



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

APPEAL NO. 98 OF 2013

THOMAS ONGERI GENI 1ST APPELLANT

EVANS BOERA MWABORA 2ND APPELLANT

ALFRED NYAMBEGEA OMBUSURO 3RD APPELLANT

VERSUS

DENISH OTIENO OYUGI 1ST RESPONDENT

THE LAND REGISTRAR, RACHUONYO DISTRICT 2ND RESPONDENT

RULING

1. By a chamber summons application dated 22nd May 2014 expressed to be made under Oder 42 Rule 35 (1) of the Civil Procedure Rules the 1st respondent prays for orders that:-

- 1. This honourable court be pleased to dismiss the appellants' appeal for want of prosecution.**
- 2. That the costs of the application be borne by the appellants.**

The application is premised on the grounds set out on the face of the application and affidavit sworn in support by Bruce O. Odeny Advocate for the 1st respondent on 22nd May 2014. The grounds on which the application is founded are that:-

- (a) The appellants filed an appeal on 26th August 2013;**
- (b) The appellants have since done nothing to prosecute the appeal.**
- (c) The appellants have no interest in prosecuting this appeal.**
- (d) That it is only just and fair that this appeal be dismissed with costs.**

2. The 1st plaintiff/appellant Thomas Onger Geni has sworn a replying affidavit in opposition to the chamber summons dated 21st July 2014. The explanation by the 1st appellant for non prosecution of the appeal is captured in paragraphs 4 and 5 of the affidavit which I set out hereunder:-

- 4. That the application is an abuse of the court process as the applicant/respondent under whose instructions the deponent purports to swear the affidavit died sometime in the month**

of December and was buried on 3rd January 2014 and the application cannot therefore be properly before this court.

5. That I could not proceed with the prosecution of the appeal in the absence of the 1st defendant and without substitution being done by the administrators of the 1st respondent's estate.

3. The 1st appellant further filed another replying affidavit sworn on 9th May 2016 in opposition to the same application apparently without any leave to do so. The appellant/respondent in the **“new replying affidavit”** repeats the above cited paragraphs of the earlier replying affidavit under paragraphs 6 and 7 affirming that the 1st respondent in the appeal died in December 2013 and was buried on 3rd January 2014.

4. The parties filed written submissions to canvass the application. The provision of the law that deals with the dismissal of appeals for want of prosecution is Order 42 Rule 35 which provides as follows:-

(1) Unless within three months after the giving direction under Rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.

Admittedly the provisions of Order 35 (1) and (2) would only be applicable where there is a pending appeal. In the present matter the record shows that the 1st respondent's counsel was served with the record of appeal herein on 12th September 2013. The appellant has stated that the 1st respondent in fact died during the month of December 2013 and was buried on 3rd January 2014. What is the fate of the appeal against the 1st respondent in those circumstances?

5. The 1st respondent having died and there having been no application made to substitute the 1st respondent within 12 months from the date of death the appeal against him has abated by operation of the law and there is presently no appeal capable of being prosecuted. Order 24 Rule 4 provides for the substitution of a dead defendant and/or in case of appeal a dead respondent.

6. Order 24 Rule 4 provides thus:-

(i) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court on an application made on that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(ii) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(iii) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.

Order 24 Rule 9 provides that the order would apply to appeals:-

(9) In the application of 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.

7. In the premises applying the provisions of Order 24 Rule 4 the appeal against the 1st respondent abated one year after the death of the 1st respondent. Hence as at the end of December 2014 the appeal had abated as no application for substitution was made within one year as provided under the law. The 1st respondent's chamber summons application is therefore superfluous as there is no appeal in existence to be dismissed for want of prosecution the same having abated after the expiry of one year for the date of death of the 1st respondent.

8. I accordingly strike out the 1st respondent's application dated 22nd May 2014 for being misconceived and incompetent. I make no order for costs and each party will therefore bear their own costs.

Ruling dated, signed and delivered at Kisii this 1st day of July, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the appellants
..... for the respondents
..... for the Court Assistant

J. M. MUTUNGI

JUDGE