given by the Applicants for extension of time to join them to the appeal. Further, the applicants have not satisfied the court that they were prevented by any sufficient cause from continuing with the appeal. The delay in bringing this application, in my view, is inordinate and no reason has been given for such delay. Despite being accorded humble time by the court, the applicants were not keen in making the necessary application and taking appropriate steps for their substitution and the revival of the appeal.

13. The upshot is that the notice of motion dated 12<sup>th</sup> November, 2018 is without merit and the same is dismissed with costs to the Respondent.

**DATED, SIGNED and DELIVERED at MOMBASA this 23<sup>rd</sup> day of September 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Obonyo holding brief for Kenga for Appellants

Ngaira for Respondents

Yumna Court Assistant

**C.K. YANO**

**JUDGE**