



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL (APPLICATION) NO. 8 OF 2007

BETWEEN

MARY WANJIRU NJUGUNA .....APPLICANT/APPELLANT

AND

HEZEKIAH MATHARA .....RESPONDENT

*(An application for leave to substitute WARUGURU PETERO the deceased appellant with her legal representative MARY WANJIRU NJUGUNA in Civil Appeal No. 8 of 2007 being an appeal from the judgment of the High Court of Kenya (Osiero, J.) dated 20<sup>th</sup> September, 2005 and the decree thereto issued on the 10<sup>th</sup> March, 2007*

in

H.C.C. C. No. 1132 of 1992)

\*\*\*\*\*

RULING

The application by notice of motion dated and lodged in this Court on 28<sup>th</sup> July, 2009 seeks the following orders; namely:-

- “1. THAT this Honourable court be pleased to grant leave to the Applicant to amend the record of appeal by substituting the deceased appellant with her legal representative MARY WANJIRU NJUGUNA in accordance with the amended draft of the record of appeal in Civil Appeal No.8 of 2007 annexed to the supporting affidavit of this Notice of Motion.***
- 2. THAT the amended record of appeal in Civil Appeal No. 8 of 2007 in terms of the draft annexed to the supporting affidavit of this application be filed within such time as the court may direct under Rule 44(2) of the rules of this Court.***
- 3. THAT costs of this application do abide the Civil Appeal.***

The application was based on the following grounds; to wit:-

- “1. The deceased died on the 6<sup>th</sup> July, 2008 and the personal representative wishes to proceed with the main appeal.**
- 2. It is necessary to substitute the appellant with the legal representative before the appeal can be heard.**
- 3. the grant of letters of administration was issued on 12<sup>th</sup> June, 2009 and this could not be filed without the grant.**
- 4. The motion is further supported by the affidavit sworn by MARY WANJIRU NJUGUNA.”**

**Mary Wanjiku Njuguna’s** supporting affidavit repeated what was stated in the grounds on the face of the application except she annexed thereon the letters of administration issued to her under **section 54** of the Law of Succession Act and also the draft amended Record of Appeal. A replying affidavit by one **Rose Nyambura Thumbi** who described herself as the administratrix of the estate of **Hezekia Mathara** the deceased/respondent dated 14<sup>th</sup> and filed herein on 18<sup>th</sup> August, 2009 questioned the competency of the appeal in view of the death of the said deceased respondent before this appeal and application were filed and also that since the deceased/applicant died on 6<sup>th</sup> July, 2008 the appeal abated on 6<sup>th</sup> July, 2009.

The Court heard this application on 29<sup>th</sup> April, 2010 when **Mr. King’ara**, learned counsel for the applicant largely repeated what was contained in the application, the grounds on the face thereof and the averments in the supporting affidavit. He also stated that he relies on the recently introduced **rule 3A** and **B** of Cap. 9 of the Laws of Kenya, and that since the deceased/respondent had been substituted in the superior court, there was no prejudice caused to the substituted respondent by filing the appeal in the name of the deceased/respondent. He also submitted that the appeal to this Court is not governed by Rules of Abatement under Civil Procedure Rules.

**Mr. Kinuthia**, learned counsel for the respondent opposed the application and recounted what was deponed to in the replying affidavit by the said **Rose Nyambura Thumbi** the legal representative of the deceased/respondent. He insisted that since the application by the legal representative of deceased/appellant was not made within twelve months as required by **rule 96** of this Court’s Rules, the appeal has abated.

**Rule 96(1)** of this Court’s Rules provides as follows:-

**“96(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.”**

Sub-rule (2) of the Rule states thus:-

**“If no application is made under sub-rule (1) within 12 months from the date of death of the appellant or the respondent the appeal shall abate.”**

The deceased appellant died on 6<sup>th</sup> July, 2008 and this application was filed on 28<sup>th</sup> July, 2009 but according to the above rule, the application for substitution should be filed within twelve months. The Rules use the word “*shall*” which means it is a strict rule which must be complied with. Counsel for the applicant asks me to apply the principles enunciated in **Rule 3A** and **B** of Cap.9 of the Laws of Kenya but I do not believe these Rules apply where there is an existing rule which according to its wording should be strictly complied with. Perhaps if the applicant had explained a justified reason for the 22 days delay in a proper application the Court would have considered an appropriate order to make. The Court can apply the principles set out in sections **3A** and **3B** of Cap. 9 Laws of Kenya, say, by ignoring the form in which parties are cited as in this appeal and application or as herein where the deceased parties are cited. In this application; however, the appeal abated at the end of twelve months of the death of the deceased

appellant, because **rule 96(2)** says so. It has not been revived. This application has no merit. It is hereby ordered dismissed with no order for costs.

***Dated and delivered at NAIROBI this 21<sup>st</sup> day of May, 2010***

**D. K. S. AGANYANYA**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**