



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, GATEMBU & M'INOTI, JJA.)

CIVIL APPLICATION NO. 81 OF 2013

BETWEEN

JOSEPH KIRUI..... APPLICANT

AND

SAID K. KEITANY RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Eldoret (P. M. Mwilu, JA) dated 27th January, 2011 and

delivered by (Hon. Azangalala, JA) on 8th February, 2011

in

CONSTITUTIONAL REFERENCE NO. 9 OF 2008)

RULING OF THE COURT

[1] Before us is a notice of motion dated 16th April, 2019 in which the applicant, **Joseph Kirui** seeks to have his appeal against Said K. Keitany (deceased) which abated following the death of the deceased and the failure to have someone substituted in place of the deceased within time, revived and reinstated.

[2] The applicant also seeks to have **Sally Jeptoo Keitany** and **Mohammed Kiptarus Keitany** substituted in place of **Said K. Keitany** (deceased). In addition the applicant seeks leave to file a supplementary memorandum of appeal bringing the proposed respondents on board.

[3] In an affidavit sworn in support of his motion, the applicant has explained that the delay in having the deceased substituted was due to the difficulties experienced in identifying the administrator of the estate of the deceased. The applicant has annexed several letters addressed to the respondents' advocates inquiring about the deceased's estate.

[4] The applicant deposes that the letters were not responded to and that he only came to discover through the High Court Succession Register that the respondents had obtained letters of administration for the estate of the deceased.

[5] The applicant maintains that the administrators concealed the information on the grant of letters of administration with the sole purpose of defeating pending claims against the estate of the deceased. The applicant has also filed written submissions in which he implores the Court to exercise its discretion under **Rule 99(3)** of the **Court Rules** and allow his application.

[6] The proposed respondents object to the application through a replying affidavit sworn by the 1st proposed respondent Sally Jeptoo Keitany, in which she maintains that the applicant is guilty of laches; and that the appeal is an afterthought. In addition, it is contended that the intended appeal is not arguable as the suit property belongs to the deceased and there was no written agreement for the alleged sale.

[7] We have considered the applicants motion and the respondent's reply. It is evident to us that although the applicant's motion has been filed about 6½ years after the death of the deceased, the applicant has demonstrated that he made serious efforts in seeking to identify the persons concerned with the deceased's estate but his efforts were not successful.

[8] In the circumstances, we think that this is an appropriate situation in which the Court should apply **Article 159** of the **Constitution**, revive the appeal and allow the application for substitution in order to give the applicant an opportunity in having his day in Court. This would allow for substantive justice and fairness. This Court proceeded in similar terms in *Elizabeth Wanjiru Njenga & Another -vs- Margaret Wanjiru Kinyara & 2 Others [2018] eKLR*, with which we agree.

[9] Accordingly, we allow the applicant's motion dated 16th April, 2019 and grant orders as prayed in paragraph **(a)**, **(b)** and **(c)**. The supplementary record of appeal shall be filed and served within fourteen days from today. Costs shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR