



REPUBLIC OF KENYA



Richard v Ng'ang'a & another; Republic & another (Respondent) (Civil Appeal (Application) 242 of 2015) [2023] KECA 109 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KECA 109 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 242 OF 2015
HM OKWENGU, F SICHALE & J MOHAMMED, JJA
FEBRUARY 3, 2023**

BETWEEN

OMBUI RICHARD APPLICANT

AND

MBAGE NJUGUNA NG'ANG'A 1ST APPELLANT

GATHURU KARIUKI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

REGISTRAR OF LANDS RESPONDENT

(Being an application under Rule 85(2) of the Court of Appeal Rules, the Appellate Jurisdiction Act, and any other enabling provisions for leave to enjoin the applicant/interested Party. in Civil Appeal No 242 of 2015)

RULING

1. By a notice of motion dated February 6, 2020, the applicant Ombui Richard, seeks orders as follows:
 - “(i) That Ombui Richard be enjoined in the suit as a legal administrator of the estate of Teresa Gesare Kebwaro (deceased) as the interested party.
 - (ii) That costs of this application be in the cause.”
2. The application is anchored on the affidavit of Ombui Richard in which he deposes that he is one of the legal administrators of the estate of Teresa Gesare Kebwaro (deceased) (Teresa), by reason of a grant issued in High Court succession Cause No. 296 of 2013, on January 23, 2014, and that Teresa was the 3rd respondent in this appeal until January 20, 2020 when she was removed by an order of this



court; that the appeal arises from a ruling of the High Court (Odunga, J) which was delivered in an application instituted on November 7, 2006 after the death of Teresa, and that Teresa whose name was struck out of the appeal on January 20, 2020, is the registered owner of the suit property; and that the order striking out Teresa's name had a rider that her legal representatives may apply to be enjoined in the proceedings. The applicant therefore prays that he be enjoined in the appeal

3. Mbage Njuguna Ng'ang'a and Paul Gathuru Kariuki who are the appellants in the appeal, and the 1st and 2nd respondents respectively, to the applicant's motion have opposed the motion through a replying affidavit sworn by the 2nd respondent. On the advice of his advocate, the 2nd respondent depones that the application is incompetent, unsustainable, and a gross abuse of the court process; that Teresa was struck off the appeal on January 20, 2020, in the presence of, and with the consent of Mr. Gikandi, advocate who was holding brief for the advocate for Teresa, who was then the 3rd respondent in the appeal; that Teresa died on October 12, 2005, about a year prior to the institution of the proceedings in the High Court; that the applicant and the estate of Teresa were aware of the proceedings in the High Court but failed and/or neglected to take steps to enable them participate in the proceedings; that following substituted service, Mr. Kiboi advocate attended the High Court and was granted time to apply for letters of administration to bring Teresa's legal representatives on board; that this was not done; and that the applicant is guilty of inordinate delay in applying to be joined in the proceedings 15 years after the death of Teresa.
4. In support of the motion, the applicant has filed written submissions in which he contends that being an administrator of the estate of Teresa, he has an obligation to protect the interest of the estate under the *Law of Succession Act* and other relevant laws, and therefore should be enjoined in the appeal to protect the interest of the beneficiaries.
5. The applicant argued that the power of the Court to join a party to an appeal can be exercised at any stage including at the appellate stage, and that no suit should be defeated by reason of misjoinder or non-joinder of a party. In support of this proposition, he cited *Attorney General v Kenya Bureau of Standards & another* [2018] eKLR.
6. The applicant further urged that the duty of the court is to facilitate the just and expeditious disposal of disputes and that his participation in the appeal will enable the court to come to a just and fair determination owing to the apparent nexus between the appeal and his position; that in any case the joinder will not prejudice any of the parties nor will it convolute the proceedings with unnecessary new matters or grounds not contemplated in the pleadings.
7. The 1st and 2nd respondents also filed written submissions in which they reiterated what had been stated in the 2nd respondent's replying affidavit, that the applicant's motion was incompetent and a gross abuse of the court process, since Teresa was struck off the appeal in the presence of and with the consent of an advocate holding brief for her Counsel.
8. During the hearing of the motion, all the parties were served with a copy of the hearing notice, but only Mr. Kiboi, advocate for the applicant attended court. Mr. Kiboi relied on the applicant's submission that had already been filed and since the respondents had also filed written submissions, we gave a date for the ruling.
9. We have carefully considered the applicant's motion and the contending submissions. It is apparent that Teresa died on 12th October 2005. This is evident from the letters of administration intestate that were issued to the applicant and one Ombui Mang'aa as administrators of the estate of Teresa on January 23, 2014. The suit in the High Court was initiated on November 15, 2006 after leave was granted *ex parte* for the respondents to apply for orders of judicial review. On July 16, 2009, the High



court ordered Teresa to be served through substituted service as the respondents were not able to trace her. It was thereafter that Mr. Kiboi, attended the High Court and informed the court that Teresa was deceased and that the family needed time to have a representative come on record. This did not happen despite the matter coming up in court severally. On December 17, 2012 Mr. Kiboi sent an advocate who applied for more time, informing the court that a succession cause had been filed. That was the position until the Court gave direction for submissions to be filed, and thereafter the High Court delivered its judgment on March 27, 2014.

10. Rule 78 of the *Court of Appeal Rules* 2010, which was in force when this appeal was filed states the following regarding the death of the respondent before service of notice.

“A notice of appeal shall not be competent by reason only that the person on whom it is required to be served was dead at the time when the notice was lodged, but a copy of the notice shall be served as soon as practicable on the legal representative of the deceased.”

11. Rule 85 of the *Court of Appeal Rules* states as follows:

“(i) an appeal shall not be instituted in the name of a person who is dead but may be instituted in the name of his legal representative.

(ii) an appeal shall not be incompetent by reason only that the respondent was dead at the time when it was instituted but the court shall, on the application of any interested person cause the legal representative of the deceased to be made a party in place of the deceased.”

12. Notwithstanding the fact that it was within the knowledge of the 1st and 2nd respondents (appellant) that Teresa was already deceased, at the time the appeal was filed against her as a 3rd respondent, as per Rule 85 of the *Court of Appeal Rules*, the appeal was not incompetent and the Court could on the application of any interested party cause the legal representative of Teresa to be made a party in place of Teresa. It is evident that there was an advocate who purported to appear for Teresa’s family in the High Court. Although the applicant was, according to the letters of administration which he has exhibited, appointed together with another as administrator of the estate on January 23, 2014, no application was made to have them joined in place of Teresa either in the High Court or in this Court. Instead, the advocate consented to have Teresa’s name struck off the appeal. The applicant has not explained why this was done. Nor has any efforts been made to have that order set aside. We have carefully perused the Court record and contrary to the applicant’s contention that there was a rider to the order of January 20, 2020 there was no rider to that order that Teresa’s legal representative could apply to be enjoined in the appeal after her name was struck out.

13. It is evident that the applicant and the family of Teresa were aware of the High Court suit but took no action to be enjoined in the suit. In addition, with the consent of the advocate who was appearing for Teresa on the family’s instructions, the appeal against Teresa was struck out. The applicant has not explained why the position has now changed and why the court should now enjoin him in the appeal in place of Teresa.

14. We agree with the appellants/respondents that the application is an abuse of the court process. It is accordingly dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

