REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPEAL (APPLI) 123 OF 2005

PAULINE WAMBUI NGARI …..……..…..… APPELLANT/APPLICANT

AND

JOHN KAIRU ……..……...…1ST RESPONDENT

JAMES CHEGE ……. 2ND RESPONDENT

(Application for substitution from the judgment and the decree of the High Court of Kenya at Nairobi (Khamoni, J.) dated 17th day of September, 1997

in

H.C.C.C. NO. 464 OF 1985 (O.S.)

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R U L I N G

The appellant in the main appeal, ***Pauline Wambui Ngari,*** *("the deceased")* died on *26th November, 2007*. I now have before me an application dated *20th March, 2009* and filed one month later on *20th April, 2009*, by ***Margaret Wanjiru***, who says she is the legal representative of the deceased, seeking the following orders:-

"***1. THAT this Honourable court be pleased to revive this suit.***

2. THAT Margaret Wanjiru, the legal representative of Pauline Wambui Ngari the appellant herein be made party to this suit in order that she may proceed with the same to its conclusion in that capacity in place of Pauline Wambui Ngari, who is now deceased

3. THAT costs of this application be in the cause."

The applicant invokes ***Order XXIII Rule 4, 5*** and ***12*** of the *Civil Procedure Rules* and ***Rule 96(1)*** and ***(2)*** of the Court of Appeal rules. I have no hesitation in declaring that ***Order XXIII*** of the *Civil Procedure Rules* has no application in the Court of Appeal. The application must therefore be considered under ***Rule 96(1)*** and ***(2)*** of the rules of this Court which provide 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.***

(2) If no application is made under sub rule (1) within twelve months from the date of death of the appellant or the respondent, the appeal shall abate."

The only issue for determination is, therefore, whether the main appeal may be revived and the applicant substituted for the deceased under the above provisions.

Learned counsel for the applicant Miss G.W. Mwangi sought to persuade me that a single Judge of this Court has the discretion to grant the orders sought since the rules are silent and do not prohibit the procedure she has adopted. She submitted that there was a genuine reason why the applicant could not apply earlier than she did because she was sick for a long time and there was a note from a doctor to confirm it. At all events, no prejudice would be caused to the respondents because execution has already taken place despite the pendency of the appeal and they will have an opportunity of being heard in the main appeal. For his part, learned Counsel for the respondents, Mr. Kinuthia, submitted that there was no "*suit*" to "*revive*" as prayed in the application, since the matter was an appeal. Furthermore, there was no provision in the rules for revival of an abated appeal and the current appeal abated *2½ years* before the application was made. At any rate, he submitted, the affidavit in support of the application confirms that the applicant was only one of the children of the deceased and there is no explanation as to why it was not possible for any other person to apply for substitution within the time required by the rules. Substitution was possible within the rules but was not made, and therefore no discretion can be exercised, concluded Mr. Kinuthia.

I have considered the application, the affidavits on record and the submissions of counsel. Unfortunately, none of the two Counsel found it necessary to research on any authorities on the issue and none was cited before me. The construction of ***rule 96(1)*** and ***(2)*** of the rules of this Court has nevertheless been considered severally. Before *23rd May, 2008* when the full court delivered itself on the matter, there was divided opinion by single Judges of the Court on whether the time limit set in the rules for substitution of a deceased party may be extended with the result that an abated appeal is revived. One view was taken, for example, by Githinji, J.A. in ***Vyatu Limited & Another vs. John Oloo Ochieng***, *Civil Appeal No. 80 of 2000*, that this was not possible. The learned Judge of Appeal stated:-

"***I have considered the application. Firstly, there is no provision in the Court of Appeal Rules which authorizes any party to an appeal to make an application for revival of an abated appeal. Similarly there is no provision in the Court of Appeal Rules which gives this Court jurisdiction to order the revival of an abated appeal.***

In the case of suits, *Order XXIII rule (2)* ***(sic) of the Civil Procedure Rules gives a plaintiff or his legal representative a right to apply for a revival of an abated suit and also power to court to revive an abated suit on terms as to costs as the Court may think fit.***

There is no corresponding right given to an appellant in the Court of Appeal by the Rules to apply for the revival of an abated appeal or corresponding power given to the Court of Appeal to revive an abated appeal. Extending time for filing an application for making a legal representative of the deceased a party would in effect be tantamount to amending or revising *rule 96 (2)* ***of the Court of Appeal Rules."***

On the other hand, Bosire, J.A. differed with that view, stating:-

"***Coming back to the provisions of rule 4, if we are to adopt the reasoning of Githinji, J.A. in the case earlier cited, it will mean that a late applicant for substitution has no remedy. If such an approach were to be adopted, it is in my view, that, in an appropriate case, it would work injustice against those litigants or parties who delay to apply but may not be at fault or who would be having good reason for the delay. I believe that rule 4, above, empowers the court in cases as the one before me to make***

such orders as are necessary for the ends of justice or to obviate hardship . In exercise of that power the Court is guided by principles it has evolved over time, for instance the length of the delay, the reason for the delay, the likely prejudice to the opposite party and possibly the merits of the intended appeal. ……..…..”

Those views were rationalized by the full Court in ***Samuel Nyoike Nduati vs. Republic & Milka Wangui Ng'ang'a*** Civil Appl. No. NAI. 292/2003 (NYR.13/03) (UR), decided on *23rd May, 2008*, when the Court stated:-

“**The issue raised before us seems to be plainly the question of whether the provisions of rule 4 can be applied to revive an application or an appeal which has abated. Rule 4 provides:-**

“***The Court may, on such terms as it thinks just, by order extend the time LIMITED BY THESE RULES or BY ANY DECISION of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”*** *– emphasis added*

We must ask ourselves: What time is the Court entitled to extend under Rule 4?, and the answer must be:-

“***(i) Time limited by these Rules, or***

(ii) Time limited by any decision of the Court or the superior court.”

Obviously *paragraph (ii)* above did not apply to the situation under consideration and, therefore, only paragraph (i) applied.

Even if the period of six months and twelve months were extended under *Rule 4*, once an appeal has abated, there is no period set within which the abated appeal can be revived and therefore even if the six months or the twelve months are respectively extended that would not mean that the abated appeal has been revived. Githinji, J.A specifically referred to the provisions of *Order XXIII Rule 8 (2)* of the Civil Procedure Rules which provide for revival of abated suits and he went on to point out the lack of a similar provision in the Court of Appeal Rules. Since there is no provision for revival of abated appeals or applications, there can be no question of:-

“***time limited by these Rules or by an order of the Court or the superior court ….”***

to warrant the application of *Rule 4*. We entirely agree with the interpretation of the legal position contained in the ruling of *Githinji, J.A.* in the *VYATU LIMITED* case and we think Bosire, J.A did not correctly appreciate the position that *Rule 4* only applies to situations where there is a time limited by the Rules or by a decision of the Court or of the superior court. We appreciate the concern of Bosire, J.A that innocent litigants or other relevant parties may suffer injustice through no fault of their own and we hope the Rules Committee will play its part and rectify the position.”

The application before me does not seek any extension of time under ***rule 4*** and I cannot even begin to consider whether time should be extended to file any application for revival of the abated appeal. Even if that application had been made, however, it would meet the same fate as in the **Nduati Case** (supra). I must find and hold, as I now do, that the application before me is untenable. The appellant died on *20th November, 2007* but the appeal did not abate. The Court however did not receive any application by any interested person to cause the substitution of the deceased as at *25th November, 2008* which is one year from the date of death. The appeal thus abated on that day. No application could be made thereafter to revive it and the one before me came *1½ years* too late. That is the current state of our rules. Concerns have been raised, however, about the possible injustice inflicted by the rule and I am aware that in response to those concerns, the Rules Committee has made proposals, hopefully due for gazettement shortly, for provision of rules similar to the Civil Procedure Rules, for revival of an abated appeal or

application. Until the rules are amended, the only order I can issue, and which I do, is to dismiss the motion dated *20th March, 2009*. In all the circumstances, I make no order as to costs.

Dated and delivered at Nairobi this 24th day of July 2009.

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR