



**Constituency Development Board Fund v Githinji & another (Civil Appeal
(Application) 18 of 2018) [2022] KECA 153 (KLR) (18 February 2022) (Ruling)**

Neutral citation: [2022] KECA 153 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 18 OF 2018
HM OKWENGU, JA
FEBRUARY 18, 2022**

BETWEEN

CONSTITUENCY DEVELOPMENT BOARD FUND APPELLANT

AND

SAMUEL NGARI GITHINJI 1ST RESPONDENT

**DAGORETTI SOUTH CONSTITUENCY DEVELOPMENT FUND
COMMITTEE - FORMERLY DAGORETTI CONSTITUENCY DEVELOPMENT
FUND COMMITTEE 2ND RESPONDENT**

*(Application under Rule 99 of the Court of Appeal Rules, 2010 for
substitution of the 2nd Appellant in Civil Appeal No. 103 of 2017)*

RULING

1. By a notice of motion dated 9th April, 2021 brought under sections 3A and 3B of the *Appellate Jurisdiction Act*, and Rules 4 and 99 of the *Court of Appeal Rules, 2010* the applicant seeks in the main, extension of time within which he can bring an application under rule 99(2) of the Court of Appeal Rules to substitute the 1st respondent with his legal representative, and secondly, that the Court be pleased to substitute him with Mary Wanjiku Ngari who is the administrator of the 1st respondent's estate, and the appeal and cross-appeal be deemed to be valid.
2. The application is anchored on the grounds that the 1st respondent Samuel Ngari Githinji (deceased), died on 29th April, 2018 and Mary Wanjiku Ngari has been issued with the grant of Letters Ad litem, and the applicant was not aware of the demise of 1st respondent until the information was disclosed by the 1st respondent's administrator in her replying affidavit in Civil Application No. E052 of 2021.
3. Mary Wanjiku Ngari, has filed a replying affidavit in which she depones that together with her son Martin Ngari, they have been issued with a full grant to administer the estate of the 1st respondent. She made an application to be substituted in the main suit but the appellants have delayed the matter



for a period of over 3 years, and that the main appeal abated due to the death of the 1st respondent and the cross-appeal has no legal basis as the same was filed when the main appeal had abated.

4. The appellant, Constituency Development Fund Board has filed written submissions in which it is apparent that he is supporting the applicant's motion. It is submitted that under Rule 99 (1)&(2) of the Court of Appeal rules, an appeal does not abate on the death of the deceased provided an application is made by any interested person for the legal representative of the deceased party to be substituted in place of the deceased party within 12 months from the date of death of the deceased. The appellant maintains that order 24(3) of the Civil Procedure Rules allows the Court for good reasons on application to extend time within which to seek substitution of the deceased party.
5. The appellant relies on *Leo Sila Mutiso vs. Rose* as quoted in *Elizabeth Wanjiru Njenga & Anor vs Margaret Wanjiru Kinyara & 2 Others* [2018] eKLR, for the proposition that in exercising its discretion to extend time, the Court should take into account the length of the delay, the reason for the delay, the chances of the appeal succeeding, and the degree of prejudice to the respondent if any. He also urges the Court to be guided sections 3A and 3B of the Appellate Jurisdiction Act and Article 159 of the Constitution
6. The applicant also filed written submissions in which it maintains that it was not aware of the demise of the 1st respondent (deceased) until 15th March, 2021 and that its previous advocate who was aware, failed to disclose this information to it. The applicant further relies on the Court's inherent powers under Sections 3A and 3B of Appellate Jurisdiction Act and Article 259 (2)(b) of the Constitution. The applicant explains that there is pending cross-appeal in the appeal that was filed on 16th February, 2021 by the applicant. Citing *Imperial Bank Limited (in Receivership) & another vs Alnasir Popat & 18 Others* [2018] eKLR, the applicant urged the court to exercise its unfettered discretion in its favour. The applicant also submitted on various issues impacting on the merits of the substantive appeal and the cross-appeal, matters in regard to which I have no jurisdiction as a single judge.
7. This application is before me as a single judge. From the heading of the motion, it is evident that it is an application for extension of time to enable the applicant have the 1st respondent in the appeal who has since died, substituted by his legal representative. Rule 99 of the Court of Appeal Rules states as follows:

“99(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 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 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. It is apparent that the 1st respondent died on 29th April, 2018, and therefore the application before me was made about three years after the death of the deceased. Rule 99(2) of the Court Rules took effect after 12 months and the appeal has therefore abated. The issue for consideration now, is whether the appeal can be revived under Rule 99(3) of the Court of Appeal Rules.
9. Rule 99(3) only allows the legal representative of a deceased party to an appeal to apply for an order to revive an appeal which has abated, subject to proof of sufficient reason for the failure to make the



application within time. Unlike Rule 99(1) which allows any interested person to apply to have the legal representative of the deceased to be made a party, it is only the legal representative who can move the Court under Rule 99(3) after the appeal has abated.

10. The applicant's motion will also not qualify under Rule 85(2) of the Court Rules, as that rule only applies to appeals instituted against a respondent who is already dead at the time of institution of the appeal. In addition, Rule 4 of the Court Rules which gives this Court powers to extend time, gives a discretionary power which can only be exercised judicially where an applicant has satisfied the Court that there are sufficient circumstances pertaining to the length of the delay, reasons for the delay, and possible prejudice that justifies the exercise of the Court's power.

11. In this case the delay is about 3 years, which is an inordinately long period. Secondly, the reason for the delay is not plausible. The applicant admits its previous advocate was aware of the death of the deceased, but did not advise them. There is nothing to confirm that this was the position, nor has the applicant explained what it did within the 3 years to pursue the appeal.

The administrator who is sought to be substituted has explained that her efforts in the main suit to be substituted, were frustrated by the applicant's delays in having the matter prosecuted.

12. In the circumstances, the applicant has not satisfied this Court that it is deserving of the exercise of this Court's discretion, nor has he provided a plausible reason for the delay in making its application. Accordingly, the application is dismissed.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

