



REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Appeal 135 of 2010

WAGECHE MARIYU.....APPELLANT/DECEASED

AND

MUTURI MARIYU.....RESPONDENT

(An appeal against the Judgement and decree of the High Court of Kenya at Nyeri (Juma J.) delivered on 17th December, 2002

in

H.C.C.A. No 45 of 2000)

RULING

Before me is a Motion on Notice dated and filed in court on 6th June, 2012 by Joseph Kabiru Wageche (hereafter the applicant), a son of the deceased appellant, Wageche Mariyu. The applicant was on 4th November 2011 grant by the High Court of Kenya at Nyeri letters of administration *ad litem* of the estate of his late father limited to representing the estate of deceased in this appeal.

The application is brought under Rules 99(1), (2), (3) and 42(1) of the Court of Appeal Rules 2010, and substantively prays for an order that Civil Appeal No. 135 of 2010 be revived and that the applicant be substituted as the appellant in place of his deceased father. The application is supported by an affidavit sworn by the applicant on 6th June, 2012.

From the supporting affidavit and the annexures thereto, the appellant, Wageche Mariyu died on 11th May, 2011. On 16th August, 2011 the applicant applied before the High Court of Kenya at Nyeri for a grant of letters of administration *ad litem* of the estate of the deceased and the same were issued on 4th November, 2011. This application for substitution was filed on 6th June, 2012. In paragraph 5 of the affidavit, the applicant deponed that he is not in any formal employment and that he was unable to raise immediately the amount of money required to enable him file and process the present application.

The application is opposed by the respondent, Muturi Mariyu through a replying affidavit sworn on 9th August, 2012. In paragraph 3 of the affidavit, the respondent concedes that the appellant died on 11th May, 2011. However, the respondent opposes the application on the ground that there has been inordinate delay in the filing of this application, a delay of seven months since the applicant obtained the grant of letters of administration *ad litem*.

I have considered the application, the affidavits and the annexures thereto and the submissions of Mr.

Kebuka Wachira and Mr. J. Gacheru, learned counsel for the applicant and the respondent respectively.

Rule 99, upon which this application is based provides as follows:

(1) An appeal shall not abate on the death of the appellant 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.

(2) 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.

(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.

The applicant therefore is required to prove sufficient cause that prevented him from continuing the appeal before it abated. This Court has also held severally that in an application for revival of an abated appeal, it will be guided by similar considerations as those in an application for extension of time. In **Leo Sila Mutiso vs. Rose, Civil Application No. Nai.255 of 1997** (unreported) the Court stated:

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are, first, the length of delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted and fourthly; the degree of prejudice to the respondent if the application is granted”.

The respondent is not correct in asserting that the delay in this application is seven months. The respondent has computed time from the date of the grant of letters of administration ad litem to the date of filing of this application. The correct computation should be from the date when the appeal abated to the date when the application to revive the appeal was made. As has been stated earlier, the deceased died on 11th May, 2011. Under Rule 99(1), the appeal abated on 10th May, 2012. This application was filed on 6th June, 2012 meaning that it was filed within 27 days of the abatement of the appeal.

While each case has to be considered on its own merit, in **Gachihi Wang’ombe vs. James Muriuki & Another, Nyeri Civil Appeal No. 155 of 2005** (unreported), a suit was revived 6 years after the death of the appellant because the applicant was an elderly lady whose medical condition did not allow her to attend to the abated appeal with due dispatch. And in **Issa Masudi Mwabumba vs. Alice Kavenya Mutunga & 4 Others, Mombasa Civil Appeal No. 287 of 2006**, (unreported), this Court revived an appeal two years and eight months after it had abated. The Court took into account the fact that the applicant had filed the appeal in person and had along the line been let down by his advocate.

The applicant has explained his delay on the grounds that he is not in any formal employment and that he was therefore not able to immediately raise the money to file and prosecute this application. The respondent has not refuted or challenged that explanation. I do not think I should hold the applicant’s lack of adequate means against him in his quest for justice. In any event, a delay of 27 days is not inordinate in the circumstances of this case.

I’m not at this stage able to address the chances of the appeal succeeding. Learned counsel did not canvass the issue. What is worth of note is that this is a family dispute. The respondent is the applicant’s uncle and the brother of the deceased appellant. The dispute revolves around the parcels of land known as **NO. LOC 9/KANYENYAINI/274 and NO. LOC.9/KANYENYAINI/T.134** which the appellant alleged were registered in the name of the respondent in trust for him during the land consolidation in Central Province in the 1960s. This being a family dispute, it would be prudent to have it determined on merit rather than through a cursory assessment of the merits of the respective cases of the parties.

On the prejudice that will be caused on the parties, again none of the parties raised or addressed this issue. I will take it that revival of the appeal will not prejudice any of the parties.

Taking into account all the foregoing matters and bearing in mind the overriding objective in Section 3A of the Judicature Act to facilitate the just, expeditious, proportionate and affordable resolution of the appeals as well as the duty of the Court under Section 3B of the same Act, I allow this application and order that this appeal be and is hereby revived and that the applicant, **JOSEPH KABIRU WAGECHE** be and is hereby substituted in place of **WAGECHE MARIYU**. Costs of this application shall abide the outcome of the appeal.

Dated and delivered at Nyeri this 7th day of February 2013

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR