IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, GATEMBU & M'INOTI, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 30 OF 2005

BETWEEN

ELIZABETH WANJIRU NJENGA.....1ST APPELLANT

DAVID KARANJA NJENGA.....2ND APPELLANT

AND

MARGARET WANJIRU KINYARA.....1ST RESPONDENT

KEZIAH MUTHONI WAINAINA.....2ND RESPONDENT

PETER NJENGA WAINAINA.....3RD RESPONDENT

(An appeal from the Ruling and Order of the High Court at Nairobi (Koome, J) delivered on the 17th day of September, 2004

in

In the Matter of the Estate of Peter Njenga Kinyara (Deceased)

SUCCESSION CAUSE NO. 1610 OF 2000)

****

RULING OF THE COURT

Introduction

1. This is a reference to the full bench from a ruling delivered on 24th February 2012 in which W. Karanja, JA, sitting as a single judge, dismissed the applicants'/appellants' application dated 11th October 2011 seeking revival of their appeal as against the 1st respondent, Margaret Wanjiru Kinyara, deceased. In the same application, the applicants had also sought an order to substitute the name of Margaret Wanjiru Kinyara, deceased, with that of her "*sole surviving son and heir*" John Wainaina Wanjiru. That prayer was also rejected. The application was based on the grounds that the 1st respondent, Margaret Wanjiru Kinyara, died on 21st March 2010; that she was survived by John Wainaina Wanjiru as the sole surviving son; that the said John Wainaina Wanjiru had failed to apply for substitution following the death of his mother, the 1st respondent; and that the applicants/appellants were keen on prosecuting the appeal and that the same ought to be revived.

Background

2. The succession dispute underlying the present proceedings has a long history and relates to a property known as Title Number Dagoretti/ Kangemi/81. Based on the record, that property was originally registered in the name of one Mzee Kinyara Nagi who died in 1972. Mzee Nagi had three wives. The first wife was Margaret Waithera Kinyara. The second wife was Joyce Njoki Kinyara, and the third wife was Wanjuhi Kinyara. Mzee Nagi and the first wife had one child, a son, Peter Njenga Kinyara. They had no children with the second wife. They had two daughters with the third wife, namely Elizabeth Nduta and Margaret Wanjiru Kinyara (the 1st respondent).

3. Upon the death of Mzee Nagi in 1972, it would appear that the property was then registered in the name of his only son, Peter Njenga Kinyara. Peter Njenga Kinyara, to whom the succession proceedings giving rise to this appeal relates, had two wives namely Elizabeth Wanjiru Njenga and Lucy Wanjiku Njenga. Peter Njenga Kinyara died on 10th January 1995 and was survived by his two widows and their children. Lucy Wanjiku Njenga died in 1999 and her only child, John Wainaina Njenga has since died. In effect, Peter Njenga Kinyara is survived by Elizabeth Wanjiru Njenga and eight children.

4. A grant of letters of administration in respect of the estate of Peter Njenga Kinyara was issued by the High Court to his widow Elizabeth Wanjiru Njenga, David Karanja Njenga and John Wainaina Njenga on 26th September 2000 in Nairobi High Court Succession Cause No. 1610 of 2000. On 1st March 2001 Margaret Wanjiru Kinyara filed summons for revocation or annulment of that grant on grounds that it was obtained through concealment of material facts; that it was not disclosed that the deceased, Peter Njenga Kinyara, held the property in trust and that she, Margaret Wanjiru Kinyara, was entitled to share the deceased's assets; that she resided on the property; and that she had undertaken extensive developments on it.

5. On 17th September 2004, the High Court (M. Koome, J, as she then was) ruled on that application and held that the 1st respondent, Margaret Wanjiru Kinyara, now deceased "*has a beneficial interest over the* (sic) *approximately one third of Dagoretti/ Kangemi/81 which was occupied by her late mother*" and that that interest should be noted in the grant of letters of administration relating to the estate of Peter Njenga Kinyara, Deceased, in whose name the property was registered.

6. Aggrieved by that decision, two of the administrators of the estate of Peter Njenga Kinyara, Deceased, namely Elizabeth Wanjiru Njenga and David Karanja Njenga lodged the present appeal in which Margaret Wanjiru Kinyara was named as the 1st respondent.

7. On 21st March 2010, Margaret Wanjiru Kinyara, the 1st respondent died. On 14th October 2011, approximately one year and seven months after her death, the appellants filed the motion dated 11th August 2011 to which we have already referred, seeking, as already stated, orders that "*this Honourable court be pleased to revive the appeal as against the 1st respondent*" and that John Wainaina Wanjiru, the 1st respondent's "*sole surviving son and heir*", be made a party to the appeal to facilitate the conclusion of the appeal.

8. That application, as indicated, was heard and dismissed by W. Karanja, JA, in the ruling delivered on 24th February 2012. It was dismissed on the grounds that under Rule 99(3) of the Rules of the Court, the applicants did not have the locus standi to apply for the revival of an abated appeal; that the only person who could do so is a legal representative of a deceased party and not any other party; that the applicants or any other party could only apply for substitution before the abatement of the appeal. That ruling is the subject of the present reference to the full court.

The reference and submissions by counsel

9. By their notice of motion dated 17th April 2013 and filed in court on 22nd April 2013, the appellants/applicants seek orders "*to review the decision of the single judge dated 24th February 2012*" and "*to extend time for filing this application…*"

10. Urging the application before us, learned counsel for the applicants Mr. G. B. Akello began by pointing out that when dismissing the application, the learned single Judge granted the applicants leave to refer the matter to a full bench of the Court. Counsel referred to the application and the affidavit in support and submitted that the learned single Judge, in rejecting the application, failed to have regard to the overriding objectives under Sections 3A and 3B of the Appellate Jurisdiction Act; that under those provisions the Judge had the latitude to allow the applicants' application notwithstanding that the appeal had abated.

11. Citing decisions of this Court in ***Stephen Boro Gitiha vs Family Finance Building Society & 3 others [2009] eKLR*** and ***Harit Sheth t/a Harit Sheth Advocate vs. Shamas Charania [2010] eKLR***, counsel submitted that the overriding objectives under Sections 3A and 3B of the Appellate Jurisdiction Act overshadow all technicalities. It was pointed out that the succession matter giving rise to the appeal before this Court is proceeding before lower court and that the 1st respondent has already been substituted in those proceedings; and that it is therefore in bad faith that counsel for the 1st respondent did not apply for the substitution before this Court.

12. Opposing the application, learned counsel for the 1st respondent Mr. Amuga began by contending the application is incompetent; that on a reference to the full Court from the decision of a single judge under Rule 55(2) of the Rules of the Court, it is not permissible for the applicants to have filed a fresh application introducing new matters that were not canvassed before the single Judge; and that the application that was rejected by the single Judge is what the Court should consider in this reference.

13. On the substance of the motion, counsel submitted that the single Judge correctly held that it is only the legal representative of the deceased, and not the applicants, who could properly apply for the revival of the appeal. Furthermore, counsel urged, the person who the applicants sought to substitute is a stranger as he is not the legal representative of the deceased; and that the applicants did not offer any explanation why they did not move the court within 12 months of the death of the 1st respondent, that is, before the appeal abated.

14. On his part learned counsel Mr. T. L. Murage for the 2nd and 3rd respondents supported the reference stating that it should not be defeated on account of a technicality.

15. In his reply, Mr. Akello submitted that the Court should have regard to Article 159(2)(d) of the Constitution and dispense substantive justice; that this is not a new application and the motion should be entertained considering that no procedure is prescribed under the Rules for making a reference to the full Court; that it is evident that the advocates for the parties became aware of the death of the 1st respondent after a year had lapsed since her death by which time the appeal had abated.

Analysis and determination

16. We have considered the reference and submissions by counsel. As already indicated above, the reason the single Judge declined to allow the applicants' application was that under Rule 99(3) of the Rules of the Court, the only person who could apply for the revival of the appeal after it abated upon expiry of 12 months from the time of the death of the 1st respondent was her legal representative. In other words, that the applicants did not, under Rule 99(3) of the Rules, have the locus standi to apply for the revival of an abated appeal.

17. The application before the single Judge called for the exercise of judicial discretion by that Judge on behalf of the Court. The circumstances in which the full Court can, in a reference such as this, interfere with the exercise of discretion by a single judge are limited. In ***Hezekiah Michoki vs Elizaphan Onyancha***

Ombongi, Civil Application No. NAI. 4 of 2009[2015]eKLR the Court stated that:

> ***"For this Court to interfere with exercise of discretion by a single Judge sitting on behalf of the full Court and to vary, discharge or reverse that decision, the full Court must bear in mind that the single Judge was exercising a discretion which is unfettered, though exercisable judicially, and it has to be shown by the applicant that the single Judge took into account some irrelevant factor or factors or failed to take into account a relevant factor or factors; that the Judge failed to apply correct principles to the issue at hand, or that, taking into account all the circumstances of the case, his decision was plainly wrong."***

See also ***John Koyi Waluke vs. Moses Masika Wetangula and 2 others; CA (Application) No. 307 of 2009[2010]eKLR.***

18. Accordingly, what we have to consider in this reference is whether the applicants have demonstrated that the learned single Judge failed to consider relevant factors or considered irrelevant factors in reaching her decision or whether her decision is plainly wrong.

19. Rule 99 of the Rules of the Court on the basis of which the applicants' application was rejected is titled "*Death of party to appeal*." It provides:

> ***"(1) An appeal shall not abate on the death of the appellant or the respondent but the Court shall, on the application of any interested person, cause the legal representative of the deceased to be made a party in place of the deceased.***
>
> ***(2) If no application is made under sub-rule***
>
> ***(1) within twelve months from the date of death of the appellant or respondent, the appeal shall abate.***
>
> ***(3) 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]

20. Rule 99 in its present form was introduced in the enactment of the Court of Appeal Rules, 2010 under Legal Notice No. 152 of 2010 by the Rules Committee. Previously, the matter of "death of party to appeal" was dealt with under Rule 96 of the repealed Court of Appeal Rules, 1972 which provided that:

> ***"96(1) An appeal shall not abate on the death of the appellant or the respondent but the court shall, on the application of any interested person cause the legal representative of the deceased to be made a party in place of the deceased.***
>
> ***(2) If no application is made under sub-rule 1 within twelve months from date of death of the appellant or the respondent the appeal shall abate."***

21. Interpreting that rule in ***Vyatu Limited & another v Public Trustee, Nyanza Province [2003] eKLR,*** Githinji JA when dealing with an application seeking an order to revive an appeal that had abated held that the Rules of the Court did not have a provision for the revival of an abated appeal. He stated:

> ***"...there is no provision in the Court of Appeal Rules which authorizes any party to an appeal to make an application for revival of an abated appeal. Similarly, there is no provision in the Court of Appeal Rules which gives this court jurisdiction to order the revival of an abated appeal. In the case of suits, order XXIII rule (2) of the Civil Procedure Rules gives a plaintiff or his legal representative a right to apply for a revival of an abated suit and also power to court to revive an abated suit on terms as to costs as the court may think fit. There is no corresponding right given to an appellant in the Court of Appeal."***

22. Subsequently, when considering an application for extension of time for substitution in ***Samuel Nyoike Nduati v R [2008] eKLR,*** Bosire, JA, took the view that the position taken by Githinji, JA in ***Vyatu Limited & Another v Public Trustee, Nyanza Province*** would "*mean that a late applicant for substitution has no remedy"* and that *" If such an approach were to be adopted … it would work injustice against those litigants or parties who delay to apply but may not be at fault or who would be having good reason for the delay."* The Judge went on to say that:

> ***"I believe that rule 4, above, empowers the court in cases as the one before me to make such orders as are necessary for the ends of justice or to obviate hardship. In exercise of that power the Court is guided by principles it has evolved over time, for instance the length of the delay, the reason for the delay, the likely prejudice to the opposite party and possibly the merits of the intended appeal."***

23. On a reference, the full Court did not agree with Bosire, JA but instead upheld the views expressed by Githinji, JA in ***Vyatu Limited & another v Public Trustee, Nyanza Province*** **(supra)**. In doing so, the Court stated:

> ***"Even if the period of six months and twelve months were extended under Rule 4, once an appeal has abated, there is no period set within which the abated appeal can be revived and therefore even if the six months or the twelve months are respectively extended that would not mean that the abated appeal has been revived. Githinji, J.A specifically referred to the provisions of Order XXIII Rule 8 (2) of the Civil Procedure Rules which provide for revival of abated suits and he went on to point out the lack of a similar provision in the Court of Appeal Rules. Since there is no provision for revival of abated appeals or applications, there can be no question of:-"time limited by these Rules or by an order of the Court or the superior court …." to warrant the application of Rule 4. We entirely agree with the interpretation of the legal position contained in the ruling of Githinji, J.A in the VYATU LIMTIED [sic] Case and we think Bosire, J.A did not correctly appreciate the position that Rule 4 only applies to situations where there is a time limited by the Rules or by a decision of the Court or of the superior court."***

24. Although the full Court in that matter allowed the reference, it appreciated that "*innocent litigants or other relevant parties may suffer injustice through no fault of their own"* and expressed the hope that the Rules Committee would rectify the position.

25. Similarly, when dismissing an application for substitution after an appeal had abated, Waki, JA in ***Pauline Wambui Ngari v John Kairu & another [2009] eKLR*** expressed the hope that the Rules Committee would address those concerns. He stated:

> ***"No application could be made thereafter to revive it... That is the current state of our rules. Concerns have been raised, however, about the possible injustice inflicted by the rule and I am aware that in response to those concerns, the Rules Committee has made proposals, hopefully due for gazettement shortly, for provision of rules similar to the Civil Procedure Rules, for revival of an abated appeal or application. Until the rules are amended, the only order I can issue, and which I do, is to dismiss the motion dated 20th March, 2009."***

26. It was against that background that the Rules Committee amended the Court of Appeal Rules to cater for revival of abated applications (Rule 51) and as well as abated appeals (Rule 99). The relevant part of Rule 51 of the Rules in relation to

> "*Abatement of Applications"* provides that:
>
> ***"(2) A civil application shall not abate on the death of the applicant or the respondent but the Court shall, on the application of any interested person, cause the legal representative of the deceased to be made a party in place of the deceased.***
>
> ***(3) If no application is made under sub-rule (2) within 12 months by the applicant or the respondent, the application shall abate.***
>
> ***(4) The person claiming to be the legal representative of a deceased party or any interested person to an application may apply for an order to revive the application which has abated and, if it is proved that he was prevented by sufficient cause from continuing with the application, the court shall revive the application upon such terms as to costs or otherwise as it deems fit."*** *(Emphasis added).*

27. It is immediately discernible from the foregoing that while under Rule 51(4) "*any interested person*" can apply to revive an application that has abated, the language employed in Rule 99(3) seems to limit the right to apply to revive an appeal that has abated to "*the legal representative of a deceased party*." It is not clear why, when Rule 99(3) was introduced, liberty to apply for revival was confined to "*person claiming to be the legal representative of a deceased party to an appeal*" as opposed to "*any interested person*" as provided under Rule 51(4) and Rule 99(1).

28. There appears to be no rational basis why "*any interested person*" would be at liberty or entitled to apply for substitution of a deceased party to the appeal within 12 months of the death of such party but loose the right to do so upon abatement of the appeal after 12 months following the death of a party. In other words, it is not clear why the right to apply for revival of an appeal and substitution of a deceased party to the appeal is not extended under Rule 99(3), to *"any interested person*" but is limited to the "*person claiming to be the legal representative of a deceased party."* Equally, there is no rational basis why "any interested person" would be at liberty to apply for substitution in an application under Rule 51 while the right to do so under Rule 99(3) is limited to the "*person claiming to be the legal representative of a deceased party."*

29. Given the mischief that informed the need to amend the rules to cater for revival of abated applications and appeals, namely to avoid the injustices that "*innocent litigants or other relevant parties may suffer through no fault of their own*", we doubt that the Rules Committee intended that whilst an application to revive an abated application may be made by "*any interested person*", and application to revive an abated appeal could only be made by the "*legal representative of the deceased party*." Perhaps the Rules Committee, to whom a copy of this Ruling shall be supplied, will revisit the two provisions and rationalize them.

30. That said, it is noteworthy that in making their application before the single Judge, the appellants also relied on Sections 3A and 3B of the Appellate Jurisdiction Act as the basis upon which they were inviting the Court to exercise its discretion to revive the appeal. One of the overriding objectives under Section 3A of that Act is to facilitate just, expeditious, proportionate and affordable resolution of appeals. For

purposes of furthering those objectives, the Court is required, under Section 3B of the Act, to handle matters with the aim of, among other things, just determination of proceedings. It is not apparent from the ruling under reference that the learned single Judge did consider the import Sections 3A and 3B of the Act when exercising her discretion.

31. In ***Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR*** the Court stated that principles encapsulated in overriding provisions of Sections 3A and 3B of the Act: "***confers on the courts considerable latitude in the exercise of its discretion in the interpretaton of the law and rules made there under***" and that the application of the overriding objective principle operates

> "***to embolden the court to be guided by a broad sense of justice and fairness***" and further that rules of the Court should be "***construed in a manner which facilitates the just, expeditious, proportionate or affordable resolution of appeals***."

32. In ***Issa Masudi Mwabumba vs Alice Kavenya Mutunga & 4 others [2012] eKLR***, Koome, JA invoked those principles when dealing with an application for revival of an appeal "*made two years and eight months*" after the death of a party. After setting out the principles that guide the Court in the exercise of judicial discretion, the Judge, in allowing the application for revival in that matter stated:

> ***"Besides the principles set out in the case of Leo (supra), I am also guided by the provisions of Section 3A and 3B of the Appellate Jurisdiction Act otherwise known as the oxygen principle. Stemming from the overarching objectives in the administration of justice the goal is at the end of day, the court attains justice and fairness in the circumstances of each case. This is the same spirit that is envisaged as the thread that kneads through the Constitution of Kenya, 2010 in particular Article 159."***

33. In the present case, the 1st respondent died on 21st March 2010. The application for revival of the appeal was made on 14th October 2011, approximately a year and 7 months after the death of the 1st respondent. The 1st appellant deposed in her affidavit in support of the application that she was a senior citizen of 86 years and that she was unaware that any action was required of her after the death of the 1st respondent. It was also demonstrated, through exchange of letters between counsel for the parties that were exhibited, that both counsel for the appellants and counsel for the 1st respondent became aware of the death of the 1st respondent sometimes in May and June of 2011 respectively. In their letter dated 30th May 2011 addressed to the advocates for the 1st respondent, the advocates for the appellants wrote:

> ***"Kindly note that it has come to our attention today that it is suspected that the 1st Respondent to the appeal, Margaret Wanjiru Kinyara passed away. If true, kindly confirm the following;***
>
> ***(i) The day the deceased passed away;***
>
> ***(ii) Whether the estate is under administration and who the administrator is. Since you have never brought this information to our attention or the court's attention, we need this information urgently to enable us apply for substitution."***

34. In their response to that letter dated 2nd June 2011, the advocates for the 1st respondent stated:

> ***"Your client and our deceased client were close neighbours and relatives. It is therefore surprising to us that you can accuse us of not informing you of our client's death when this information ought to have been brought to your attention by your client at the earliest.***
>
> ***We came to learn of our client's sad demise only recently. We are however informed that she died on 21st March, 2010. We do not know if her estate is under administration as of today. We are therefore unable to comment on the last paragraph of your letter at the moment since it is also apparent that the appeal-has abated."***

35. Based on that correspondence, it is clear that by the time counsel for the parties became aware of the death of the 1st respondent, the appeal had already abated since 12 months had lapsed after the death of the 1st respondent. The delay in filing the application for revival of the appeal was therefore explained and was not in the circumstances inordinate. Comparatively, in ***Gachihi Wang'ombe vs. James Muriuki & Another [2011] eKLR,*** Aganyanya JA revived an abated appeal 6 years after the death of the appellant after factoring in that the applicant (the legal representative) was an elderly lady whose medical condition did not allow her to attend to the abated appeal with due dispatch.

36. Had the learned single Judge applied the overriding principles in the context of the foregoing circumstances, we think she would have arrived at a different conclusion. As she did not do so we must, respectfully, interfere, as we hereby do, with the exercise of discretion by the learned single Judge by setting aside the ruling given on 24th February 2012. We substitute therefor an order allowing prayer 1 of the applicants' application dated 11th August 2011 with the result that the appeal is hereby revived.

37. It is common ground that John Wainaina Wanjiru the son of the 1st respondent who the applicants had sought to be made a party in the appeal in place of the deceased is not the legal representative. To that extent, the learned single Judge cannot be faulted for declining to accede to the request to substitute him for the deceased.

38. The appellants/applicants have placed before us the Grant of Probate of Written Will of the deceased issued by the High Court in Succession Cause No. 1075 of 2012 from which it is evident that the grant of representation was issued to the deceased's personal representatives, Margaret Wanjiru Wainaina and Eunice Wangari Mwangi. Consequently, we order that the said Margaret Wanjiru Wainaina

and Eunice Wangari Mwangi, the personal representatives of the deceased Margaret Wanjiru Kinyara, deceased, be made parties to this appeal in the place of the 1st respondent deceased. The appellants shall, within 14 days from the date of delivery of this Ruling file and serve an amended record of appeal reflecting the substituted parties in accordance with this ruling and in accordance with the orders of the Court given on 5th November 2015. Thereafter, this appeal shall be fixed for hearing on basis of priority.

39. There is one other matter. Mr. Amuga counsel for the 1st respondent urged that it is not permissible, on a reference of this nature, for the applicant to file a fresh application introducing matters that were not raised before the single Judge. That is indeed correct. Rule 55 of the Rules of the Court on reference from decision of a single judge requires the application to be made informally to the judge at the time when the decision is made or by writing to the Registrar within seven days thereafter. Under Rule 55(2) no additional evidence shall be adduced at the hearing by the Court of an application previously decided by a single judge. Therefore, an applicant on a reference from a decision of a single judge to the Court should not file a fresh application introducing additional evidence and the practice to do so is to be deprecated.

40. The costs of the reference shall be costs in the appeal.

Orders accordingly.

Dated and delivered at Nairobi this 23rd day of November, 2018.

P. N. WAKI

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR