



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 67 OF 2010 (UR 47/2010)

BETWEEN

BILLEY OLOUCH OKUN ORINDA.....APPLICANT

AND

AYUB MUTHEE M'IGWETA.....1ST RESPONDENT

FREDRICK MWITI M'IGWETA.....2ND RESPONDENT

JAPHETH MURITHI M'IGWETA.....3RD RESPONDENT

(An application to revive the application dated 26th March, 2010 seeking leave to file the appeal out of time)

RULING

Before me is an application brought under **Rule 4 & 51(4)** of the **Court of Appeal Rules** (the Rules). Billy Olouch Okun Orinda, the applicant, seeks *inter alia* an order reviving the application dated 26th March, 2012 which has since abated.

Samson Okun Orinda (deceased), who is the applicant's father, instituted a suit in the High Court seeking specific performance of a sale agreement dated 20th November, 1990 between himself and the respondents. The trial court vide its judgment dated 30th October, 2009 declined to issue an order of specific performance and instead ordered the respondents to refund the deceased the amount he had paid pursuant to the transaction. Aggrieved with the said decision, the deceased filed an application dated 26th March, 2010 seeking leave of this Court to file the intended appeal out of time. However, before the application could be prosecuted the deceased died on 6th July, 2010.

Subsequently, the applicant applied for letters of administration over the deceased Estate and the same were issued on 31st May, 2012. The applicant filed an application dated 30th May, 2012, before this Court seeking to be substituted in place of the deceased. This Court by an order dated 3rd June, 2013 substituted the deceased with the applicant and directed the applicant to file an application seeking revival of the application for leave to file the appeal out of time within 14 days. In compliance with the order, the applicant filed the current application.

The grounds upon which the applicant relies on in support of the application is that, firstly, the deceased

passed away on 6th July, 2010; secondly, despite applying for letters of administration over the deceased's Estate immediately after his death, the same were only issued on 31st May, 2012; thirdly, by then the application seeking leave to file the intended appeal out of time had abated.

In response to the application, Mr. Kaumbi Kioga, learned counsel for the respondents, swore an affidavit in opposition. He deposed that the application sought to be revived had never been served upon on the respondents and he is not aware of the contents. He deposed that the abated application came up for hearing before Visram, J.A on 26th October, 2010, when it was stood over generally to enable the applicant's advocate to enjoin the deceased's legal representative. Counsel submitted that by operation of the law, the application for leave to file the intended appeal abated on 26th October, 2011. Further counsel for the respondent deposed that it was clearly evident from the letters of administration on record the same was issued on 31st May, 2011, that was 5 months before the statutory period for abatement had lapsed. The affidavit in support of the current application does not explain why it took the applicant more than 12 months to file an application for appointment for legal representative after being issued with a limited grant.

He went on to state that the affidavit in support of the current application sworn by the applicant's advocate stating that the letters of administration were issued on 30th May, 2012, is false and may constitute perjury considering that in an affidavit in support of the application dated 30th May, 2012, it was deposed that the letters were issued on 6th July, 2011.

According to Mr. Kaumbi, this Court should not assist the applicant who is indolent. He also deposed the abated application had no merit.

Mr. Kanyangi, learned counsel for the applicant, submitted that the applicant is the eldest son of Samson Orinda and was allowed to bring the current application within 14 days on 3rd June, 2010. He submitted that the applicant seeks to revive the application dated 26th March, 2010 which had since abated under **Rule 50** of the Rules. When the application for leave to file intended appeal came up before Visram, J.A, the respondents counsel pointed out that the deceased had died and therefore we commenced the process of substitution.

He submitted that there was no perjury in regard to the date the letters of administration were given; that the grant is dated 31st May, 2011, but was issued to the applicant on 30th May, 2012; all this time he was visiting the registry looking for the grant with no avail. This was explained to this Court on 20th June, 2013 and that is what is deposed in my affidavit. Counsel urged the application be allowed for ends of justice.

On his part and in response to the above submissions, Mr. Kaumbi, learned counsel for the respondents, and in opposing the application relied in his affidavit which was sworn 10th March, 2014. He reiterated the averments in his affidavit. He argued that the current application is brought after two years after the limited grant was issued. The application dated 26th March, 2010, abated 12 months after the order by Visram, J.A was issued. He argued that the application dated 26th March, 2010, was not necessary and all the applicant was required to do was to obtain a Certificate of Delay to indicate the period taken in preparing and availing the certified copies of proceedings.

He urged the Court to deem the current application as withdrawn with costs.

In response, Mr. Kanyangi submitted that there could have been a problem in the affidavit in support of the application dated 30th May, 2005, he nonetheless urged the Court to overlook the same as a technicality. He relied on **Article 159** of the **Constitution**.

Rule 51 of the Rules provides in part:-

“51 (1)

(2) A civil application shall not abate on the death of the applicant or the respondent but the Court shall, on the application of any interested person, cause the legal representative of the deceased to be made a party in place of the deceased.

(3) if no application is made under sub-rule (2) within 12 months by the applicant or the respondent, the application shall abate.”

In this case, the deceased passed away on 6th July, 2010, and therefore, the application seeking leave to file the intended appeal out of time abated on or about 6th July, 2011. **Rule 51(4)** of the Rules provides:-

“ The person claiming to be the legal representative of a deceased party or any interested person to an application may apply for an order to revive the application which has abated and if, it is proved that he was prevented by sufficient cause from continuing with the application, the court shall revive the application upon such terms as to costs or otherwise as it deems fit.”

Here, it is the applicant's contention that immediately after the deceased's death, he applied for letters of administration which were issued on 30th May, 2012, after the prescribed period within which he could be substituted with the deceased had lapsed and after the application for leave to file the appeal out of time had abated. The applicant had first to make an application for an order of substitution in order to have the *locus standi* to seek revival of the abated application.

It is the respondent's contention that the letters of administration clearly indicate that the same was issued on 31st May, 2011, and not 30th May, 2012, as alleged by the applicant. Further, the applicant's advocate in his affidavit in support of the application dated 30th May, 2012, deposed that the letters were issued on 6th July, 2011. Clearly there are discrepancies as to the actual date when the letters of administration were issued. The applicant's counsel explained that the letters were availed to him on 30th May, 2012, despite being dated 31st May, 2011; there was a mistake in his affidavit. This Court while considering the application for substitution in its ruling dated 3rd June, 2013, found that the letters were issued on 30th May, 2012, and that the explanation given by the applicant for the delay in obtaining the letters of administration was plausible. Guided by the said finding, the applicant has demonstrated that by reason of delay in the issuance of the letters of administration he was prevented with continuing with the application seeking leave to file the intended appeal out of time.

On the issue of the application dated 26th March, 2010, not having been served upon the respondents, the same can be served without any prejudice to the respondents.

What is before the Court is an application for revival of the application dated 26th March, 2010, seeking leave to file an intended appeal out of time. The merits of the application dated 26th March, 2010, is not before the Court at this juncture and as such the Court is precluded from considering the same.

Based on the foregoing and pursuant to the Overriding objective of this Court, the applicant's application ought to be allowed and the application dated 26th March, 2010, be set down for hearing to be determined on its merits. The overriding objective confers on the court considerable latitude in the interpretation of the law and rules made there under, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective. One view taken by this Court, in ***Caltex Oil Limited - vs- Evanson Wanjihia- Civil Application No. Nai 190 of 2009 (unreported)*** is that:-

“..... it is important to state that in our view, the powers of this Court have recently been enhanced by the incorporation of an overriding objective in sections 3A and 3B of the Appellate Jurisdiction Act Cap 9 and sections 1A and 1B of the Civil Procedure Act Cap 21 following the amendment of the Statute Law (Miscellaneous Amendment Act No.6 of 2009).

The overriding objective provides that the purpose of the two Acts and the rule is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Although the overriding objective has several aims the principal aim is for the Court to act justly in every situation either when interpreting the law or exercising its power. The Court has therefore been given greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective.”

See City Chemist & Another -vs- Commercial Bank Ltd. -Civil Appeal No. Nai. 302 of 2008.

For the aforesaid reasons the Notice of Motion dated 30th May 2012 is allowed, **Billey Oluoch Okun Orinda** is substituted with **Samson Okun Orinda (deceased)**. The applicant is granted leave to make the necessary application to revive the appeal within 30 days from the date of this ruling. Costs of this application shall abide the outcome of the appeal.

Dated and delivered at Nyeri this 7th day of April, 2014.

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR