



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Githinji JA)

CIVIL APPLICATION NO NAI 218 OF 2003 (KSM 30/2003)

VYATU LIMITED & ANOTHER.....APPLICANT

VERSUS

PUBLIC TRUSTEE, NYANZA PROVINCE.....RESPONDENT

(An application for extension of time to substitute a Legal Representative

of the deceased in an appeal from Judgment and Decree of the High Court

of Kenya at Kisumu, Wambilyanga J, dated 4th July, 2000 in

HCCA No 80 of 2000)

RULING

The applicant seeks the following orders:

1. That time limited for substitution of a legal representative of the deceased respondent be extended to enable the applicant to substitute the Public Trustee Nyanza Province as a legal representative of the respondent in Civil appeal No 80 of 2000 *Vyatu Limited and another v John Oloo Ochieng*.
2. That thereafter Civil appeal No 80 of 2000 which has abated due to effluxion of time subsequent to the death of the respondent be revived and be put back in the list of appeals to be heard.

The application is brought under rule 1(2) Court of Appeal Rules, rule 4 of Court of Appeal Rules, section 3A of the Civil Procedure Act, section 95 of Civil Procedure Act and order XLIX rule 5 of Civil Procedure Rules.

The application is supported by the affidavit of Mr L G Menezes. The respondent was the plaintiff in High Court Civil suit No 320 of 1997. He had sued the applicants herein to recover general and special damages for injuries he suffered in a road traffic accident. The High Court awarded the respondent a total of Shs 721,500/= with costs on 4th July, 2000.

The applicant was dissatisfied by the judgment of the High Court and filed Civil Appeal No 80 of 2000. The respondent died on 26th February, 2002 before the appeal was heard. It is conceded that the appeal was now abated by virtue of rule 96(2). Rule 96 of the Court of Appeal Rules provides:

“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 subrule 1 within twelve months from date of death of the appellant or the respondent the appeal shall abate”.

On 12th June, 2003 the High Court made the following order in HCCC No 320 of 1997:

1. That the Public Trustee Nyanza Province be and is hereby appointed interim administrator of the estate of the late John Oloo Ochieng.
2. That the judgment debtor do pay the decretal sum to the interim administrator of the estate of the decree holder within 30 days from the date of the suit.
3. That the interim administrator do pay the advocate – client taxed costs to the advocates for the decree holder.

In further proceedings in the High Court an objection was raised on the participation of M/s Otieno Omuga & Co Advocates for the deceased John Oloo Ochieng and on 13th October, 2003 Tanui J ruled thus:

“The gist of this objection is that the advocates for the plaintiff who has since died and a legal representative has not been substituted in his place does not have *locus standi*. I agree with the fact that such a firm of advocates cannot have had instructions to proceed with the case subsequent to the death of their client and before a legal representative is substituted. If in the present case the

Public Trustee was only appointed an interim administrator mainly for the purpose of receiving the decretal sum”.

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) 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.

Secondly, the Public Trustee has not been officially appointed a legal representative of John Oloo Ochieng (deceased) because the Public Trustee has not been granted letters of administration or limited grant *pendent lite* under paragraph 10 of the Fifth Schedule to the Law of Succession

Act. The order of the High Court given on 12th June, 2003 appointing the Public Trustee as interim liquidator does not in fact appoint the Public Trustee as a legal representative of the deceased. The duties of the interim administrator are limited by the order to that of receiving the decretal sum and paying the costs of the advocate.

For the above reasons, the application is incompetent and is dismissed with costs to the Public Trustee.

Dated and delivered at Kisumu this 28th day of November, 2003

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR