



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, J.A. [IN CHAMBERS]

CIVIL APPEAL (APPLICATION) NO. 192 OF 2004

CHARLES MBWIKA MUSEE.....APPELLANT

AND

SETTLEMENT FUND TRUSTEES.....1ST RESPONDENT

MWANGANGI NTHANGA NGUYO.....2ND RESPONDENT

*(An Appeal from the Judgment & Decree of the High Court of Kenya at Machakos, (Nambuye, J.)
dated 30th June 2004*

in

HCCC NO. 220 OF 1996)

R U L I N G

By his motion on notice dated 25th September 2013, the applicant through F. M. Mulwa Advocate is asking this Court to extend time within which to file and serve an application to substitute the deceased 2nd respondent one Mwangangi Nthanga Nguyo.

The application is supported by the affidavit of Charles Mbwika Musee sworn on 26th September, 2013. According to Charles Mbwika (the appellant in Civil Appeal No. 192 of 2004) he only learnt of the deceased's death in the early months of 2013. To date, he has not been able to ascertain who the legal representative of the 2nd respondent's estate is but he is certain he can get that important information if given more time by the court.

He deposes that his intended appeal is meritorious and unless he is granted the extension he seeks, he will suffer grave prejudice. The reason he has given for the delay is that he was not aware of the death of the 2nd respondent until 2013. He maintains that the respondent will not be prejudiced. He entreats this Court to exercise its discretion in his favour and grant him the order sought.

The application is opposed by Philip Mulwa who has the conduct of the appeal on behalf of the estate of the deceased. Mr. Mulwa's position is that the appeal has already abated pursuant to **Rule 99(2)** of the **Court of Appeal Rules**, and there is therefore nothing to extend. He also avers that five (5) years delay is

an inordinately long time, and the same has not been explained. He maintains that the delay is not excusable and urges the court to dismiss the application.

In her submission, Ms. Muteti, learned counsel for the respondent, raised a very pertinent point which in my view Mr. Mulwa, learned counsel for the applicant did not address i.e that the issue that the appeal has already abated and there is therefore nothing to extend.

The question I ask myself is what time is the applicant asking the court to extend? Does he want the court to say that the appeal has not abated – i.e. to extend the 12 months provided for under **Rule 99(2) of this Court's Rules**? If that is the extension I understand him to be asking for, then in my considered view, this Court has no power to grant that order. I say so because **Rule 99(2)** is very clear. It categorically states that:-

“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.”

I hold the view that Rule 4 of this Court's Rules cannot apply in this case, and this Court cannot extend the said 12 months. To that extent I am in agreement with Ms. Muteti, learned counsel for the respondent. This is a self-executing rule, which in my view falls outside the ambit of Rule 4.

I am in agreement with learned counsel for the respondent that what the applicant ought to have done was to move the court with a citation for the court to appoint a particular person e.g the widow of the deceased as a legal representative for purposes of substitution within twelve months of the death of the respondent in order to avoid abatement of the appeal.

Where an appellant files an appeal and goes to slumber then the court cannot be called to his aid. It behoves an appellant to be forever vigilant for as long as his/her appeal is pending in court to ensure that the same does not abate. Once an appeal abates, then under **Rule 99(3) Court of Appeal Rules** only the legal representative of a party may move the court for the revival of the appeal.

Indeed it is worth noting that although the appeal was filed in 2004, and the deceased died 4 years thereafter, it was not until 5 years after the respondent's death and 9 years since the filing of the appeal that according to the appellant, he discovered that the respondent had died. Even as at the date of filing this application, the appellant had not ascertained the whereabouts or full names of the widow or son of the deceased who he intends to substitute the respondent with.

That doesn't paint a picture of a diligent appellant who was/is keen on pursuing his appeal. This application is in my view devoid of merit. The same is dismissed with costs to the 2nd respondent.

Dated and delivered at Nairobi this 30th day of January, 2015.

W. KARANJA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR