Njoroge & another v Kamau (Deceased) & another (Civil Appeal (Application) E051 of 2019) [2024] KECA 806 (KLR) (12 July 2024) (Ruling)

Neutral citation: [2024] KECA 806 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL (APPLICATION) E051 OF 2019

WK KORIR, JA

JULY 12, 2024

BETWEEN

KIMARU NJOROGE ..... 1ST APPLICANT

JANET NJAMBI NJOROGE ..... 2ND APPLICANT

AND

MARY MUGURE KAMAU (DECEASED) ..... RESPONDENT

AND

MWANGI KAMAU MBURU ..... PROPOSED RESPONDENT

(Being an application for substitution of the deceased respondent with her legal representative in Nakuru Civil Appeal No 51of 2019)

RULING

1. The applicants (Kimaru Njoroge and Janet Njambi Njoroge) who are the appellants in Nakuru Civil Appeal No. 51 of 2019 (the appeal) have moved the Court through the notice of motion dated 18th August 2022 filed under Rule 99(1) and (2) of the *Court of Appeal Rules* and sections 3A and 3B of the *Appellate Jurisdiction Act*, firstly, seeking the revival of the appeal which abated on account of the death of the respondent, Mary Mugure Kamau (the deceased respondent), and secondly, seeking an order substituting the deceased respondent with Mwangi Kamau Mburu (the proposed respondent) who is said to be the administrator of the estate of the deceased respondent.

2. It is the applicants' case that the respondent in the appeal died on 1st March 2020 during the pendency of the appeal and their attempt to identify the legal representative of the deceased's estate led to delay in lodging the present application. They aver that it was not until 11th February 2022 that the applicants learnt of the proposed respondent's relationship to the deceased respondent when the proposed respondent applied for substitution in Nyahururu ELC Appeal No. 40 of 2018. The applicants depose

that the delay in applying for the substitution of the deceased respondent had led to the abatement of their appeal. It is their case that it is just and in the interest of justice that the application be allowed so that the appeal can be determined on merit.

3. The application is opposed through the replying affidavit sworn on 13th March 2023 by Mwangi Kamau Nduru, the proposed respondent. He avers that the application has been brought out of time and no reasonable excuse has been advanced for the delay in applying for substitution. He deposes that he does not have the locus to participate in this appeal as he lacks the letters of administration. He also states that there is no evidence that he is the legal representative of the deceased's estate as alleged by the applicants. Further, that the 2nd applicant has failed to inform the Court that the 1st applicant is deceased and a deceased party cannot apply for substitution. Additionally, he avers that the application is incompetent and bad in law. The proposed respondent therefore prays for the dismissal of the application.

4. The application was disposed of by way of written submissions.

   For the applicants, the firm of E.W. Ndegwa filed submissions dated 8th March 2023. Therein, counsel reiterated the grounds in support of the application and argued that the application to restore the abated appeal has merit. Counsel submitted that the reasons advanced by the applicants are sufficient to explain the delay in filing this application within the stipulated period.

   According to counsel, the delay was caused by factors beyond the applicants' control. Counsel also submitted that the applicants were actively following up on this matter in a bid to revive the appeal. Counsel relied on the case of Elizabeth Wanjiru Njenga & Another v. Margaret Wanjiru Kinyara & 2 others [2018] eKLR in support of the submission that an abated appeal can be revived with the leave of the Court. Counsel also argued that the prayer for substitution is merited and should be allowed.

5. For the proposed respondent, learned counsel Ms. Elizabeth Mwangi through the submissions dated 23rd March 2023 argued that the affidavit in support of the application is defective as it was not commissioned and should be struck out for having no evidentiary value. Counsel asserted that the 1st applicant died on 20th June 2013 and could not therefore be a party to the abated appeal. Counsel relied on *Constituency Development Board Fund v. Githinji & another [2022]* KECA 153 (KLR) to urge that the 2nd applicant did not have locus standi to bring the present application since she was not a legal representative of the deceased respondent. Additionally, counsel referred to the case of *Rajesh Pranjivan Chudasama v. Sailesh Pranjivan Chudasama [2014]* eKLR to submit that the proposed respondent lacked the authority in the form of letters of administration to stand in the shoes of the deceased respondent. Finally, counsel argued that this application was brought after an inordinate and unexplained delay. Ultimately, counsel prayed for the dismissal of the application.

6. The applicants are indeed correct that an abated appeal can be revived either by the legal representative of the deceased party or an interested person to the appeal. That is the essence of rule 102 (3) of the *Court of Appeal Rules,* 2022 which provides that:

   > "(3) The person claiming to be the legal representative of a deceased party or an interested party to an appeal may apply for an order to revive an appeal which has abated and, if it is proved that the legal representative was prevented by sufficient cause from continuing the appeal, the court shall revive the appeal upon such terms as to costs or otherwise as it deems fit."
   >
   > [Emphasis supplied]

7. Rule 102(3) is an amendment of the repealed rule 99(3) of the *Court of Appeal Rules*, 2010 which stated that:

> "The person claiming to be the legal representative of a deceased party to an appeal may apply for an order to revive an appeal which has abated; and, if it is proved that the legal representative [was] prevented by sufficient cause from continuing the appeal, the court shall revive the appeal upon such terms as to costs or otherwise as it deems fit."

8. The insertion of the words "or an interested party" in the present rules seem to have been aimed at addressing the concerns of the Court in *Elizabeth Wanjiru Njenga & another v. Margaret Wanjiru Kinyara & 2 others [2018]* eKLR that the Court of Appeal Rules, 2010 appeared to limit the right to revive an abated appeal to "the legal representative of a deceased party to an appeal" thereby denying the party on the other side the right to revive an abated appeal against a deceased opponent. In that case the Court while allowing a reference from the decision of a single Judge denying the applicants' application to revive an abated appeal observed that:

> " There appears to be no rational basis why "any interested person" would be at liberty or entitled to apply for substitution of a deceased party to the appeal within 12 months of the death of such party but loose the right to do so upon abatement of the appeal after 12 months following the death of a party. In other words, it is not clear why the right to apply for revival of an appeal and substitution of a deceased party to the appeal is not extended under Rule 99(3), to "any interested person" but is limited to the "person claiming to be the legal representative of a deceased party." Equally, there is no rational basis why "any interested person" would be at liberty to apply for substitution in an application under Rule 51 while the right to do so under Rule 99(3) is limited to the "person claiming to be the legal representative of a deceased party."
>
> Given the mischief that informed the need to amend the rules to cater for revival of abated applications and appeals, namely to avoid the injustices that "innocent litigants or other relevant parties may suffer through no fault of their own", we doubt that the Rules Committee intended that whilst an application to revive an abated application may be made by "any interested person", and application to revive an abated appeal could only be made by the "legal representative of the deceased party." Perhaps the Rules Committee, to whom a copy of this Ruling shall be supplied, will revisit the two provisions and rationalize them."

9. From the cited decision, it is apparent that this application is properly before this Court. However, in the instant application, the proposed respondent contends that the supporting affidavit attached to the application fails to meet the legal threshold of an affidavit and whatever is contained in the supporting affidavit are mere statements. The applicants did not respond to this argument. On my part, I note that this issue has been taken up through submissions. Such a serious issue ought to have been raised through the replying affidavit so as to afford the applicants an opportunity to respond by way of a further affidavit. In the circumstances, this issue does not fall for determination in this application.

10. Another issue raised by the proposed respondent in opposition to the application is that the 1st applicant is deceased and could not lodge an appeal against the deceased respondent. The appeal which is sought to be revived was filed in 2018 and if indeed the 1st applicant died in 2013 as alleged, then his name has erroneously been included in the appeal and such an error can always be rectified. Further, whether or not the 1st applicant is indeed deceased as averred by the proposed respondent cannot in any way affect the 2nd applicant's right to bring the instant application. I thus find no merit in this argument and I reject it.

11. I now turn to the merits of the application. A prayer for revival of an appeal which has abated cannot be allowed as a matter of course or as of right. An applicant seeking an order of revival must demonstrate to the satisfaction of the court that he or she was prevented by sufficient cause from making an application for substitution before the abatement of the appeal. It is the applicants' case that the deceased respondent died on 1st March 2020 and their attempts to identify the legal representative of his estate were not successful until 11th February 2022 when they discovered that the proposed respondent had applied to substitute the deceased respondent in Nyahururu ELC Appeal No. 40 of 2018. The proposed respondent has not rebutted the averment. The application being dated 18th August 2022 and the deceased respondent having died on 1st March 2020, it means the appeal had abated for a period of 1 year and 5 months by the time the instant application was filed.

12. The proposed respondent's averment that he is not an administrator of the estate of the deceased respondent and that there is no evidence that he is the legal representative of the deceased's estate is not tenable in the face of the averments by the parties. I have read the Limited Letters of Grant Ad Litem issued by the High Court in Nyahururu in favour of the proposed respondent. The grant does not limit the proposed respondent's authority to the matters before the first appellate court. I also note that the proposed respondent had used the same grant to pursue the costs awarded by the High Court. The proposed respondent cannot use the grant to execute for costs in the judgment that is the subject of the abated appeal and at the same time claim that he is not the administrator of the estate of the deceased respondent.

13. Having found that the proposed respondent is a proper candidate for substitution in the abated appeal, the question that remains to be answered is whether the delay in bringing this application is inordinate. I note that the 2nd applicant had lodged citation proceedings dated 1st February 2022 against the proposed respondent. It is also observed that the applicants have exhibited a letter by their counsel dated 30th January 2021 addressed to the Registrar of Births and Deaths seeking a duplicate of the deceased respondent's death certificate. That means that the applicants did not go to slumber upon learning of the deceased respondent's demise but instead actively looked for ways of substituting the deceased respondent. In short, they have shown their intent of proceeding with their appeal and their efforts should not be rewarded by a dismissal of their application. I therefore find that the delay is not inordinate.

14. In holding that the delay herein is not inordinate, I observe that the Court in *Issa Masudi Mwabumba v. Alice Kavenya Mutunga & 4 others [2012]* eKLR revived an appeal which had abated for 2 years and 8 months. Similarly, in Elizabeth Wanjiru Njenga & another [*supra*], the Court, sitting on a reference, revived an appeal that had abated for a period of 1 year 7 months. I am also aware that the applicants have invoked the provisions of sections 3A and 3B of the *Appellate Jurisdiction Act* which requires that I be guided by the interests of justice and fairness in order to facilitate a just, expeditious and proportionate resolution of appeals. In the circumstances, and going by the cited authorities, the instant application is for allowing.

15. For the foregoing reasons, the application by the applicants for revival of the abated appeal is allowed. I also allow the prayer for substitution of the deceased respondent by the proposed respondent in the revived appeal. The applicants should file and serve an amended record of appeal within 14 days from the date of the delivery of this ruling. The issue as to whether the 1st applicant is alive or not can also be taken care of through the amended appeal. The costs of the application shall abide the final outcome of the revived appeal.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF JULY, 2024

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR