



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)

CIVIL APPLICATION NO. 65 OF 2018 (UR 41 OF 2018)

BETWEEN

JOSEPH WANYAMA MUCHOE

(Appealing for and on behalf of the members of)

YUYA FARMERS CO-OPERATIVE SOCIETY LTD.....APPLICANT

AND

MERCIA MULIRO

(Sued as the personal representative of

MASINDE MULIRO.....RESPONDENT

(Application for substitution of Mukasa Mwambu Muliro in place of Mercia Muliro respondent (Deceased)

in

CIVIL APPEAL NO. 17 OF 2015)

RULING OF THE COURT

[1] On 26th October, 2016, this Court issued an order in Civil Appeal No. 17 of 2015, declaring that the appeal had abated under **Rule 99(2)** of the **Court Rules**. This was because the respondent to the appeal, **Mercia Muliro** (hereinafter referred to as deceased), who had been sued as the personal representative of **Masinde Muliro**, had died in September, 2015 and no application had been made to substitute her within one year of her death.

[2] Subsequently, the applicant **Joseph Muchoe Wanyama**, who was the appellant in the appeal, filed a motion under **Rule 42 & 99(3)** of the **Court Rules**, seeking to have **Mukasa Mwambu Muliro** substituted in place of Mercia Muliro (deceased). The applicant swore an affidavit in which he deposed that his efforts to get instructions from the legal representative of the estate of Masinde Muliro, had not borne fruit. However, he had subsequently discovered that Mukasa Mwambu Muliro, had been granted letters of administration for the estate of Mercia Muliro (deceased), on 6th June, 2018. Attached to the applicant's affidavit, were Gazette Notice No. 4264 of 4th May, 2018, and a copy of grant of letters of administration intestate issued by the Chief Magistrate's Court at Kitale, appointing Mukasa Mwambu Muliro, as the administrator of the estate of Mercia Muliro (deceased).

[3] The respondent opposed the applicant's motion maintaining that although he was appointed as the administrator of the estate of Mercia Muliro (deceased), he did not have the capacity to administer the estate of **Henry Pius Masinde Muliro** (deceased). This was because, the grant was issued to Mercia Muliro (deceased) and in any case, the late Henry Pius Masinde Muliro (deceased), was survived by his five children who were the beneficiaries, and the respondent was not one of them. He therefore urged the Court to dismiss the application.

[4] The effect of an abatement of a suit or appeal, is well captured in **Said Sweilem Gheithan Saanum vs Commissioner of Lands (being sued through Attorney General) & 5 others [2015] eKLR**. Such a suit or appeal, ceases to exist in the eye of the law. However, Rule 99(3) of the Court of Appeal Rules, 2010 states as follows:

“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.” (Emphasis added).

[5] It is clear from Rule 99(3), that the Court has jurisdiction to revive an appeal that has abated only in situations where, first, the person making the application is the legal representative of the deceased party to an appeal, and secondly, the legal representative has a satisfactory explanation for failing to continue with the appeal.

[6] In this instant, the applicant is not a personal representative of Mercia Muliro (deceased). To the contrary, he is seeking to have Mukasa Mwambu Muliro substituted in place of the deceased. Secondly, Mercia Muliro (deceased), who was party to the appeal, was not sued in her personal capacity, but was sued in her capacity as personal representative of the estate of Masinde Muliro (deceased). Her appointment as personal representative of the estate of Masinde Muliro (deceased), is a fiduciary duty that cannot be delegated. Upon the death of Mercia Muliro, the grant given to her in respect of the estate of Masinde Muliro became inoperative paving the way for the appointment by the court of a substitute legal representative.

[7] The appointment of Mukasa Mwambu Muliro, as personal representative of the estate of Mercia Muliro, only gives him authority to administer the estate of Mercia Muliro (deceased). It does not allow him to automatically step into the shoes of Mercia Muliro (deceased) to administer the estate of Masinde Muliro (deceased). The respondent’s contention that he is not a beneficiary of the late Masinde Muliro (deceased), and that there are other beneficiaries who are the prime candidates for appointment as personal representatives has not been controverted. In the circumstances, we find that this application is misconceived. It is accordingly dismissed with costs.

DATED and delivered at Eldoret this 6th day of March, 2019.

E. M. GITHINJI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I hereby certify that this is

a true copy of the original.

DEPUTY REGISTRAR