



IN THE COURT OF APPEAL

AT MOMBASA

CIVIL APPEAL 287 OF 2006

BETWEEN

ISSA MASUDI MWABUMBA APPELLANT/APPLICANT

AND

ALICE KAVENYA MUTUNGA [Sued As The Legal Representative

Of Aaron Nthenge Mutunga – Deceased]

HASSAN HAMISI SAUTI

THE ATTORNEY GENERAL

DIANI PROMOTION SERVICES

LOITA DEVELOPMENT LIMITED RESPONDENTS

(An appeal from the ruling and order of the High Court of Kenya at Mombasa (Sergon, J) dated 1st September, 2006

in

HCCC NO. 437 OF 2002)

RULING

1. **ISSA MASUDI MWABUMBA** (appellant) filed Civil Appeal No. 287 of 2006 against the ruling and order of the High Court at Mombasa (Sergon, J) dated 1st September, 2006 in Mombasa Civil Case No. 437 of 2002. The appellant was acting in person and the appeal which abated was filed presumably on or about 29th November, 2006. The appellant died on 18th February, 2008, and according to the provisions of **Rule 99 (1) (2) of the Court of Appeal Rules**, the appeal abated within twelve [12] months from the date of the death of the appellant which was on 19th February, 2009.

2. On 28th October, 2011, **Hamisi Hassan Mwatsahu** (applicant) filed the notice of motion under **Rules**

4, 5 (2) (b), 44, 47 and 99 (1) (3) of the Court of Appeal Rules. In which he seeks for orders that:

“1. Mombasa Court of Appeal Civil Appeal No. 287 of 2006 be revived upon Hamisi Hassan Mwatsahu being substituted as the legal representative of Issa Masudi Mwabumba now deceased.

2. Soaring holding Limited be joined as the 6th respondent in accordance with the proposed amended memorandum of appeal and the applicant/appellant be at liberty to serve notice and record of appeal out of time.

3. The applicant/appellant be at liberty to serve the respondents with the amended memorandum of appeal in accordance with the proposed amended memorandum of appeal annexed herewith.

4. An injunction order restraining the respondents, their servants agents and assignee or whomsoever from transferring, disposing off and or in any manner dealing with the suit parcels of land pending determination of this appeal.

5. Costs be costs in the appeal.”

3. According to the applicant, he is the legal representative of the **appellant**, who died on 18th February, 2008. The appellant died before the appeal was heard and finalized. The applicant is still desirous of pursuing the appellant’s claim regarding the dispute over the ownership of two parcels of land known as GALU KINONDO 644 and 646. The appeal abated on 19th February, 2009, and the reasons advanced by the applicant are that he engaged a lawyer in early 2009 who did not take any steps to prosecute the appeal for reasons that court diary had no available dates.

4. By the same application the applicant also sought for injunctive orders which cannot be appropriately granted in this application which is before me as a single judge. I will only address myself to the issue of the revival of the abated appeal as provided for under **rule 99 (3) of the Court of Appeal Rules** which provides:

“The person claiming to be the legal representative of the 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 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.”

5. This application was opposed by Mr H. Khanna, for the 5th respondent, Mr Mango for the 4th respondent, and Ms Yato for the 3rd respondent. It was submitted by counsel for the respondents that since the appeal abated; the onus is upon the applicant to show sufficient cause that he was prevented from making the application to enable him continue with the appeal. According to Mr Khanna, it is discernible from the applicant’s supporting affidavit that he was aware of his rights when he enjoyed the services of a lawyer in early 2009 before the appeal abated thus he should have submitted the application for substitution.

6. The applicant engaged a counsel by the name Abdulla who appeared in Court on 21st July, 2011 and the Court pointed out to the applicant’s counsel the need for him take steps to regularize the appeal. Further, reasons advanced by the applicants are that the limited grant of letters of administration which gives the applicant authority to file this application was limited to filing a suit whereas the applicant has made an application to be joined as the appellant.

7. I have considered the notice of motion, the supporting affidavit, the replying affidavit and submissions by counsel. This application and the order for revival of the abated appeal invoke the exercise of judicial discretion. The principals to guide the court on the exercise of judicial discretion to extend time or to revive a suit are similar and they have been articulated in a long line of authorities. See the case of; **LEO SILA MUTISO VS ROSE, CA NAI 255 OF 1997 (unreported)**:

“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.”

8. This application was made two years and eight months after the appeal had abated. The explanation offered by the applicant is that the Advocate Mr Abdallah failed to take the steps because the court diary did not have dates. It is also to be noted that the appeal was filed by the deceased in person. By a notice of appointment filed on 20th July, 2011, the firm of Timamy & Company Advocates came on record as having been instructed by the applicant as the legal representative of the deceased.

9. Besides the principles set out in the case of *Leo* (supra), I am also guided by the provisions of **Section 3A and 3B of the Appellate Jurisdiction Act** otherwise known as the oxygen principle. Stemming from the overarching objectives in the administration of justice the goal is at the end of day, the court attains justice and fairness in the circumstances of each case. This is the same spirit that is envisaged as the thread that kneads through the **Constitution of Kenya, 2010** in particular **Article 159**.

10. Bearing in mind those overarching objectives, this appeal deserves to be revived for the following reasons: firstly, the appellant was acting in person when he filed the appeal. Secondly, an advocate was instructed but he did not take the necessary steps to revive the appeal; although no reasons have been given for the advocate’s failure, his failure or mistakes cannot be attributed to the applicant. Thirdly, the applicant has a limited grant of letters of administration in respect of the deceased’s estate. Although the limited grant gives the applicant power to file a suit, that power can also be construed to include prosecuting an appeal. The fourth reason for allowing the revival of the suit is for reasons that the dispute involves ownership of land and a durable solution that addresses the substantive issues is always a better option.

11. The respondents complaint that this matter has taken several decades and in particular, this application was made after two [2] years and eight [8] months had passed are valid concerns. It is also obvious the respondents will continue to be inconvenienced by the prolonged litigation but in my humble view, that is the price one has to pay while defending their rights and the prejudice can be compensated with costs.

12. For the foregoing reasons, I allow the applicant leave to revive the appeal and substitute himself for the appellant in this appeal within fourteen [14] days. The appeal should be served on all the parties who will be affected by the orders sought within fourteen [14] days.

I decline to grant the orders of injunction for obvious reasons that this is not within my province as a single judge.

Costs of this application be awarded to the respondents in any event.

Dated and delivered at Mombasa this 19th day of July, 2012.

M. K. KOOME

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

