



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civil Appli 139 of 2009 (UR 92/2009)

BEN SIRENGO.....APPLICANT

AND

KWANZA LAND DISPUTES TRIBUNAL COMPRISING OF

ONYANGO WAO

SIMON REMBEGOT

JONATHAN MUTAMBO

RICHARD TUBUTA.....1ST RESPONDENT

AND

MAGDALENA NASIPWONDI SIMIYU.....2ND RESPONDENT

**(An application for substitution of Lydia Nafula Simiyu in place of Magdalena Nasipwondi Simiyu
2nd respondent (Deceased) in Civil Appeal No. 288 of 2002)**

RULING

By this application expressed to be brought under **rule 96(1)** of the Court of Appeal Rules, the applicant, **BEN SIRENGO**, seeks an order that he be allowed to substitute one **LYDIA NAFULA SIMIYU** in place of the 2nd respondent, now deceased, in Civil Appeal No. 288 of 2002 which appeal was against the ruling and order of the High Court of Kenya at Kitale, Etyang, J, dated 10th May, 2002 between the applicant and the respondents.

Though the Attorney General who acts for the 1st respondent was served with the hearing notice for the application he did not appear before me. Lydia Nafula Simiyu who is the legal representative of the estate of the 2nd respondent appeared in person and strenuously opposed the application.

It is common ground that Civil Appeal No. 288 of 2002 was filed at Nakuru on 18th October, 2002 and that the 2nd respondent passed on on 26th June 2005. The two parties were neighbours and the applicant attended her funeral. Though he knew the 2nd respondent had died, it is his contention that he took no

action to substitute her since he did not know her legal representative. He asserts that the delay in seeking substitution was due to the fact that M/s Barongo & Company Advocates who had acted for the deceased in the suit and in the appeal did not furnish him with the Death Certificate and Grant of Letters of Administration. This, he said, was the cause of the delay. He eventually succeeded in obtaining those documents on 10th March, 2008 and lodged this motion on 14th May, 2009.

The record shows that the applicant had applied for adjournment before the full bench of this Court on 24th September 2008 so as to enable him make substitution.

The 2nd respondent died on 26th June 2005. The applicant was mandated to cause the legal representative of the deceased to be made a party to the appeal in her place within 12 months from that date. But, having failed to do so the appeal against her abated by dint of the provisions of rule 96(2) of the Rules.

The appeal having abated this application serves no real purpose since the substitution would not revive an abated appeal. Thus what the applicant is engaged in is an exercise in futility. See **Samuel Nyoike Nduati v Republic and Another Civil Application No. 292 of 2003 (Nyeri) unreported** and **Vyatu Limited & Another vs Public Trustee Nyanza province [2003] KLR 688**.

Again, the applicant who is unrepresented but appears well versed in the rules of the Court, has been indolent and guilty of laches in prosecuting this application. He knew when the 2nd respondent died but took no action to substitute her within the time limited by the Rules. He did not act for 3 years until he appeared before this Court in September, 2008. Even though he was chasing the necessary legal papers which would have enabled him to act, he did not explain why he went into another deep slumber of 10 months before lodging this application in May, 2009. The delay which is inordinate has not been explained at all.

Further, I express great doubt whether the applicant has a meritorious appeal which may be deemed arguable before this Court. I say so having perused his memorandum of appeal in Civil Appeal No. 288 of 2002.

The dispute the subject matter of the abated appeal has been simmering for well nigh 15 years. It is prejudicial to the respondents and the legal representative of the estate of the deceased to prolong it. Reviving it would procrastinate the dispute. It should be left to die as **rule 96(2)** demands so.

In the result this application fails and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 4th day of June 2009.

P.K. TUNOI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR