



Wanderi v Kionga (Civil Appeal 156 of 2012) [2023] KECA 346 (KLR) (31 March 2023) (Ruling)

Neutral citation: [2023] KECA 346 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 156 OF 2012
WK KORIR, JA
MARCH 31, 2023**

BETWEEN

SAMUEL WANDERI APPLICANT

AND

JAMES GICHURE KIONGA RESPONDENT

(Being an application for substitution of the respondent in Nakuru Civil Appeal No. 156 of 2012)

RULING

1. Samuel Wanderi, the applicant, lodged a notice of motion under order 1 rule 1, 2, 3 and 4, and order 51 of the *Civil Procedure Rules*, as well as section 3A of the *Civil Procedure Act*. He seeks that James Gichure Kionga (the respondent), who is deceased, be substituted with Jane Njoki Geshure, who has obtained limited grant of letters administration in respect to the deceased's estate for purposes of executing the judgment in this appeal. The applicant also prays to be awarded the costs attendant to his application. The application is premised on the grounds contained in the undated supporting affidavit sworn by the applicant. In the affidavit, the applicant states that the respondent died on July 19, 2019 and that Jane Njoki Geshure who was the deceased's wife had obtained limited grant of letters of administration for the purposes of seeking compliance with the judgment of this court in Nakuru civil appeal No 156 of 2012. He prays that the application for substitution be allowed with costs.
2. In response, Jane Njoki Geshure swore an affidavit on March 25, 2022 through which she confirms the death of her husband on July 19, 2019 and that she had obtained a limited grant of letters of administration for purposes of seeking compliance with the judgment of this court in civil appeal No 156 of 2012. She, however, contends that contrary to the view held by the applicant, it is not compulsory that she files an application for substitution in place of her late husband who was the decree holder. She further states that prior to her husband's death, he was in the process of executing the judgment because the applicant has declined to obey the judgement of this court. She holds the view that matters which have reached the execution stage ought to proceed without substitution of



deceased parties. In her view, the application is a tactic deployed to delay and frustrate the process of execution. She therefore prays for the dismissal of the application with costs.

3. This matter was canvassed by way of written submissions. The applicant's submissions are dated January 20, 2023. Counsel urge that the application is premised on three grounds, namely, that the respondent is deceased, that Jane Njoki Geshure has been granted limited letters of administration, and that the applicant is incapable of prosecuting his application for review by dint of the respondent's death. It is submitted that the application is borne out of the delay on the part of Jane Njoki Geshure in initiating substitution of the deceased respondent. Counsel also states that Jane Njoki Geshure has made two attempts at substitution in the High Court with one of those being dismissed for want of prosecution. The applicant therefore prays that I exercise my discretion and allow his application.
4. Jane Njoki Geshure through an email to the court's registry dated February 6, 2023 indicated that she was not filing any submissions in this matter.
5. The application before this court is bereft of details. however, from the snippets of information on record, I can state by way of history that the applicant is the appellant in civil appeal No 156 of 2012 before this court. It appears he had lost the litigation between him and the deceased respondent at the superior court and sought to overturn that decision through the stated appeal. His appeal was dismissed by this court on December 21, 2018. The applicant discloses that he has since filed an application to review the judgment of the court.
6. Turning to the substance of the instant application, I note that the applicant has cited order 1 rules 1, 2, 3 and 4, and order 51 of the *Civil Procedure Rules*, as well as section 3A of the *Civil Procedure Act* as the anchors of his application. However, an application for substitution of a party in a matter before this court should be brought pursuant to the rules of this court. At the time this application was made in February 2022, the *Court of Appeal Rules, 2010* were still in force. In case of the death of a party to an appeal, rule 99 of the rules provided the procedure as follows:

99. Death of party to appeal

1. An appeal shall not abate on the death of the appellant or the respondent 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.
 2. If no application is made under sub-rule (1) within twelve months from the date of death of the appellant or the respondent, the appeal shall abate.
 3. 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."
7. The law is that upon the death of a party to an appeal, there being no application to substitute the deceased party within twelve months from the date of death, the appeal shall stand abated. The death certificate placed before this court by the applicant shows that the respondent died on July 17, 2019 and any application for substitution ought to have been made within twelve months from that date. The instant application was made on February 2, 2022 which was about thirty months from the date of the death of the respondent. By the time the application was made, the appeal had abated. The appeal could only be revived through an application to the court. The applicant has not made any attempt to revive the abated appeal and there is therefore no appeal to which Jane Njoki Geshure can be enjoined by way of substitution. Having so found, it is not necessary to explore the argument by Jane



Njoki Geshure that it is not mandatory to substitute a deceased party where the matter has reached the execution stage. In the circumstances, the instant application is for dismissal and is hereby dismissed.

8. With regard to the costs of this application, the rule is that costs follow the event unless the court shall for good reason otherwise order. In this case, the applicant has not offered any reason as to why I should depart from the general rule. In the circumstances, Jane Njoki Geshure shall have the costs of the application from the applicant. As such, the application dated February 2, 2022 is dismissed with costs to Jane Njoki Geshure.

DATED AND DELIVERED AT NAKURU THIS 31ST DAY OF MARCH, 2023

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

