



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, SICHALE & KANTAI, JJ.A)

CIVIL APPLICATION NO.5 OF 2011

BETWEEN

SUSAN WAMAITHAAPPLICANT

IN AN APPLICATION BY AND

NAOMI NJOKI KIMANIAPPLICANT

AND

MARY NJERI KIMANI1ST RESPONDENT

WARIARA KIMANI2ND RESPONDENT

(Being an application for substitution of the deceased Applicant in the Application for stay of execution in an intended appeal from the Ruling of the High Court of Kenya Nairobi (Rawal, J) delivered on 23rd February 2009

in

H.C.SUCCESSION CAUSE NO.2165 OF 1996)

RULING OF THE COURT

1. Susan Wamaitha, **the applicant** in the notice of motion before us dated 18th February 2015 is the daughter of the late Naomi Njoki Kimani who died on the 4th of March 2014. She prays in the application for an order that she be substituted with her late mother, Naomi Njoki Kimani, as the applicant, and hence as the intending appellant. The applicant's late mother, Naomi Njoki Kimani (who is hereinafter referred to as "**the deceased**") had given a notice of appeal dated 31st May 2010 manifesting her intention to appeal to this court against the Ruling of Kalpana Rawal, J, (as she then was) delivered on 23rd February 2009 in the High Court at Nairobi in Succession Cause No.2165 of 1996. In that Ruling, the learned Judge gave the deceased 30 days from the date of the ruling to account for rent collected in the estate of Kimani Wanyoro (deceased) failing which property No. L.R. 36/11/222 situate at Eastleigh, Nairobi would be sold as prayed in a summons dated 19th June 2008 taken out by Mary Njeri Kimani and Beth Wariara Kimani.

2. Subsequent to the giving of the notice of appeal, the deceased made to this Court an application by notice of motion dated 18th January 2011 predicated on rule 5(2) (b) of the Rules of this Court seeking an order for stay of execution of the ruling by Kalpana Rawal J, pending the hearing and determination of her intended appeal.
3. On 2nd February 2015 the applicant sought and obtained a Limited Grant *ad litem* in the estate of her mother, the deceased.
4. Mr. Harrison Kinyanjui, learned counsel appearing for the applicant urged us to grant the order for substitution as prayed in the motion to enable the applicant to step in the shoes of her late mother with a view to pursue the pending litigation.
5. Although served on 17th August 2015 with a hearing notice to attend Court for the hearing of the application, Messrs Nyamu & Nyamu, the advocates on record for 1st respondent did not appear, nor did advocate Ngugi B. G. who is on record for the 2nd respondent appear, though served with a hearing notice on 24th September 2015.

6. The deceased who lodged a notice of appeal as aforesaid, also lodged an application seeking an order for stay under Rule 5(2)(b) of the Rules of this court. By dint of Rule 51 (2) of the Rules of this court, applications in this Court do not abate on the death of the applicant or the respondent and the Court is enjoined, on the application of any interested person, to cause the legal representative of the deceased to be made a party in place of the deceased. If no application is made within 12 months, the application abates.

7. In this case, the deceased died on 4th March 2014 and the applicant lodged the application for substitution on 3rd March 2015, a day before the application for stay abated. Though not relevant here, we observe that under Rule 51 (4) of this Court's Rules, the Court has discretionary power to revive an application that has abated where sufficient cause is shown by any person claiming to be the legal representative of a deceased person or any interested person who may apply for revival of such application. We also observe, though not relevant here, that by dint of Rule 99 of this Court's Rules, an appeal does not abate on death of an appellant or respondent and that the Court on the application of any interested person can cause the legal representative of the deceased to be made a party in place of the deceased.

8. Having perused the application before us and the replying affidavits and given due consideration to the matter, we are satisfied that this is a proper case for making of an order for substitution as prayed. Accordingly, we allow the application and grant the order for substitution as prayed in the notice of motion dated 18th February 2015.

9. Each party shall bear its own costs.

Dated and delivered at Nairobi this 16th day of October 2015.

G. B. M. KARIUKI SC

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR