

REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
CIVIL APPEAL (APPLI) 304 OF 1997

HENRY WAITHAKA GITU1ST APPLICANT

JEREMIAH WILSON MWAURA2ND APPLICANT

AND

SAMUEL NDUNGU GITU 1ST RESPONDENT

DANSON NDUNG'U..... 2ND RESPONDENT

MATHEW NGICHABE SISENDA 3RD RESPONDENT

MARY MWAYITSI SISENDA 4TH RESPONDENT

(Being an application to join the applicants as parties in the Appeal in their capacities as legal representatives of the later Wilson Gitu Njuguna and to extend time to serve Notice of Appeal and Record of Appeal on the applicants in the Appeal from judgment of the High Court of Kenya at Kakamega, (Justice B. Tanui) dated 11th July, 1997

in

H.C.C.C. No.110 of 1988 (O.S)

RULING

The present application by the applicants who are the legal representatives of the deceased who was the first defendant in the suit before the superior court and who died after giving evidence but before judgment was given by the superior court, to be joined as respondents in the appeal filed by the respondent herein, must succeed. The application which is brought under Rule 83(2) enables the legal representatives of the deceased which the applicants undoubtedly are, to be made a party in place of the deceased. This Rule is not dependent on Rule 77 which merely provides that a Notice of Appeal shall not be incompetent by reason only that the intended respondent is dead at the time when it was lodged and that it shall be served as soon as practicable on his legal representatives, in this case, the applicants. This is what the appellant should now do if he has not yet done so. Indeed, this is what this Court on 18th June, 1999, requested the appellant to do and awarded costs against him.

The objection to the present application that the applicants who are intended appellants, but rather respondents in the appeal, should have filed a notice of appeal, is therefore not applicable. Similarly, the objection that the applicants can only apply to be made a party to the appeal only if the deceased had been made a party to the appeal before his death, is, having regard to the clear provisions of Rule 83(2) which does not mandate such a precondition, flawed.

In the result, the application succeeds and the applicants are hereby joined in their capacities as legal representatives of the deceased, Wilson Gitu Njuguna, as respondents in the appeal from the judgment of Tanui, J. delivered on 11th July, 1997 in Civil Case No.110 of 1988 (O.S) and as such, shall be served with the Notice of Appeal by the appellant in that appeal within 7 days from today and with a Record of Appeal within 30 days from the service of the Notice of Appeal.

In my view, and having regard to the Ruling of this Court on 18th June, 1999, already referred to, the appellant in the appeal should have served the notice of appeal on the applicants by now, but has rather taken an obstinate stand on the matter. I will, however, make no order as to costs in respect of the present application.

Dated and delivered at Kisumu this 20th day of March, 2000.

A.M. AKIWUMI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR