



Gichanga v Kiarie (For and on Behalf of the Estate of Onesmus Mwenje and Phylis Nyambura Kinyanjui) & another (Environment and Land Appeal 41 of 2020) [2024] KEELC 4978 (KLR) (24 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4978 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 41 OF 2020**

JG KEMEL, J

JUNE 24, 2024

BETWEEN

WELLINGTON NJOMO GICHANGA APPELLANT

AND

SAMUEL KIARIE (FOR AND ON BEHALF OF THE ESTATE OF ONESMUS MWENJE AND PHYLIS NYAMBURA KINYANJUI) 1ST RESPONDENT

FAITH MUTHONI CHURU, JOSEPH NDUNGU NJOROGE & LUCY WAMBUI WAWERU (SUED AS TRUSTEES OF PCEA THINDIGUA CHURCH) 2ND RESPONDENT

RULING

1. By a Motion dated 13/10/2023 premised on Order 45 Rules 1 & 2 as read with Order 51 Rule 4 of the *Civil Procedure Rules* and Sections 1A, 3A, 80, 95 and 100 *Civil Procedure Act* the Applicant seeks Orders That;
 - a. Spent.
 - b. This Honorable Court be pleased to review its decision and Order made on 7th June 2023 of inter alia struck out the appeal no. 41 of 2020.
 - c. In particular this Honorable Court be pleased to make orders as follows;
 - a. That the Order made on 7th June 2023 ordering for the appeal and application to be struck out be reversed and the appeal and application be reinstated.
 - b. That upon grant of prayer 3(a) above, the Honorable Court be pleased to order that the Appellant application be set down for hearing on priority basis.



- c. That upon grant of prayer 3(a) above, the Honorable Court be pleased to reverse the orders for costs.
 - d. In the alternative, upon the grant of prayer 3(a) above, the Honorable Court be pleased to grant leave for the Applicant to correct the name of Wellington Njommo Gichanga to read as, Peter Njommo Gichanga as the Appellant.
 - e. The Honorable Court be pleased to make such further Orders as may be expedient and necessary for the ends of justice herein.
 - f. The Honorable Court be pleased to make the requisite Orders in respect of the costs of this Application.
2. The Application is based on grounds that there is sufficient cause to warrant the Hon Court to review its decision and Order made on 7/6/2023. That there was a typographic error on the face of the said Order and the Court rendered it's Ruling without knowledge of all proper facts and documents that ought to have been before Court hence the Application.
 3. The application is also supported by the Affidavit of even date sworn by Vincent Makori, the Applicant's counsel. He averred that inter alia this Hon Court found that the Appellant was deceased and therefore the appeal was incompetent. That the Appellant died in 2018 and his son Peter Njomo Gichanga obtained letters of administration ad litem annexed as VO1. That the firm of Onsiani & Co. Advocates accordingly applied for substitution as shown by VO3, copy of the application but failed to properly handover prompting the current error. That the slight delay in filing the instant Application was caused by the Kiambu Chief Magistrate's Court where many files were allegedly relocated after the Chief Justice's visit to the station. That the Appellant family have built a matrimonial home and heavily invested on the suit property and the said typographic error of the name should not be visited upon the Appellant.
 4. The Application is opposed by the 2nd Respondent only.
 5. On behalf of the Trustees of PCEA Thindigua Church comprising the 2nd Respondent, Faith Muthoni Churu swore her Replying Affidavit on 14/1/2024. She deponed that the Application is incompetent and frivolous aimed at wasting precious judicial time. That there is no discovery of new evidence to justify the Review of the Court dated 7/6/2023. That the Appellant's Advocates filed a Supporting Affidavit sworn by the Late Wellington Njomo Gichanga two years after his death. That it is doubtful that a dead man filed an appeal and went ahead to swear an Affidavit and still the Applicant wishes to reinstate the appeal. That the 1st Respondent herein is equally deceased and the Applicant wants to reinstate an appeal against him. She further accused the Applicant's Advocate for not being licensed to practice law at the time of filing the appeal. The averment that the Appellant's family reside on the suit land was refuted and the Court was urged to dismiss the Application with costs.
 6. On 15/2/2024 directions were taken and parties elected to canvass the Application by way of written submissions.
 7. By the time of this Ruling only the Applicant had filed his submissions dated 3/4/2024 through the firm of Onyango Oyieko & Co. Advocates.
 8. Two issues were drawn for determination to wit; whether the Appellant was substituted in the lower Court and whether the Application is merited.
 9. Firstly, it was submitted that the overriding objectives under Section 3A and 3B of the *Civil Procedure Act* and Article 159(2) *Constitution* of Kenya overshadow technicalities. That since substitution of the



late Wellington was done in the trial Court, it was in bad faith for the Respondents to file such an application despite knowledge and participation in the substitution proceedings. Reliance was placed on Order 24 rule 7(2) Civil Procedure Rules which provides;

“(2) The Plaintiff or the person claiming to be the legal representative of a deceased Plaintiff or the trustee or official receiver in the case of a bankrupt Plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.”

10. On the issue of merits of the Application, the Applicant submitted that the late Wellington died on 27/6/2018 and vide a Grant issued on 24/4/2019 in Milimani High Court and the application for substitution was made at Kiambu CMCC on 25/6/2019. That under Order 24 rule 1 CPR it is provided that the death of a Plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues. That this Court has power and discretion to revive a suit that has abated and determine it on merits. That since substitution was already done in the lower Court that alone is enough justification to revive the appeal. The case of Dorothy Mumbua Mutune & Another v Design Forte Limited [2021] eKLR was cited in support.
11. The singular issue for determination is whether the Application is merited. Before delving into that it is necessary to establish the competency or otherwise of the motion before Court.
12. The Court record shows that as early as 25/11/2021, this Court reached a finding that the purported Applicant/Appellant herein Wellington Njomo Gichanga was deceased. He died on 27/6/2018 yet his appeal was allegedly filed on 12/10/2020. In very candid terms this Court interalia held ‘A dead person cannot sustain a legal suit’. See para. 18 of the Ruling dated 25/11/2021.
13. That finding notwithstanding the Applicant’s counsel proceeded to prosecute his appeal. The 2nd Respondent’s counsel, maintained that there was no competent appeal before Court which position the Court agreed with and proceeded to strike out the appeal on 7/6/2023.
14. One would be forgiven to think that the ‘appeal’ proceedings would halt at that point. That is not the case because the “Applicant” is now back in Court principally seeking an order for Review of the Court Ruling issued on 7/6/2023. The Respondent vehemently objects to the Application and terms it frivolous.
15. Certainly, the Court’s power to review its decisions is limited as enshrined in statute. The power of review must be exercised within the framework of Section 80 of the Civil Procedure Act as read with Order 45 Rule 1 of the Civil Procedure Rules, 2010.
16. Section 80 Civil Procedure Act provides:-

“ 80. Any person who considers himself aggrieved-

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act,

May apply for a review of judgement to the Court, which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.”



17. Order 45 *Civil Procedure Rules* states;

“ 1. Application for review of decree or order [Order 45, rule 1.]

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.”

18. From the above provisions, it is clear that while Section 80 of the *Civil Procedure Act* grants the Court the power to make orders for review, Order 45 of the *Civil Procedure Rules* sets out the jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason. In the case of *Republic v Medical Practitioners & Dentists Board & Another; MIO1 on behalf of MIO2 (a Minor) & Another (Interested Party); King'angá (Ex parte)* (Miscellaneous Civil Application 59 & 63 of 2019 (Consolidated)) [2021] KEHC 298 Mativo J (as he then was) aptly discussed what constitutes a mistake or error apparent on the face of the record as follows;

“The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1.”

19. The Applicant argues that there was a typographic error on the face of the Court's record in relation to the Appellant's name. That the name of the late Wellington Njomo is so similar with that of his son Peter Njomo who is the Administrator of the late Wellington's estate. Accordingly, the current Advocates on record failed to take notice of the names upon taking up the matter from Onsiani & Co. Advocates who filed substitution proceedings in the trial Court. Applying the definition of error apparent above the Applicant's averments do not qualify for an error apparent on the face of record. The Court reached its finding based on the lack of capacity of the Appellant to appeal and not misdescription of a party or his name. The accusation of the former firm of Onsiani & Co. Advocates falls outside the ambit contemplated for error apparent on the record. The Court is being called to examine, scrutinize and analyze averments that are outside the scope of Review.

20. Counsel rehashed the provisions of Order 24 rule 7 (2) of the *Civil Procedure Rules* and cited the case of Dorothy Mumbua (supra) to urge the Court to revive the appeal. Order 24 of the *Civil Procedure Rules* state that the death of a Plaintiff does not cause a suit to abate if the cause of action survives.



Similarly, even if the suit abates, that is one year after the Plaintiff's death, the same can be revived by the legal representative of the deceased party so long as sufficient reasons are given. Further the case of Dorothy Mumbua supra is distinguished to the extent that in that case the Appellant died on 5/8/2019 and the grant ad litem was issued on 8/10/2020, one year after the appeal had abated. In allowing the Application the Court was persuaded that the succession Court was partly to blame for the long period taken to issue the said grant which period also fell at the peak of Covid 19 pandemic.

21. Turning to the present case the appeal was struck out for being incompetent. There was no Appellant right from the time of filing of the Appeal. Recently the Court of Appeal in Onesmus Sintole Saidimu v Sane Ole Saidimu Nkikoora & 5 Others [2021] eKLR in dismissing an appeal that challenged the trial Court decision to declare a suit incompetent for having been filed in the name of deceased Plaintiff one year after his demise held; -

“(24) From the pleadings in Nairobi ELC No. 1209 of 2015, Nkikoora was claiming the suit property, and his claim was amongst others against the statutory manager, Onesmus and George. This suit was fatally defective, having been filed in the name of Nkikoora after his death. The learned Judge cannot therefore be faulted for rejecting the application to have Semencurr substituted in place of Nkikoora, as there was no valid suit. In our view, an order for striking out the suit was superfluous and needless. That suit was in law a nullity, and as stated in *Macfoy v United Africa Company* [1961] 3 All ER 1169:

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to setting aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so.”

22. Indeed, even in the instant case there was no need for a striking out order for the simple reason that there was no appeal ab initio. The Application is bereft of merit. Seeing that the Applicant is long dead, the costs to the 2nd Respondent to be borne by the Applicant's Counsel Vincent Makori guided by the Court of Appeal Ruling in the case of National Land Commission v Johnson Okiro Misiga [2021] eKLR where the Court of Appeal in ordering Counsel to bear costs held;

“Ultimately the motion cannot be granted and fails. I dismiss it with costs. I order that the costs be borne by the Respondent's Advocates as I do not see the justice of the Respondent himself being saddled with the costs arising from a completely unnecessary application presented by his Advocates who, I fearfully hope, will invest in a copy of, and will take time to thoroughly acquaint themselves with the Rules of this Court.”

23. The application is dismissed with costs to the 2nd Respondent.

24. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 24TH DAY OF JUNE, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;



Okumu HB Oyieko for the Appellant/Applicant

1st Respondent – Absent

Murimi HB Prof. Muigua for 2nd Respondent

Court Assistants – Phyllis / Oliver

