



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OTIENO-ODEK J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 90 of 2013

BETWEEN

JOSEPH NJOGU NGOYA..... APPLICANT

AND

LUCY NJERI NJOGU ..... RESPONDENT

*(Being an application for substitution in an appeal from the Judgment of the High Court of Kenya at Nairobi (Gacheche. J.) dated 17th November 2010*

in

**HCCC No. 12 of 2006 (OS)**

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**RULING**

1. This is an application for substitution of a deceased party after abatement of appeal. The deceased, **Lucy Njeri Njogu**, was plaintiff by way of Originating Summons in **HCCC No. 12 of 2006**. She died on 15<sup>th</sup> November 2014 as respondent in **Civil Appeal No. 90 of 2010** lodged before this Court. Upon her death, Civil Appeal No. 90 of 2010 abated on 15<sup>th</sup> November 2015 for lack of substitution. The deceased was the estranged wife to the applicant.

2. By an Amended Notice of Motion dated 31<sup>st</sup> August 2016 made pursuant to **Rules 4, 16, 99 (1) & (3)** of the Court of Appeal Rules and **Sections 3A** and **3B** of the **Appellate Jurisdiction Act**, the applicant **Joseph Njogu Njogu** has applied to substitute the deceased with the names of **David Ngoya Njogu** and **Paul Kimani Njogu** as respondents. A further prayer is for this Court to grant orders extending time to apply for substitution of the deceased party and that this Court should grant orders that the abated appeal be revived.

3. The Amended Notice of Motion is supported by an affidavit deposed by the applicant on the grounds that **David Ngoya Njogu** and **Paul Kimani Njogu** are joint administrators of the estate of the deceased having been issued with letters of administration on 9<sup>th</sup> November 2015; that whereas the joint administrators are sons of the deceased, the applicant is their biological father; that the joint administrators have not filed an application to be substituted as respondents in Civil Appeal No. 90 of 2010 and that due to failure by the administrators to apply for substitution, the applicant has lodged the

present application to have the administrators substituted as respondents in place of the deceased.

4. The administrators in an affidavit dated 4<sup>th</sup> October 2016 deposed by **David Ngoya Njogu** oppose the application on the ground that the appeal abated on 15<sup>th</sup> November 2015; that the application is bad in law as it offends **Rule 99 (3)** of the Rules of this Court; that under **Rule 99 (1)** an application for substitution can be filed by an interested person within 12 months of the death of the deceased; that the applicant being an interested person in the appeal was duty bound to have filed the application for substitution within 12 months; that the joint administrators are not interested in the appeal and it is not their responsibility to make an application for substitution; that since no application for substitution was made within 12 months, the appeal abated as a matter of law under **Rules 99 (1) and (2)**; that under **Rule 99 (3)**, only the legal representative can apply for an order to revive an abated appeal; that the applicant herein is not the legal representative of the deceased and for this reason the instant application brought under **Rule 99 (3)** is incompetent and should be dismissed; that the applicant has been indolent and not vigilant in ensuring that the appeal did not abate.

5 At the hearing of this application, learned counsel Ms S. K. M. Wandaka appeared for the applicant while learned counsel Ms V. M. Wambua appeared for the respondent. Both counsel filed a list of authorities to support their submissions.

6. Counsel for the applicant reiterated the grounds in support of the application emphasizing that the applicant was not to blame for delay in making an application for revival of the abated suit. It was submitted that this Court has jurisdiction to revive an abated suit under **Rule 99 (3)** of the Rules of this Court; that this Court should administer justice without undue regard to technicalities as stipulated under **Article 159** of the Constitution. Counsel cited the cases of **Samuel Nyoike Nduati -v- R & Another (2007) eKLR**; **Kezia Wambui Mwaura & Another -v- Clement J. M. Kariuki & 4 Others (2016) eKLR** and **Peterson Gichohi -v- Maina Johana Miano alias Joseph Miana Miano (2016) eKLR** in support of submission.

7. The respondent in opposing the application submitted that there was a clear distinction between an application under **Rule 99 (1) and (2)** and an application under **sub-rule (3)**; that under **sub-rules (1) and (2)**, an interested party can apply for substitution of the deceased but such application must be made within 12 months from the date of the death; that under **rule 99 (3)**, only the legal representative of the deceased can apply for revival of an abated appeal and that an application to revive an abated appeal cannot be made by an interested party. Counsel submitted that the appeal in this matter has abated and cannot be revived unless the application is made by the administrator of the estate of the deceased and the applicant is not the administrator of the deceased. Counsel submitted that all along the applicant was aware of the death of the deceased who was his estranged wife and he attended her burial. Counsel cited the cases of **Charles Mbwika Musee -v- Settlement Fund Trustees & Mwangangi Nthanga Nguyo, Civil Appeal (Application ) No. 192 of 2004** and **Pauline Wambui Ngari & Another -v- James Chege, Civil Appeal (Application) No. 123 of 2005**.

8. This is a single judge matter and I have considered submission by counsel and authorities cited. In **Samuel Nyoike Nduati -v- R & Another (2007) eKLR**, Bosire JA expressed that in an appropriate case, **rule 4** empowers the Court to make such orders as are necessary for the ends of justice or to obviate hardship and if one has to adopt the reasoning that the Court has no jurisdiction to extend time for substitution, this would mean that a late applicant for substitution has no remedy. In **Kezia Wambui Mwaura & another -v- Clement J. M. Kariuki & 4 Others (2016) eKLR**, Justice Kihara Kariuki PCA expressed that:

*“Learned counsel for the respondent, Mr. Alexander Jaoko, referred the Court to various authorities all in support of the proposition that this Court has no jurisdiction under Rule 99 to revive an appeal which has abated. All these authorities refer to rule 96 (2) of the retired Court of Appeal Rules, which rule was similar to rule 99 ( 1) and (2) of the current Court of Appeal Rules 2010 now in force, and all hold that this Court did not have the power to revive an abated appeal. It must be noted that these pronouncements on rule 96 are no longer authoritative as the former rules were repealed upon the Court of Appeal Rules 2010 coming into force on the 17<sup>th</sup> September*

2010. In the current rules, a new sub-rule under rule 99, being sub-rule 3, was introduced.... Rule 99 (3)... gives this Court jurisdiction to revive an abated appeal if sufficient cause is shown as to why the appeal did not continue. Therefore the argument that there is no competent appeal upon which an application can hinge is misplaced.”

**Rule 99 (3)** clearly states who can make a late application for substitution and revival of an abated appeal. Such an application can only be made by a person claiming to be the legal representative of a deceased party to an appeal. The Rule provides:

**“99 (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.”**

9. In **Charles Mbwika Musee -v- Settlement Fund Trustees & Mwangangi Nthanga Nguyo, Civil Appeal (Application ) No. 192 of 2004**; Karanja, JA observed that once an appeal abates, then under **Rule 99 (3)** only the legal representative of a party may move the court for the revival of the appeal. Likewise, in **Pauline Wambui Ngari & Another – v- James Chege, Civil Appeal (Application) No. 123 of 2005**; this Court (Waki, JA) declined to grant an order for revival of an appeal that had abated.

10. In **Kezia Wambui Mwaura & Another -v- Clement J. M. Kariuki & 4 Others (2016) eKLR**, this Court granted orders to revive an abated appeal under **Rule 99 (3)**. Likewise in the persuasive case of **Peterson Gichohi -v- Maina Johana Miano alias Joseph Miana Miano, (2016) eKLR** the Environment and Land Court granted orders to revive an abated appeal. In both cases, the application to revive the abated appeal was made by the administrators of the estate of the deceased. In the same vein Koome, JA in **Issa Masudi Mwabumba -v- Alice Kavenya Mutunga & 4 Others (2012) eKLR** granted orders reviving an abated suit on an application made by a person with limited grant of letters of administration to the estate of the deceased. A common feature in all these cases is that the applicant was the legal representative of the estate of the deceased. In the instant case, the applicant is not the legal representative or administrator of the estate of the deceased.

11. Guided by the dicta in **Charles Mbwika Musee -v- Settlement Fund Trustees & Mwangangi Nthanga Nguyo**, that once an appeal abates, it is only the legal representative of a party who may move the court for the revival of the appeal, I am inclined to find that the instant application is incompetent having been filed under **Rule 99 (3)** by a person who is not the legal representative of the estate of the deceased. Accordingly, the Amended Notice of Motion dated 31<sup>st</sup> August 2016 be and is hereby dismissed with costs.

***Dated and delivered at Nairobi this 4<sup>th</sup> day of November, 2016***

**J. OTIENO-ODEK**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**