



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CIVIL APPLICATION NO. 68 OF 2017 (UR 46/2017)

BETWEEN

WILLIAM KIPKOSGEI SEREM.....APPLICANT

AND

TABARNO BUSIENEI *alias*

MARTHA JEPKIMO BUSIENEI.....FIRST RESPONDENT

MOSES THUKU MWANGI.....SECOND RESPONDENT

*(Application for revival of Appeal No. 352 of 2014 which abated by operation
time for failure to substitute the appellant within time stipulated by law)*

RULING OF THE COURT

[1] This is an application under **Rule 99(3)** of the **Court of Appeal Rules** for an order for revival of the abated Civil Appeal No.352 of 2014.

The applicant is the legal representative of Susan Kiprono who died on 17th September, 2015. The application is opposed by the respondents who are represented by Mr. Kiarie of Kiarie & Company Advocates.

[2] By a judgment delivered on 6th October, 2014 in High Court, Kitale Civil Suit No.119 of 2012, the High Court cancelled the land title No. Trans Nzoia/Sinyere/36 registered in the name of Susan Kiprono comprising of 14.2 Hectares and ordered that 11 acres and 10 acres thereof be registered in the names of Tabaino Busienei and Moses Thuku Mwangi, the 1st and 2nd respondents herein, respectively.

The said Susan Kiprono against whom judgment was entered filed an appeal in the Court of Appeal Civil Appeal No.352 of 2014. However the appeal abated under **Rule 99(2)** of the Court of Appeal Rules as no application for substitution was made within twelve months of her death.

However Rule 99(3) of the Court of Appeal Rules authorizes a legal representative of a deceased appellant to apply for revival of the abated appeal and provides further that:

“... if it is proved that the legal representative was prevented by a sufficient cause from continuing the appeal, the Court shall revive the appeal upon such terms as to costs or otherwise as it may deem fit”.

[3] The applicant states in the supporting affidavit that there was delay because the process of applying for letters of administration ordinarily takes a long time. He annexed a Grant of Letters of Administration intestate issued to him in succession cause No. 26 of 2016 on 18th August, 2016 in respect of the estate of Susan Kiprono.

[4] The 2nd respondent Moses Thuku Mwangi deposes in the replying affidavit, amongst other things, that, the application is brought in bad faith, that the applicant caused the grant in succession cause No.26 of 2016 to be confirmed and to be registered as the heir of the land in

dispute Trans Nzoia/Sinyerere/36, that the applicant has obtained title for the whole land including the land awarded by the High Court to the two respondents, that the respondents have filed another suit Land Case No. 24 of 2017 in the Kitale Environment and Land Court to have the registration cancelled and that an interlocutory injunction was granted on 2nd February, 2017, restraining the applicant from taking possession, selling or charging the disputed land. Those facts have not been disputed by the applicant and indeed are supported by documentary evidence.

[5] The proceedings of High Court Civil Suit No. 119 of 2012 show that the defendant in the suit Susan Kiprono gave a power of Attorney to the applicant herein and that it is the applicant who defended and testified on her behalf and conducted the defence. The judgment also shows that the applicant was present when the judgment was delivered. He must be the one who filed the appeal in the name of Susan Kiprono. He was aware of her death but he did not obtain an interim grant to enable him to prosecute the appeal.

Instead he proceeded with the succession cause and caused himself to be registered as the heir of the entire land on 24th October, 2016.

The application for revival of the abated appeal was filed on 18th July, 2017 nearly nine months thereafter. The character of the appeal has changed and the judgment appealed from has been superseded by the decision of the probate and administration court transmitting the land the subject of the appeal to the applicant.

[6] From the foregoing, the applicant has not demonstrated that he was prevented by a sufficient cause from applying to be joined in that appeal as a legal representative of Susan Kiprono. Rather, the evidence shows that the application has been brought in bad faith and is an abuse of the process of the court.

The application has no merit and is hereby dismissed with costs to the respondents.

Dated and delivered at Eldoret this 15th day of February, 2018.

E. M. GITHINJI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.