



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, JA. (IN CHAMBERS))**

**CIVIL APPEAL (APPLICATION) NOS. 66 & 216 OF 2012 (CONSOLIDATED)**

**BETWEEN**

**ANDREW O. NYANGWESO ..... APPELLANT**

**AND**

**ALLOYCE BARASA .....1<sup>ST</sup> RESPONDENT**

**OYE ASHIOYA T/A ASHIOYA & CO. ADV.**

**EMMANUEL OTIANGALA T/A**

**KURONYA AUCTIONEERS .....2<sup>ND</sup> RESPONDENT**

**(An Appeal from a Judgment of the High Court of Kenya at Busia, (Muchemi, J.) dated 29<sup>th</sup> February, 2012**

**in**

**H.C.C.A. NO. 39 OF 2010)**

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**RULING**

1. The appellant's further Amended Notice of Motion dated 31<sup>st</sup> July 2015 seeks two orders: that these two appeals, which have abated as against Emmanuel Otiangala t/a Kuronya Auctioneers, (the deceased) the 2<sup>nd</sup> respondent, be revived and that ALICE ANINDO AYUKU, the widow and legal representative of the deceased (the widow) be substituted for the deceased in this appeal.
2. In his affidavit in support of the application and submissions before me, the appellant stated that as the deceased hailed from Kakamega where he was also buried while he lives in Busia, he learnt of the deceased's death late and initially thought it was a rumour intended to defeat his appeal against the deceased. When he later enquired from the deceased's widow if indeed the deceased had died, she was un-co-operative. He, however, managed to confirm that the deceased had indeed died and filed this application. His original application was defective but he got leave of the court and amended and further amended it. The appellant further stated that he is keen to pursue his appeal against the deceased's legal representative. He therefore prayed that this application be granted.

3. The widow strongly opposes the application. In her replying affidavit and submission by her counsel, she contends that this application has no merit for two reasons. One, that as the cause of action arose in the course of the deceased's business as an Auctioneer, the appellant's claim, if any, is against the deceased's business and not the deceased's estate. As such, the appellant should have applied to substitute the deceased with the nominees appointed by the Auctioneers Licensing Board to wind up the deceased's business and not the deceased's legal representative.
4. Secondly, the widow further argues, the deceased having died on 9<sup>th</sup> December 2012, the appellant's appeal as against the deceased abated on 9<sup>th</sup> December 2013. The appellant has not given any good reason why he did not apply for substitution before the appeal abated. She dismissed the appellant's contention that he learnt of the deceased's death late as totally false. The deceased having been a court officer, the news of his death in a grisly road accident spread like bush fire. And Busia being a small town, the appellant must have known of the death soon thereafter. The appellant having easily served court process upon the widow in her rural home in Kakamega and even by registered post through her children, it was not difficult for the appellant to trace her to confirm the deceased's death and apply for substitution in good time. On those grounds, the widow urged me to dismiss this application with costs.
5. I have considered these rival submissions. I have also carefully read the record and in particular the averments in the affidavits in support of the application and those in the replying affidavits as well as the legal provisions and the authorities cited by counsel for the widow.
6. The appellant's claim in the suit from which these appeals arise was that on 7<sup>th</sup> January 2010, the deceased, in collusion with the 1<sup>st</sup> respondent, unlawfully attached his properties in a purported distress for rent. In his affidavit in support of this application, the appellant further claimed that that attachment was unlawful in that it was not authorized by court. The subordinate court dismissed that claim and the appellant's appeal to the High Court was also dismissed thus provoking this second appeal.
7. Counsel for the appellant never cited to me any authority in support of his contention that such claim if proved can only survive against the deceased auctioneer's business and not against his estate. My view is that it survives against both. As against the nominee appointed to wind up the deceased's business to the extent of the net value of the deceased's business and as against the deceased's legal representative to the extent of the net value of the deceased estate. In the circumstances, this application to join the deceased's legal representative is competently before court.
8. As to the merits of this application, I agree with the widow that had the appellant been a little more diligent, he would have confirmed the deceased's death earlier and applied for substitution. However, in the interest of justice, bearing in mind that the appellant is unrepresented, I exercise my discretion under **Rule 99(1)** of the **Court of Appeal Rules** in favour of the appellant and allow this application. I therefore order that Civil Appeal Nos. 66 of 2012 and 216 of 2012 which had abated as against Emmanuel Otiangala now deceased are hereby revived. I further order that the said Emmanuel Otiangala deceased is hereby substituted by his legal representative, the said Alice Anindo Ayuku. The said Alice Anindo Ayuku shall henceforth be the second respondent in these appeals. The second respondent shall have the costs of this application in any event.

**DATED and delivered at Kisumu this 14<sup>th</sup> day of October, 2015.**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

I certify that this is a true copy

of the original.

**DEPUTY REGISTRAR**