



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Civil Appli 38 of 2008 (NAK 4/08)

MWANGI KINYUA APPLICANT

AND

WAWERU KINYANJUI

DIRECTOR OF SETTLEMENT

MACHIRA MACHARIA

DANIEL KOGI GITHU

DANIEL MUHIARESPONDENTS

(an application for extension of time to lodge an application for substitution of WAWERU KINYANYUI (Deceased) by MWANGI KINYUA in the intended appeal from the High Court of Kenya at Nakuru (Koome J.) dated 27th July 2007

in

H.C.C.C. NO. 303 OF 2000

RULING

Mwangi Kinyua, the applicant, has moved this Court by motion on notice dated 2nd February, 2008, for an order that I exercise my discretion under **rule 4** of the Rules of this Court and extend the time within which to apply under **rule 96 (1)** of the said Rules for substitution of Waweru Kinyanjui as respondent in Civil Appeal No. 303 of 2000. The appeal is pending before this Court with the applicant as the appellant and Waweru Kinyanjui and four others as respondents. Waweru Kinyanjui died on 29th August 2004, during the pendency of the aforesaid appeal. By dint of the provisions of **rule 96(2)**, above, that appeal abated, after the expiry of twelve months from the date of death. This Mr. Kahiga Waitindi, Counsel on record for the applicant, conceded, but he argued that the abatement notwithstanding, the Court has jurisdiction under **rule 4** of the Court of Appeal Rules, to extend time even after the expiry of the time stipulated for doing any act or taking any step in an appeal.

The applicant is one of the creditors of the estate of Waweru Kinyanjui. It is the applicant's case that upon Kinyanjui's death he asked the Public Trustee to apply for letters of administration for purposes of

substitution under **rule 96 (1)** aforesaid, the Public Trustee but he refused that the estate of the deceased had no assets. It had only liabilities. The deceased's widow was not ready to apply for the grant. Consequently the applicant decided to make the application himself. By the time he obtained the grant the twelve months limitation period under **rule 96 (2)** aforesaid had expired, and hence this application.

Since the death of the deceased a period in excess of 4 years has gone by. The issue which arises is whether an extension of time will in itself without more revive the abated appeal. Mr. Kahiga's submission is that an application for an extension may be made before or after the expiry of the time stipulated for the doing of any act under the Rules of this Court.

Mr. Mutonyi for 3rd and 5th respondents submitted that the applicant was dilatory in ascertaining who was entitled to apply. Besides, the supporting affidavit, in his view is defective in that although the deponent in the supporting affidavit is shown as **Mwangi Kinyua**, the person who swore the affidavit is one **Peter Njoroge Kariuki**. Initially I was unable to appreciate this point, but when a copy of the passport annexed to the affidavit was drawn to my attention, the point became clearer. The relevant part of that affidavit is paragraph 13, which reads thus:

“That by the time the grant was being issued, I was out of the country in England to visit my daughter who was unwell. I only returned to Kenya on 8th December, 2007 as is evident from my travel documents. Annexed hereto and marked “MW7” are copies of the relevant travel documents.”

The travel documents annexed to the affidavit bear the names Njoroge Peter Kariuki and not Mwangi Kinyua. The deponent is shown to be Mwangi Kinyua, which then means that the applicant by relying on another person's documents was clearly intending to mislead the Court. The law in such matters is clear. In the English Case of The King v. The General Commissioners for the Purpose of the Income Tax for the District of Kensington ex parte Princes Edmond de Polignac [1917]1KB 485, Lord Viscount Reading authoritatively stated as follows:

“Before I proceed to deal with the facts I desire to say this: Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court come to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit.”

It is also quite clear that the appeal against Kinyanjui abated. While I agree with Mr. Kahiga that this Court has the jurisdiction under **rule 4**, aforesaid, to extend time both before and after the time fixed for doing any act has expired, I do not agree with him that an extension of time **per se** will revive a suit which has abated. To make this point clear, it is necessary to juxtapose the provisions of **rule 96 (2)** aforesaid and **O.23** of the Civil Procedure Rules. The former concerns applications for substitution of a deceased party before this Court, and the latter relates to similar applications but made in the High Court as a subordinate court. In the former there is no provision for the revival of a suit which has abated, but in case of the latter **rule 8 (1)** and **(2)** provides as material, as follows:

“8 (1) where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action.

(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.”

The above quoted provision concerns a deceased plaintiff. However provisions relating to the deceased defendants do not have a provision for the revival of the suit. The limitation period appears to me to be final. Hence **0.23 rule 4(3)**, has provision for abatement of a suit against a deceased defendant, but there is no provision for revival of the suit. That position appears to be analogous to **rule 96 (2)** of this Court’s rules, which also has provision for abatement but none for revival of an appeal.

In the foregoing circumstances it is clear to me that unless an appeal is revived, extending the time within which to apply for substitution will be an exercise in futility.

Having come to the foregoing conclusions, I do not think there is any basis for exercising my judicial discretion under **rule 4**, above, to extend time within which to apply for the substitution of Waweru Kinyanjui. That being my view of the matter it behoves me to dismiss the applicant’s application dated 2nd February 2008, with costs to the 3rd and 5th respondents, the other respondents having not participated in the application. It is so ordered.

Dated and delivered at Nakuru this 3rd day of October, 2008.

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR