



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL (APPLI.) NO. 156 OF 2003

GOPAL RAMJI LADHA PATEL APPELLANT

AND

CITY FINANCE BANK LIMITED RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Lady Justice Gacheche) dated 20th January, 2003

in

H.C.C.C. NO. 807 OF 1999)

RULING

By this application expressed to be brought under **Rule 4** of the Court's Rules, the applicant, Purbhai Gopal Ramji Patel seeks two orders:

- “1. That this Honourable Court be pleased to enlarge time upon which to file the application for substitution out of time.**
- 2. That the applicant herein Purbhai Gopal Ramji Patel do substitute the appellant herein Gopal Ramji Ladha Patel (deceased).**

The respondent though duly served with the hearing notice through its counsel, was not represented before me when the application was called to hearing and hence I heard the applicant's counsel only.

The applicant is the widow of Gopal Ramji Ladha Patel, the deceased who died on 23rd March, 2004. However, before his demise the deceased, had lodged *Civil Appeal No. 156 of 2003* at Nairobi. This, he had done on 7th July, 2003.

It is indisputable that the appeal was not prosecuted before the deceased passed on and neither did any interested party nor his estate cause his legal representative to be made a party in his place. It must follow, therefore, that by dint of **Rule 96 (2)** of the Court's Rules the appeal had abated by 23rd March, 2005 since no application was made to substitute him within twelve months from the date of his death.

The applicant explains the omission to cause the deceased's substitution as due to lapses or lack of diligence on its previous counsel.

It is worthy of note that this application was filed on 28th February, 2008, about four year shy of one month after the death of the deceased and I am informed from the bar that the appeal is scheduled to be heard on 16th July, 2008.

The appeal having abated way back in 2005, there is no way that it can be revived under the Rules of the Court. It remains as dead as a dodo. This being the position, this application amounts to an exercise in futility since even if time to apply for substitution of a party was extended, that by itself would not revive the abated appeal. See **Vyatu Limited & Another vs. Public Trustee Nyanza Province** [2003] KLR 688 and **Samwel Nyoike Nduati vs. Republic**, Civil Application No. Nai. 292 of 2003 (unreported).

In the circumstances, since there is no provision for revival of an abated appeal, this application is rejected as it cannot succeed and must; accordingly fail.

Regrettable as it may be, since the applicant may suffer injustice through counsel's negligence, there is no way I can ameliorate the hard situation she finds herself in.

This application is hereby dismissed but with no order as to costs.

Dated and delivered at Nairobi this 11th day of July, 2008.

P. K. TUNOI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.