IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: KOOME, GATEMBU, & SICHALE, JJ.A)

CIVIL APPEAL NO 130 OF 2017

BETWEEN

MARY KIUNGA IKIOME ....APPELLANT

AND

H. YOUNG COMPANY LTD.......................................RESPONDENT

(An appeal from the judgment of the High Court at Meru (Gikonyo, J.) dated 7th November, 2016

in

MERU ELC CASE NO 143 'A' OF 2010

****

JUDGMENT OF THE COURT

M'rithara M'ikiome the then plaintiff filed a plaint dated 22nd October, 2010. His cause of action was based on alleged trespass on his parcels of land by dumping of loose soil on the said plots by ***H Young Company Ltd,*** the then defendant and the respondent herein.

The defendant filed a defence on 6th December, 2010 and with no action to progress the suit, the respondent filed a Notice of Motion application dated 6th November, 2013 and sought to have the plaintiff's suit filed on 22nd October, 2010 dismissed. The application was resisted on the basis that it took ***Mary Kiunga***, the appellant herein, sometime before obtaining letters of administration in respect of the estate of the then plaintiff ***(M'rithara M'ikiome)*** who died on 10th August, 2012.

During the pendency of the motion dated 6th November, 2013; the appellant filed an application dated 13th November, 2013 seeking an order to the effect that she be appointed the legal representative of the plaintiff (having obtained limited grant of letters of administration) and that the suit which had abated by operation of law be revived.

The motion dated the 6th November, 2013 by the respondent and of 13th November, 2013 by the appellant were considered by ***Makau, J***. who in a ruling dated 23rd October, 2014 rendered himself thus:

> "***This court is alive to the fact that as of the time of filing of the defendant's application the plaintiff might have been dead as alluded to by the applicant/respondent Mary Kiunga Ikiome that the plaintiff had died on 10th August, 2012, then if that is so this suit had abated by 10th August, 2013. Under Order 24 Rule 3(2) of the Civil Procedure Rules it provides***
>
> ***'(2) where within one year no application is made under sub rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff;***
>
> ***Provided the court may, for good reason on application, extend the time***.

In view of the above the plaintiff's suit had abated as of 10th August, 2013 and when the defendant filed their application for dismissal of suit, there was no pending suit before this court as the plaintiff's suit had abated by the operation of law.

The applicant/respondent in her application concedes that this suit has already abated and seeks to have the same revived by virtue of Order 24 Rule 7(2) which provides:

'(2) ***the plaintiff or the persons claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit'***

Any person claiming to be a legal representative of a deceased plaintiff may apply for an order to revive a suit which has abated. The burden is upon such an applicant to prove that he was prevented by any sufficient cause from continuing the suit and upon discharging that burden that is when court can revive the suit.

The applicant/respondent in her application averred to have been issued with a limited grant of letters of administration ad ltem to continue with the deceased plaintiff's suit. This court has observed that the succession cause number has not been disclosed and that the alleged grant of letters of administration ad litem has not been annexed as an exhibit in the applicant/ respondent's application."

The appellant was dissatisfied with the said outcome prompting her to file a notice of motion dated 2nd December, 2014 predicated on Article 159 (a) of the Constitution, O.45(1) & 51(1) of the Civil Procedure Rules and S.3 & 3A of the Civil Procedure Act. She sought the following orders:

"**1.*That the order dated 23rd October, 2014 dismissing the applicant's application dated 14th November, 2013*** (*must be 13th November, 2013)* ***be reviewed***.

2.That the applicant be appointed as the legal representative of the deceased M'Rithara M'Ikiome."

The motion of 2nd December, 2014 was supported by the appellant's affidavit which she swore on 2nd February, 2014. She deponed:

1. " That I am the wife of the late M'Rithara Kiome who was the plaintiff in this case and who passed on 10th August 2012.

2. That my advocate on the record Mr. B.G. Kariuki has read over to me and explained to me the ruling dated 23·10. 2014 in which my application dated 14.11.2013 was dismissed.

3. That the said advocate has also explained to me the contents of the ruling of the defendants application dated 6.11.2013 which was also read on 23.10.2014.

4. That I have learnt that the main reasons why my application was dismissed was because the death certificate of my late husband and the limited letters of grant were not annexed to the application although at the time the application was filed the said documents were available to my lawyer.

5. That my advocate informs me and verily believe the same to be true that the failure to annex the two documents was inadvertent and was caused by a clerk who was not familiar with the filing of documents.

6. That I now annex a certified copy of the death certificate of my deceased husband (marked MKI '1') and the limited letters of administration marked MK '2').

7. That I had no control over the filing of the documents and the mistakes of my advocate should not be visited on me.

8. That I make this affidavit in support of an application annexed hereto."

The respondent resisted the motion and filed grounds of opposition dated 9th December, 2014. It contended that:

"1. ***The application is fatally defective. It does not meet the requirements of Order 45 rule 1 in that:***

> ***(i) There is no new or important matter that has been recently discovered. All information and documents were all along in the possession of the applicant.***
>
> ***(ii) The applicant has not alleged or even demonstrated that there is a mistake or error apparent on the face of the record.***
>
> ***(iii) The month long delay between 23rd October, 2014 (when the ruling was delivered) and 2nd December 2014 has not been explained sufficiently or at all.***

(2) The suit abated over 16 months ago in August 2013; and there is still no reason or sufficient reason advanced to explain why the same should be revived.

(3) The Grant of Letters of Administration ad litem attached as an exhibit refers to a totally different case and is therefore inapplicable in this present suit."

On 7th November 2016 ***Gikonyo, J.*** dismissed the appellant's motion, thus provoking the appeal before us. In a Memorandum of Appeal dated 15th September, 2017, the appellant, listed 5 grounds of appeal in which she faulted the learned judge for dismissing the application in spite of the evidence and the law; in finding that the typographical error by the court in indicating her Succession Cause as CMCC 143 of 2010 as opposed to HCC 143'A' of 2010 was a serious misdirection and in holding that in an application for review all the three conditions set out in Order 45 of the Civil Procedure Rules must be satisfied.

On 31st October, 2018 the appeal came before us for plenary hearing when learned counsel ***M/S Wambugu*** appeared for the appellant and ***Mr. Olando*** appeared for the respondent. The appellant relied on her submissions together with her list of authorities filed on 2nd June, 2018 in urging the appeal. She contended that ***Makau, J***. declined to enjoin the appellant as a legal representative based on a typographical error attributed to the court in indicating that the letters of administration were issued in CMCC 143'A' of 2010 as opposed to HCC 143 'A'. Further it was the appellant's contention that Article 159(2)(d) frees the court from technicalities in its dispensation of justice.

In the respondent's written submissions filed on 23rd October, 2008, ***Mr. Olando*** in highlighting them submitted that the appellant filed an application to review the order dated 23rd October, 2014 dismissing the application dated 13th November, 2013; that the deceased died on 10th August, 2012 and the death certificate was issued on 25th March, 2013, whilst the Limited Letters of Administration ad litem were issued on 24th September, 2013 and hence these did not constitute new evidence that was not within the appellant's knowledge when she filed the application dated 13th November, 2013. He supported the findings of the ***Gikonyo, J***. that there had been an unreasonable delay in filing the application for review. Further, the respondent contended that the suit having abated, the orders sought in this appeal are superfluous.

We have considered the record, the rival written and oral submissions, the authorities cited and the law.

The appeal before us is a first appeal. As submitted by the appellant, our mandate as a 1st appellate Court is as spelt out in ***SELLE V. ASSOCIATED MOTOR BOAT CO. [1968] EA 123*** wherein it was stated:

"i) an appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –vs-Ali Mohamed Sholan (1955)22 EACA 270".

The learned Judge considered the review application before him and came to the conclusion that there was no error or mistake apparent on the face of the record. In the ruling of ***Makau, J.*** dated 23rd October, 2014, the learned Judge dismissed the appellant's motion on the basis, *inter alia*, that:

"The court cannot ignore the fact that allegedly issued grant of letters of administration ad litem is not attached. It is doubtful whether such grant exists and would be wrong for the court to start speculating on the issue and issue orders based on speculation. In the absence of the alleged limited grant of letter of administration I find and hold that the applicant has no capacity to prosecute this application. The same is incompetent and is struck out."

The Judge also dismissed the respondent's application dated 6th November, 2013 seeking to dismiss the then plaintiff's suit on the basis that there was no suit to dismiss as the same had abated. The learned Judge stated:

"In view of the fact that this suit abated before the defendant filed its application the same cannot be determined on its merits as it has been overtaken by events, however, as the plaintiff's suit has already abated and the plaintiff/respondent filed the present application which have found to be incompetent and struck it out, the defendant will get costs of this application as against the applicant/respondent."

In essence the ruling of ***Makau, J***. reiterated the fact of non-existence of a suit. These orders were not challenged. In the applications before ***Gikonyo, J.*** the appellant herein (who had not been made a party as the application to be substituted had been rejected by ***Makau, J.)*** sought to have the denial reviewed. She based her arguments that the refusal by ***Makau, J.*** was based on a typographical error in respect of the Succession Cause number. This was not exactly the true position as the learned Judge, as stated above, pointed out that the letters of administration had not been annexed to the application seeking substitution. This was not an error apparent on the face of the record, as it

was not disputed that indeed the letters of administration were not annexed to the application.

However, be that as it may, of fundamental concern is the fact that the plaintiff died on 10th August, 2012, and the suit abated by operation of the law 1 year later, hence by 10th August, 2013 the suit had abated. The appellant filed an application dated 13th November. 2013 for substitution by which time the suit had abated. ***Makau, J.*** held as much and no appeal was filed against this finding. It is therefore correct to state that by the time the matter came before ***Gikonyo, J.*** there was no suit pending as the plaintiff's suit had abated by 10th August, 2013. In our view, the orders sought by the appellant in this appeal are superfluous. The appellant in apparent realization of the futility of the orders sought, placed reliance on Article 159(2)(d), of the Constitution. It is however, our considered view that Article 159 (2)(d), of the Constitution will not avail the appellant. In ***RAILA ODINGA IEBC & OTHERS [2013] eKLR*** stated:-

> "***Article 159(2) (d) of the constitution simply means that a court of law should not pay undue attention to procedural requirements at the ex parte of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural ….as they seek justice from the court***."

The appellant failed to annex the letters of administration in the application before ***Makau, J.*** seeking substitution. She also failed to file an appeal against the ruling of ***Makau, J.*** that declined the revival of the plaintiff's suit that had abated. We are of course not without sympathy to the appellant but she has herself and/or her counsel to blame for the injustice (if any) visited upon her.

We find no merit in this appeal. It is hereby dismissed with costs to the respondent.

Dated and delivered at Meru this 6th day of February, 2019.

M. K. KOOME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

....

JUDGE OF APPEAL

F. SICHALE

....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR