



Ouya & another (Suing as personal representatives of the Estate of the late Faith Judith Ouya) v Gicimu as personal representative of the estate of the Late Uwe Kerschek & 2 others (Civil Appeal 64 of 2019) [2022] KECA 1273 (KLR) (18 November 2022) (Judgment)

Neutral citation: [2022] KECA 1273 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 64 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
NOVEMBER 18, 2022**

BETWEEN

**DICKENS OUYA 1ST APPELLANT
COLLINS OTIENO OGADA 2ND APPELLANT
SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF THE LATE
FAITH JUDITH OUYA**

AND

**ESTHER GATHONI GICIMU AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF THE LATE UWE KERSCHEK 1ST RESPONDENT
PURITY WANGUI KURIAH 2ND RESPONDENT
REGISTRAR OF TITLES 3RD RESPONDENT**

*(Being an appeal from the ruling of A Omolo, J delivered on March 11, 2019
in Mombasa Environment and Land Court Case 133 of 2014, in which
the ELC dismissed the appellants application dated November 25, 2015)*

JUDGMENT

1. The appellants in this appeal are challenging the ruling of A Omolo, J delivered on March 11, 2019 in Mombasa Environment and Land Court [hereinafter ELC] Case 133 of 2014, in which the ELC dismissed the appellants application dated November 25, 2015. The application sought to have the appellants to be substituted as defendants in the suit in the place of Faith Judith Ouya, the deceased.
2. The background to the appeal is that vide a plaint dated May 28, 2014, the 1st respondent sued Faith Judith Ouya (the deceased) together with the 2nd and 3rd respondents in Mombasa ELC Case No 133 of 2014. She was aggrieved by the deceased's action of taking possession of the land and the title deed to



MN/1/5246 (title CR 26658) under instrument registered as CR 16658/2. This was after the deceased applied for and was granted a special limited grant to the estate of the late Uwe Kerschek, to access the funds in his account; that the deceased posed as the wife of the late Uwe Kerschek and that she had a fake marriage certificate. It was averred that the deceased obtained fraudulent registration of the suit land in her names. The 1st respondent sought several orders including; a declaration that the late Uwe Kerschek is the registered proprietor of the suit land; an order that the subject transfer of the title to the deceased by the 3rd respondent and the subsequent transfer to the 2nd respondent is void; an injunctive relief against the 2nd and 3rd respondents from transferring or dealing with the suit property; cancellation of the transfers to the deceased and the 2nd respondent; damages for trespass; and, an inventory of the assets of the late Uwe Kerschek.

3. The appellants on November 25, 2015 filed an application seeking an order substituting them as defendants in the suit in place of the deceased. It was supported by an affidavit sworn by both appellants, and in that affidavit, they annexed a special limited grant of letters of administration dated November 18, 2015, granted to both of them for purposes of being substituted in the ELC Case No 133 of 2014, and further representation.
4. That application remained on record but was not prosecuted, instead on the September 18, 2018, the appellants filed a notice of motion seeking substitution of the appellants with the deceased (as 1st defendant) in the suit; further, it sought an order that the orders of the ELC issued on the September 18, 2017 be stayed and further, entries in the records of the suit property be stopped forthwith pending the hearing and determination of the application; and that the said orders be interpreted in light of the glaring discrepancies with the orders made by the Deputy Registrar on September 15, 2017 and consequently, the same be set aside/varied/reviewed and or vacated.
5. The grounds for the application are on the face of the motion and rehashed in the supporting affidavit sworn by Dickens Odhiambo Ouya, one of the appellants, of even date, in support thereof. It is averred that on September 14, 2015 the court granted leave to substitute the deceased and that on the November 18, 2015 the appellants were granted letters of administration ad litem, of all the estate of the deceased. The other grounds challenge the order by the Deputy Registrar dated September 15, 2017, withdrawing the suit as against the 2nd and 3rd respondents based on a notice of withdrawal dated September 6, 2017, signed by all the parties except themselves (the appellants) as legal representatives of the deceased. It also challenges the withdrawal of the suit as against the deceased on the basis of a consent the proposed appellants did not sign as representatives of the deceased.
6. The 1st respondent opposed the application by way of grounds of opposition. The grounds raised are fact that the application is incompetent frivolous and bad in law; that the appellants had not annexed the authority appointing them the legal representatives of the deceased; the suit has been withdrawn as against the 2nd and 3rd respondent and the consent of the appellants was not required; that the deceased had no claim in the suit and that the suit as against the deceased abated.
7. The ruling of the learned judge of the ELC was not included in the record of appeal. What is annexed is the order given by the ELC on March 11, 2019 and issued on April 12, 2019. That order makes reference to the appellants' application dated September 18, 2018. It makes two orders; one that the application is unmerited and is dismissed; and two that the suit is abated and the court file closed as there was no longer any suit capable of being prosecuted.
8. The appellant was dissatisfied with the decision and filed a notice of appeal dated February 11, 2019. In the appellants' memorandum of appeal, five grounds of appeal are stated. The appellants fault the learned ELC for failing to adhere to the rules of natural justice by dismissing the appellants' application without giving them an opportunity to be heard; for marking the suit as abated without being moved



by any party; for ignoring the appellants' action of applying to be substituted for the deceased brought within a year of the deceased death; and that the orders extracted out of the consents filed by the respondents went beyond the consents that were recorded in court. The appellants prayed that the appeal be allowed; the orders of the ELC of March 11, 2019 be set aside; and the costs of the appeal be awarded to the appellants.

9. The appeal was heard virtually before us on the July 18, 2022, with learned counsel Mr Nicholus Abidha appearing for the appellants, while learned counsel Mr Omollo held brief for learned counsel Mr Gor for the 1st respondent. There was no appearance for the 2nd and 3rd respondents despite service with the hearing notice effected on the June 17, 2022
10. Mr Abidha relied on his written submissions dated March 5, 2021 and the accompanying list and bundle of authorities of even date. In brief counsel urged that the suit had not abated because the deceased died on July 14, 2015, that the appellants obtained letters of administration *ad litem* on September 18, 2015, and filed the application seeking substitution on the November 25, 2015, which was within one year of the deceased death; that further in the application dated September 18, 2018, the court's attention was drawn to the earlier application of November 25, 2015. Counsel relied on the cases of *Rebecca Mijide Mungole & another vs. Kenya Power and Lighting Co. Ltd & 2 others [2017] eKLR* and *Said Sweilem Gbeithan Saanum v Commissioner of Lands (Being sued through Attorney General) & 5 others (2015) eKLR*, in support of his submissions on substitution.
11. Mr Omollo on his part relied on the written submissions filed by Mr Gor dated April 8, 2021. The submissions give a chronology of what transpired in the case before the ELC and the various applications and consents recorded by the parties. It is Mr Gor's contention that there was no way the 1st defendant's interest in the matter would be affected if the plaintiff chose to have the injunction, she obtained from the court set aside, and to have the entire suit withdrawn. It was urged that as at the time the impugned consent was entered into in 2017, the 1st defendant was deceased and had not been substituted by her personal representatives. In regard to the appeal, Mr Omollo urged that the appellants chose to approach the court 2 years after the death of the deceased to seek substitution. It is urged further that the record of appeal is incomplete as the appellants did not attach the proceedings relating to the application and the impugned ruling, thus rendering the appeal incompetent. It was contended further that the case was withdrawn by the 1st respondent who was the plaintiff in the case, as against all the defendants, who include the deceased; that since the deceased had no counter claim in the suit, there was nothing left of the suit.
12. We have carefully considered this appeal, the submissions by counsel to the parties and the cases and the law relied on. The mandate of this court is set out under rule 31(1) (a) of the *Court of Appeal Rules, 2022*. This court's decision sets down instances when the court can interfere with the decision of the Superior Court in the case of *Selle and another vs Associated Motor Boat Co Ltd [1968] EA 123* which held:

' The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.' *United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs East African Underwriters (Kenya) Ltd [1985] eKLR.*'



13. We think that the issues for determination; one, whether the appeal is incompetent; two, whether the suit against the deceased had abated; and three, whether there is any suit subsisting which is capable of being prosecuted. In regard to the first issue, the 1st respondent argued that the appeal is incompetent for reason the proceedings and the ruling the subject matter of this appeal were not included in the record of appeal filed by the appellants. The appellants counsel Mr Abidha gave an oral response to the challenge on the competence of the application urging that a request was made for the proceedings and that the letter was attached.
14. The *Court of Appeal Rules* applicable at the time this appeal was filed are the 2010 Rules. Rule 87 speaks to contents of an appeal and provides as follows:
87. Contents of record of appeal
- (1) For the purpose of an appeal from a superior court in its original jurisdiction, the record of appeal shall, subject to sub- rule (3), contain copies of the following documents—
- a. an index of all the documents in the record with the numbers of the pages at which they appear;
 - b. a statement showing the address for service of the appellant and the address for service furnished by the respondent and as regards any respondent who has not furnished an address or service as required by rule 79, his last known address and proof of service on him of the notice of appeal;
 - c. the pleadings;
 - d. the trial judge's notes of the hearing;
 - e. the transcript of any shorthand notes taken at the trial;
 - f. the affidavits read and all documents put in evidence at the hearing, or, if such documents are not in the English language, certified translations thereof;
 - g. the judgment or order;
 - h. the certified decree or order;
 - i. the order, if any, giving leave to appeal;
 - j. the notice of appeal; and
 - k. such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant:
- Provided that the copies referred to in paragraphs (d), (e) and
- (f) shall exclude copies of any documents or any parts thereof that are not relevant to the matters in controversy on the appeal.
15. The record of appeal as filed contains the certificate of urgency dated September 18, 2018, notice of motion and the supporting affidavit of even date; grounds of opposition by the 1st respondent dated November 1, 2018 and an order dated April 12, 2019. The decision appealed from is missing from the record, submissions relied on by the parties as well as the relevant certified copies of the proceedings.
16. This court dealing with issue of contents of a record of appeal, albeit in an application for striking out of the record of appeal, in *Tropicana Hotels Limited Vs SBM Bank (Kenya) Limited (formerly known as Fidelity Commercial Bank Ltd [2020] eKLR* stated:



The mandatory requirement in rule 87(1) is only subject to subsection (3) which donates jurisdiction to a judge or registrar of the court appealed from to exercise his/her discretion on application of a party to direct which documents or parts of documents should be excluded from the record of appeal. Our appreciation of the implication of this rule in our view is that in the absence of giving of such directions, inclusion of all the documents enumerated in rule 87 of the court's rules is mandatory. Non-compliance therefore vitiates the record of appeal as filed by the respondent.

17. See also, *Kenya Ports Authority Pension Scheme & 8 others vs Kinyua Muyaa & Co Advocates, Mbsa Civil Appeal No 69 of 2020*. We are aware that the respondent did not file an application to strike out the record of appeal for non-compliance with procedural rules including rule 87. None the less, failure by the appellants to include the decision appealed from and the relevant proceedings puts us in a difficulty in terms of analyzing what was presented before the trial judge in order to make an informed decision. As it stands, the record of appeal is lacking important content.
18. In regard to the second issue of whether the suit against the deceased defendant had abated, the *Civil Procedure Rules* [CPR], under order 24 rule 4 stipulates:
 4. (1) 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 in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
 - (2) ...
 - (3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.'
19. There is no dispute that the suit before the ELC was against three defendants, the deceased being the 1st defendant in the case. Upon her death the suit survived, evident by the actions taken by the plaintiff and the remaining defendants. The issue is whether order 24 rule 4 (3) of the *CPR* was complied with. The appellants posited that they obtained letters of administration ad litem on September 18, 2015, and filed the application seeking substitution on the November 25, 2015, which was within one year of the deceased death. The applicants urge that while prosecuting the application dated September 18, 2018, they drew the court's attention to the earlier application. The appellants relied on the decisions in *Rebecca Mijide Mungole & another vs Kenya Power and Lighting Co Ltd & 2 others*, supra. In the cited case, this court, differently constituted stated:

' Because the suit will only abate where, within one year of the death of the plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff's legal representative.'
20. The appellants also relied on *Said Sweilem Gbeithan Saanum v Commissioner of Lands (Being sued through Attorney General) & 5 others, supra*, where the court held that:

' From the language of order 24 rule 3(2) aforesaid ... the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already



taken place, for convenience an order of the court is necessary for a final and effectual disposal of the suit.'

21. On the basis of the holdings in the two cited cases (above) the appellants urge, one that the application to substitute the deceased defendant was made in time. Secondly, that it was necessary for the fact of the abatement of the suit to be brought to the attention of the court, proved and recorded in an order, and that until that is done, the suit should not be considered abated. That since the fact of abatement was never brought to the attention of the court, they urged us to find and hold that the suit against the appellants had not abated as the ELC held. There is no dispute that the deceased died on the July 14, 2015. The appellants filed an application to substitute the deceased on the November 25, 2015. That application remains unprosecuted, as the appellants filed a different application dated September 18, 2018, which is the subject of this appeal. While the 1st respondent maintained that the appellants approached the court 2 years after the death of the deceased to seek substitution, and that by then the suit had abated; the appellants contend that in their application of September 18, 2018, they drew the attention of the ELC to the application of November 25, 2015, and for that reason they brought the application for substitution within time.
22. Abatement of a suit is not dependent on the court's attention being drawn to that fact, as abatement takes place due to effluxion of time. The need to draw the court's attention to the abatement in the case of a deceased plaintiff is so that an order to that effect is made, on the basis of which the defendant seeks costs of the suit.
23. Order 24 rule 4 of the [CPR](#) provides the procedure in case of death of one of several defendants or of a sole defendant. The first stage is that the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party in the suit. The second stage is that once a legal representative is made a party in the suit, he continues with the suit and can make any defence appropriate to his character as legal representative of the deceased defendant. The third stage is that where within one year no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.
24. The operating words under the third stage is 'where within one year no application is made'. It is not disputed that the appellants filed the application dated November 25, 2015 for the substitution of the deceased defendant. That application was made timeously, before the expiry of one year. That means that by the time the learned ELC judge made the order of September 18, 2018 the appeal had not abated. The effect of that is that the existence of the application dated November 25, 2015 is that it vitiates the order abating the suit.
25. Our finding that the existence of the application dated November 25, 2015 on the record, filed before the abatement of the suit vitiated the order declaring the suit abated answers the third issue for determination. The suit as against the deceased defendant had not abated.
26. The appellants contend that the ELC should not have marked the file closed, first before hearing them, and secondly because no party moved the court to do so. We agree with the appellants.
27. We have come to the conclusion that for the reasons contained in this judgment the appellants' application for substitution as parties in the suit was not heard on the merits. The learned judge of the ELC was wrong to dismiss the application and to declare that the suit as against the deceased defendant as abated and to close the file. Consequently, we allow this appeal. The orders which commend themselves to us are as follows;
 - i. The order of the ELC made of the March 11, 2019 and issued on the April 12, 2019 be and is hereby set aside.



- ii. The application dated September 18, 2018 together with that of November 25, 2015 is sent back to the ELC for re- hearing,
- iii. The applications be heard by any other ELC judge other than A Omollo, J
- iv. The appellants will have the costs of this appeal.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF NOVEMBER, 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

Signed

DEPUTY REGISTRAR

