IN THE COURT OF APPEAL

AT MALINDI

(CORAM: KARANJA, KOOME & ODEK JJ.A)

CIVIL APPEAL NO. 100 OF 2016

BETWEEN

MARY WAMBUI NJUGUNA.....APPELLANT

VERSUS

WILLIAM OLE NABALA.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

MWANATUMU ATHUMANI ARTHUR.....3RD RESPONDENT

RHODA MUGURE NGANGA.....4TH RESPONDENT

GRACE NYOKABI GITHOME.....5TH RESPONDENT

THE REGISTRAR OF TITLES, COAST.....6TH RESPONDENT

ROBERT GATHUA.....7TH RESPONDENT

JASON KATHURIMA.....8TH RESPONDENT

IBRAHIM MUSA MOHAMMED.....9TH RESPONDENT

HENRY GATHUKA CHEWE.....10TH RESPONDENT

(Being an appeal from the Ruling and Order of the Environment and Land Court at Malindi (Hon. Angote .J,) delivered on 22nd September, 2016

in

Malindi Environment and Land Court Case No. 64 of 2007 Formerly Mombasa HCCC No. 11 of 2001)

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JUDGMENT OF THE COURT

[1] The circumstances surrounding this appeal are quite peculiar. They primarily concern a party who successfully urged the trial court to allow her to be joined in the suit before the High court to substitute her husband who had passed away but paradoxically, she turned round to challenge the same joinder. The application to join Mary Wambui Njuguna (appellant) in the suit in place of her late husband was successfully urged by her counsel. She nonetheless turned around and faulted the same court for issuing the very orders she had sought on the grounds that the court lacked jurisdiction to issue the said order as the suit as against her deceased husband had abated. This issue *inter alia*, becomes the gravamen of this appeal.

[2] Here below is a brief factual background of the matter; the appellant is the legal representative of the estate of her husband, the late Sammy Njuguna *(the deceased),* who was sued as a 2nd Defendant in Malindi **Environment and Land Court Case No. 64 of 2007** (formerly Mombasa HCCC No. 11 of 2001). Following the deceased's death on 23rd August, 2007, the appellant filed an application dated 10th February, 2009, in which she sought to be joined in the proceedings in place of her late husband. That application was allowed vide an order delivered on 14th May, 2009.

[3] The subject suit proceeded to trial and was duly determined as the judgment thereon was delivered on 6th March, 2015 in favour of the Plaintiff *(1st respondent herein).* Upon learning of the judgment and conscious that the time within which she could mount an appeal had since lapsed, the appellant once again moved the court through an application dated 8th May, 2015. This time round she was seeking a plethora of orders among them leave to substitute her counsel; abridgement of time to enable her file Notice of Appeal out of time; review of the judgment; directions regarding the mode of service of the application and; maintenance of *status quo* pending the hearing and determination of that application and the intended appeal.

[4] In support of the application, the appellant stated that the judgment should be reviewed since the record was replete with errors apparent on the face thereof. To begin with, that her joinder to the suit was a nullity; because at the time of her joinder, the suit against her deceased husband had abated and had not been revived. Consequently, that the subsequent judgment against her was equally null, having been premised on incurably defective proceedings. The appellant went on to argue that having been joined in the suit in place of her late husband, the pleadings, particularly the plaint; ought to have been amended to reflect her joinder. She claimed that as a result of the failure by the 1st respondent to amend his plaint, she was rendered incapable of defending the matter as the legal representative to the deceased's estate.

[5] On the issue of review, the appellant pointed out that owing to the aforesaid errors, the matter proceeded with little participation from her, as she was also informed by her erstwhile lawyer that the dispute was mainly between the 1st respondent and the 3rd respondent. As a result, it was her contention that the proceedings offended the natural justice principle of *audi alteram partem* as she was never accorded an opportunity to be heard and that such procedural and legal lapses should not be visited upon her. It was therefore her view that the judgment which decreed the cancellation of her late husband's title without his estate being accorded due process and failure to review the said judgment which had errors apparent on the face of the record denied her not only a fair trial but also access to justice. On the prayer for abridgment of time, the appellant averred that she had never been informed of the delivery of judgment and only learnt of the same from the 3rd respondent. Further, that the delay in instituting the appeal was also occasioned by the hardship she faced in retrieving the file from her erstwhile counsel and instructing new counsel in the matter. In light of the circumstances, she also sought an order maintaining the *status quo,* to safeguard the intended appeal from being rendered nugatory.

[6] That application was opposed vide the 1st respondent's replying affidavit sworn on 22nd May, 2015. The 1st respondent dismissed the application as an attempt by the appellant to obfuscate issues, adding that there had been previous similar frivolous applications. He also asserted that the appellant cannot claim abatement of suit while also seeking joinder to the same suit as well as substantive orders. In equal measure, counsel submitted, the appellant cannot seek review whilst at the same time seeking to appeal. In addition, he stressed that nothing was disclosed to warrant the review sought; that to the contrary, the appellant was at all times represented by able counsel and was accorded an opportunity to be heard. The 1st respondent pointed out that the appellant's failure to file an amended defence is not an error apparent on the face of the record and that her counsel's neglect if any, does not affect the substance of the matter. For these reasons, the 1st respondent termed the application incurably defective, an abuse of the court process and sought its dismissal.

[7] Upon hearing the parties' respective submissions on the matter, the learned trial Judge (**Angote, J.**) in a ruling delivered on 22nd September, 2016, found the application devoid of merit and dismissed it. As per the learned Judge, the appellant was always at liberty to pursue the amendment of defence and it was not necessary for the plaint to be amended as claimed by the appellant. Whilst agreeing with the appellant that the suit had indeed abated at the time the application for joinder was made, the learned Judge however found that by seeking to be joined in the abated suit, the appellant had by implication revived the suit. Further, that since she thereafter participated in the proceedings through counsel, the appellant is guilty of laches and she cannot now turn around and claim that her joinder was improper. The learned Judge found that whether or not the joinder was improper was an issue for appeal, not review.

[8] That is the gravamen of this appeal, which is predicated on several grounds that are prolix but can be summarized as; the learned Judge erred by:

> **a) declining to review the judgement, yet the suit had abated and the appellant had successfully demonstrated that the abated suit had not been revived.**
>
> **b) holding that it was not necessary to amend the pleadings; and that the application for joinder constituted implied consent to revival of suit.**
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> **c) Holding that the application for joinder was not a nullity and that there was no error apparent on the face of the record; and declining to exercise his discretion in favour of an order for review which was justified.**
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> **d) Misapprehending the provisions of Section 7 of the Appellate Jurisdiction Act on enlargement of time.**
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> **e) Failing to find that there was nothing paradoxical about seeking review on one hand and abridgment of time to appeal on the other, and that estoppel by conduct could not be attributed to the appellant in this case.**

[9] The appeal was canvassed through written submissions with oral highlights at the plenary hearing. **Mr. Kimani** learned counsel for the appellant submitted that the proceedings pertaining to the joinder of the appellant were a nullity because at the time the application was made, the suit against her deceased husband had already abated and no application was made to revive it. Consequently, the Judge had no jurisdiction to effect a joinder and given this want of jurisdiction, the order joining the appellant did not serve to revive the abated suit as was

held by the trial Judge. The decision in ***Mehta vs. Shah (1965) EA 321*** was cited in this regard. Counsel was emphatic that abatement of suit is a matter of law and proceedings taken when a suit has abated are a nullity. Counsel went on to state that, the improper joinder notwithstanding, the appellant was never made a party to the suit, as the plaint was never amended to reflect the joinder. Counsel contended that under the former **Order VI rule 3** (now **Order 8 rule 3)** of the **Civil Procedure Rules** *(the rules),* the introduction of a legal representative to a suit, in place of a deceased defendant, is given effect by an amendment. He reiterated that failure to amend the plaint to introduce the appellant as a party in the suit deprived her an opportunity to be formally served with the amended plaint; to put forth her defence and more importantly; to personally appear and testify in support of her case.

[10] On the necessity for amendment of plaint, counsel for the appellant argued that as with all other cases of substitution of parties, the plaint must always be amended to indicate the new party; thereafter, the amended plaint must be served on all parties to the suit, with attendant summons to enter appearance. This, he said is a mandatory requirement under **Order 24 rule 4** of the rules. Consequently, counsel contended that the learned Judge fell into error when he held that the appellant was at liberty to amend her defence, knowing full well that no such amendment could be made unilaterally without first amending the plaint and introducing the appellant's name. In addition, that the Judge fell into further error when he found the appellant to have revived the abated suit, as only the plaintiff could revive it. He urged this Court to find all consequential orders made after abatement of the suit, a nullity.

[11] On the issue of review, counsel faulted the Judge for disregarding various errors on the face of the court record, particularly allowing a joinder of the appellant to an already abated suit; failure by the 1st respondent to amend his plaint to include the appellant. Counsel reiterated that in the circumstances of the case, review of the judgment was in order, given that the same was founded on null and void proceedings. He also advanced the view that an appeal and review are not mutually exclusive. Commenting on **Section 7** of the **Appellate Jurisdiction Act**, counsel was emphatic that it empowered the trial court to enlarge time. The decision in ***Mombasa Civil Application No. 20 of 2016*; *Zeinab Khalifa & Others vs. Abdulrazak Khalifa & Another*,** was cited to bolster the argument that the Court of Appeal has jurisdiction to entertain a fresh application for enlargement of time after a similar application was dismissed by the High court. By parity of reasoning counsel argued that, if such an application can be made before the High court, then it can also be made before the Environment and Land court as was the case here, thus the trial court should have allowed the prayer for the abridgment of time. Counsel urged us to allow the appeal.

[12] Rising on his feet to oppose the appeal was learned counsel **Mr. Jengo** for the 1st respondent who began by stating that the court's power to review its orders is an exercise of discretion. In this case, the appellant failed to demonstrate why this Court should interfere with the trial court's exercise of discretion without demonstrating cogent reasons. It was counsel's view that the appellant failed to point out the purported errors on the face of the record and as such, the matter was not at all suitable for review. With regard to the appellant's grievance about the orders of joinder, counsel stated that having been the one who moved the court seeking those orders, the appellant was estopped from rebounding from her own orders.

[13] Besides, the appellant was also guilty of laches on the matter, having waited for eight years before seeking to set aside her own order on joinder. Furthermore, counsel contended that since the appellant neither appealed nor sought to have the order of joinder set aside (before the trial court), the appellant was barred from raising the matter in this appeal, as to do so would be to introduce new issues on appeal. In any event, the appellant was always represented by counsel throughout the trial. Moreover, having failed to appeal against the order on joinder, the same remained valid and binding. Counsel also pointed out that the validity or otherwise of the subsequent proceedings was never an issue prior to judgment and the application for review was a belated and unprocedural attempt by the appellant to undo her joinder in the matter so as to escape the consequences of the judgment.

[14] Counsel for the 1st respondent distinguished the **Mehta case** *(supra)* in that it concerned an affront to statutory law, unlike the present case which was all about procedural rules, which were favourable to the appellant when she applied to be joined in the suit but now turns around to use the same rules as an escape route. Counsel went on to argue that in an application for review, it was imperative for an applicant to be specific about the order sought to be reviewed and should in fact have extracted and annexed it to the application for review. Failure to do so rendered the application fatally defective. Lastly on whether the plaint and defence needed amendment as claimed by the appellant, Mr. Jingo argued that the appellant never sought the same, and apart from changing the names the appellant has not demonstrated that she had any substantive amendments to make to the claim. According to counsel the appellant did not suffer any prejudice as she is merely approbating and reprobating, in the end counsel urged us to dismiss the appeal with costs.

[15] This being a first appeal, the duty of this Court is as re- stated in the case of ***Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR***, where it was held in part that:-

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."***

With the foregoing in mind, the issues for determination in this appeal are inter-twined with each other, we discern them to be as follows:

a) Whether the validity of joinder could be addressed by the trial court in a review application and if so;

b) Whether the joinder of the appellant to the suit was proper and if so;

c) Whether by dint of the order of joinder, the abated suit was revived and lastly;

d) Whether a review of judgment was warranted in the circumstances.

[16] On the first issue, the appellant's case is that her joinder to the suit was erroneous notwithstanding that she made the application and therefore it was amenable for review being an error apparent on the face of the record. In rebuttal, the 1st respondent contended that this was not an issue that could be raised in a review application, but rather, was a matter for appeal. In order to address this issue, it is essential to

first ascertain the prerequisites of a review application. The general procedure governing the Environment and Land Court is stipulated under **Section 9 (2)** of the **Environment and Land Court Act**; which provides that the court is bound by the procedure laid down under the Civil Procedure Act. **Section 80** of the **Civil Procedure Act**, provides for review and states that;

> ***"Any person who considers himself aggrieved—***
>
> ***a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
>
> ***b) by a decree or order from which no appeal is allowed by this Act may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."***

[17] The grounds upon which an application for review can be based are as provided for under **Order 45, rule 1** (Former (**Order XLIV)** of the **Civil Procedure Rules** which states as follows:

> ***"(1) Any person considering himself aggrieved-***
>
> ***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."*** (Emphasis added)

[18] As stated earlier, the appellant's application for review was based on allegations of errors apparent on the face of the record; mainly on her joinder to an abated and un-revived suit. It is common ground that the suit had abated, also as rightly pointed out by counsel for appellant, the abatement of a suit upon the lapse of the statutory period is an issue of law. This begs the question, does an *'error apparent on the face of the record'* include errors of law? **In the case of *Nyamogo & Nyamogo vs. Kogo* *(2001) EA 174*, this Court stated that;-**

> ***"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal."*** **(Emphasis added)**

[19] It therefore follows, that questions regarding the abatement of suit and the propriety of the appellant's joinder to the abated suit, being issues of law, could only be raised in an appeal and not in a review. On the same point, the learned authors of;- **Chittaley & Rao in the Code of Civil Procedure** (4th Edn) Vol. 3, pg 3227 explain the distinction between a review and an appeal in the following words:-

> ***"A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal."***

In the present case, the appellant faulted the Judge's appreciation of the law as far as her joinder to the suit was concerned. She also faulted his finding that by filing the application for joinder, she had effectively revived the suit. These are matters touching on the Judge's deliberate understanding and interpretation of the law and cannot be entertained on review by the same Judge or another one of equal jurisdiction.

[20] We also need to underscore the fact that when a court is sitting on review, it is not sitting on appeal of its own decision. It is for that reason that the alleged errors must be apparent on the face of the record without inviting any interrogation or protracted arguments thereon. It therefore follows that the propriety of the appellant's joinder to the suit was not an issue to be entertained by way of a review application. This therefore dispenses with not just the first issue, but with the second one as well.

[21] Turning to the issue on whether the abated suit was ever revived, the appellant faulted the Judge for finding that her application for joinder had effectively revived the abated suit. The appellant's argument in this regard is that legally speaking, the suit could only be revived by the 1st respondent; that since he had failed to seek the revival of suit, the substratum of the proceedings no longer existed after the abatement of suit. In the circumstances she argued that even her joinder to the suit and the resulting judgment were all inconsequential. Under **Order 24, rule 4** of the **CPR,** the procedure to be followed in case of death of one of several defendants or of sole defendant is given as follows:

> ***"(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.***
>
> ***(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased***

defendant.

(3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant." (Emphasis added)

[22] It is apparent from **subsection (1)** above, the application to substitute the legal representative in place of the deceased defendant may be made by any party to the proceedings. It may very well even be made by the deceased's legal representative. The rule does not limit the duty to move court in this regard to the plaintiff alone.

We also need to comment on the argument by the appellant that the matter was ripe for review because she was denied an opportunity to be heard, since the 1st respondent failed to amend his plaint, and in turn she was unable to amend her defence so as to plead her case appropriately. The appellant advanced the notion that where there is substitution of a legal representative, the pleadings must always be amended to reflect the name of the legal representative. The procedural rules on substitution of parties by a plaintiff are distinct from the rules on substitution following the death of a defendant. As rightly submitted by **Mr. Kimani,** where substitution is done, it is sometimes necessary for amendment of pleadings to be done to enable the new parties to be brought on board and served with the pleadings; to enable them defend themselves. However, that only applies in cases where the substitution is done at the instance of a plaintiff who wishes to introduce new defendants or new parties.

[23] The circumstances are different in cases of death of a defendant. As is evident from **Order 24 rule 4** aforesaid, the substitution of the legal representative in place of a deceased defendant means that the legal representative comes in to replace the deceased party. Indeed, **Order 24 rule 4 sub rule (2)** allows the legal representative to make any defence he/she may wish. It states:

"(1) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant."

No rule requires that the plaint must be amended. As rightly held by the Judge, if the appellant was desirous of tweaking the defence hitherto filed, she was at liberty to move the court and amend the defence. Instead, she chose to proceed with the defence as was and cannot thereafter claim to have been denied an opportunity to be heard.

[24] On the ground of appeal that the trial court misapprehended the provisions of **Section 7** of the **Appellate Jurisdiction Act** in so far as granting enlargement of time to appeal was concerned, we can do no better than reproduce the said provision which is stated in the following words:-

Power of High Court to extend time:

"The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence."

[25] As per the appellant, the ELC being a court of equal status to the High court, ought to have granted the prayer for abridgment of time to enable the appellant lodge his Notice of Appeal. In disallowing that prayer, the trial court found the appellant could not pursue both review and appeal simultaneously; that having opted for review, she had effectively abandoned the option of appeal. Under **Order 45 rule 2** of the rules, it is stipulated that:

"A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

We agree with the conclusion by the learned Judge that it was not open for the appellant to pursue an appeal and at the same time a review of the same orders. The appeal could only lie on the outcome of the application for review.

[26] For the aforesaid reasons we find this appeal without merit and order it dismissed with costs to the 1st respondent.

Dated and delivered at Mombasa this 15tday of November, 2018.

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR