REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Application 346 of 2009

GITHARA CHUCHU & 473 OTHERS..... APPLICANTS

VERSUS

GITITU COFFEE GROWERS CO.OP SOCIETY LTD.....1ST RESPONDENT

KENYA PLANTERS CO-OPERATIVE UNION LTD.....2ND RESPONDENT

*(An Application to rescind, vacate, vary, correct and or modify the order of the Court of Appeal sitting at Nairobi (**Bosire, Onyango-Otieno & Aganyanya, JA.**) dated 9th June, 2009*

in

C.A. Appl. No. 109 OF 2008)
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RULING OF THE COURT

This dispute is an example of how judicial time and space can be occupied by one matter for many years. The dispute has been in the courts for over 30 years. The instant application itself is being determined three years since its filing. The application is an upshot of another application by the respondents to stay certain orders of the High Court. Twice, that application came before this court but for reasons that will become clear shortly, was taken out of the hearing list.

On 18th September, 2008 when the application came up, the court (Bosire, Githinji and Aluoch, JJ.A.) ordered that:

"In the course of hearing this application it has emerged that several of the respondents are deceased. It is not clear who they are. That being the case it is not desirable to proceed with the hearing of the motion before us. We take it out of the hearing list and stand it over to a fresh date to be re-fixed at the Court Registry before this same bench.

In the meantime counsel for the respondents to file a further replying affidavit to indicate the respondents who have died, the respective dates of their death and whether any of them has had a legal representative appointed to replace him. The affidavit to be filed and served within 30 days from the date hereof.

The applicant will have the liberty of responding to it within 7 days of service upon them of that

affidavit.

Today's costs to be in the motion. Interim orders extended until then."

But it is the order of 9th June, 2009 (Bosire, Onyango-Otieno and Aganyanya, JJ.A) that has provoked the instant application. On that day the court made the following order.

"This notice of motion was fixed for hearing before us this morning. It has however, transpired that some of the respondents have since died and substitution is necessary. This was the position on 18th September, 2008 when it was adjourned to enable the counsel for respondents to file further replying affidavit. It is clear from the record before us that the deceased parties have not been substituted by their legal representatives as required pursuant to rule 51(2) of this Court's Rules, and Mr. Nabutete, the learned counsel for the respondents admits that omission and seeks more time to substitute them. Mr. Murugara, the learned counsel for the applicant does not object to the adjournment as he also cannot proceed under the present situation. In the circumstances, we adjourn the hearing of this application to a date to be fixed at the Registry. Let the deceased persons be substituted before the next hearing date. Costs to be in the application. Interim orders extended." (Emphasis ours)

The applicants in the instant motion who were the respondents in the first application now seek that the court rescinds, varies/corrects and/or modifies the above order by omitting the requirement that the applicants' counsel undertakes to obtain letters of administration in respect of the deceased applicants prior to the hearing and determination of Civil Application No. Nai. 109 of 2009. They pray further that the surviving applicants be allowed to proceed with the application dated 23rd May, 2008 without the requirement of substitution of those who are deceased; that the surviving applicants be treated as trustees of the deceased applicants. Finally, and as an alternative, it is suggested that the interest of the deceased applicants;

"....be protected/preserved under Kikuyu customary law by the applicants committees in Kimathi and Giagithu factories to which all the applicants live and dead belong to which the payment of Kshs. 13,251,459/95 was to be made."

We honestly do not understand this prayer. The case of **Otieno v. Ougo & Another** [1987] KLR 407 cited in support is also of no help.

According to the applicants the effect of the order in question is to indefinitely stay the orders to pay them their dues by the respondents so long as all the deceased applicants are not substituted. In view of the number of the deceased applicants, (over 200 applicants are said to have died by 2009); the fact that the families of the deceased are poor people; and the period this matter has taken to conclude, the applicants have pleaded with the court to find that it is fair and just to rescind the order of 9th June, 2009.

In response, learned counsel for the respondent took issue with the insinuations in the application that he had made certain concessions as regards the liability. We do not wish to be drawn into that debate only to say that the material part of the record is clear as reproduced in the early part of this ruling.

Other than that controversy, learned counsel for the respondent submitted before us that there are no grounds upon which the orders of 9th June, 2009 can be rescinded; that instead the surviving applicants ought to specify which applicants are alive and whether they wish to proceed with the matter without substitution of their deceased colleagues. That way, counsel submitted, the proceedings will be orderly.

We have anxiously and with profound sympathy to the applicants considered this application.

Rules 35 and **47** of the Court of Appeal Rules upon which this application is brought are not

applicable. The former **rule 56** is today **rule 57** of the 2010 Rules. By dint of that rule (57) this court will rescind its order if the order relates to extension of time otherwise than to a specific date, or where the order directed the doing of some act without specifying the date by which the act is to be done. The matter before us does not relate to any of the above circumstances.

The applicants' complaint is that it is onerous to comply with the order requiring substitution of the deceased applicants before the matter can be listed for hearing. It is not in doubt that several applicants are deceased. It was indeed submitted that half of 474 applicants were deceased by 2009. The number today may be higher. Even the list supplied by learned counsel for the applicants in civil application No. Nai 109 of 2008 may not be up-to-date.

We appreciate the difficulty the surviving applicants find themselves; a difficultly beyond their control as they cannot ensure that families of their deceased colleagues take out letters of administration. Likewise, we appreciate, from submissions, the affected families are not financially capable to petition for grants of representation in all the cases, being small-scale farmers.

An application in terms of **Rule 51(2) (1)** of the Court of Appeal Rules does not abate on the death of an applicant or a respondent. But it is the duty of any interested party to ensure that the deceased party is substituted by a legal representative. The rule provides:

"99 (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." *(Emphasis supplied)*

As the living applicants are desirous of proceeding with this matter, the death of some of their colleagues does not affect their claim. This Court in **John Muthomi Kanyoi v Peter Kamande & James Kabii** Civil Appl. No. 220 of 1997 observed that the death of the 2nd respondent during the pendency of the appeal did not prevent the 1st respondent from proceeding with his appeal.

In accordance with the provisions of **Article 159 (2) (b) & (d)** of the Constitution of Kenya and **Section 3A & 3B** of the Appellate Jurisdiction Act, and to obviate further suffering of the applicants, we modify the order of this court dated 9th June, 2009 by deleting the words "**... before the next hearing"** so that the substitution of the deceased applicants does not stop the rest of the applicants from proceeding with the application and eventually the appeal.

The order of 9th June, 2009 will now read in the relevant part as follows:

"... In the circumstances, we adjourn the hearing of this application to a date to be fixed at the Registry."

We must clarify that this decision does not contradict the recent unanimous five judge bench decision in **Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others**, Civil Appl. Nai. 307 of 2003.

In departing from the decisions in of **Musiara Ltd. v. Ntimama** [2005] 1 EA 31, and **Chris Malinda t/a Nyeri Trade Centre v Kenya Power & Lighting Co. Ltd.**, Civil Application No. Nai 174 of 2005, this Court (Omolo, Bosire, Githinji, Waki and Deverell, JJ.A) held that this court has no jurisdiction either under the Constitution or the Appellate Jurisdiction Act to recall, re-open and rehear an appeal which has been heard and determined.

By slightly modifying the order for the ends of justice to be met in an interlocutory matter, we have not re-opened a concluded appeal. We accordingly allow the application in the terms stated herein. Costs of the application to abide the outcome to the appeal.

DATED and DELIVERED at Nairobi this 1st day of March, 2013.

M. K. KOOME

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR