



Case Number:	Civil Appeal 11 of 2005
Date Delivered:	04 Mar 2016
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Ruling
Judge:	Paul Kihara Kariuki
Citation:	Kezia Wambui Mwaura & another v Clement J M Kariuki & 4 others [2016] eKLR
Advocates:	Mr. Alexander Jaoko for the Respondent
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	H. C. C. C. NO. 290 OF 1994
Case Outcome:	Application allowed
History County:	Nairobi
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), (IN CHAMBERS)

CIVIL APPEAL NO. 11 OF 2005

BETWEEN

KEZIA WAMBUI MWAURA

ANN WOKI KARANJA.....APPELLANTS

VERSUS

CLEMENT J.M. KARIUKI

MARGARET WAMBUI

PETER G. W. NJIRI

JOHN W. LUKANDU

KENYA ASSEMBLIES OF GOD CHURCH.....RESPONDENTS

(An application for substitution in Civil Appeal No. 11 of 2005, being an appeal from the judgment of the High Court of Kenya at Nairobi (Ransley, J.) dated 15th October, 2004)

in

H. C. C. C. NO. 290 OF 1994

RULING

1. By way of motion on notice dated the 9th November 2015 and brought under **rules 42 (1)** and **99** of this Court's rules, the applicant, Grace Wanjiku Karanja seeks orders that:

a. ***This Court be pleased to order that the appellants herein be substituted with their personal representative one Grace Wanjiku Karanja; and***

b. ***This Court be pleased to order that this abated Appeal be revived.***

2. The application is supported by the applicant's affidavit in which she depones that the 1st appellant passed away on the 5th July 2013 while the 2nd appellant passed away on the 5th May 2014. The applicant obtained grants of representation in respect of the 1st and 2nd appellants on the 30th September 2015 and the 27th July 2015 respectively. She further avers that by the time she became aware of the pendency of the appeal, and that in the time that it took her to obtain the grants of representation, the appeal had abated. She depones that the delay in bringing this application to regularize the appeal was not deliberate, and that no prejudice will be suffered by the respondents if the orders sought herein are granted.

3. The respondents opposed the application. Relying on the replying affidavit sworn by the Reverend Peter Njiri, the respondents contend that the rules under which the application has been brought do not allow this Court to revive an appeal that has already abated. In addition, the respondents contend there has been no explanation as to the long delay in obtaining the grants of representation, or in bringing the present application to revive the appeal.

4. Rule 99 of the Court of Appeal Rules, 2010, provides that:

99(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 respondent, the appeal shall abate.

3. *The person claiming to be the legal representative of a deceased party to an appeal may apply for an order to revive an appeal which has abated; and if it is proved that the legal representative [was] prevented by sufficient cause from continuing the appeal, the court shall revive the appeal upon such terms as to costs or otherwise as it deems fit.*

5. This application was filed on the 12th November 2015, two years and four months after the death of the 1st appellant, and one year and six months after the death of the 2nd Appellant. Thus, it is clear that the application has been brought outside the time prescribed under rule 99(2). This Court, however, has jurisdiction under sub-rule (3) of rule 99 to revive an application provided that sufficient cause is shown.

6. Learned counsel for the respondent, Mr. Alexander Jaoko, referred the Court to various authorities, all in support of the proposition that this Court has no jurisdiction under rule 99 to revive an appeal which has abated. All these authorities refer to rule 96(2) of the retired Court of Appeal Rules, which rule was similar to rule 99 (1) and (2) of the current Court of Appeal Rules, 2010 now in force, and all hold that this Court did not have the power to revive an abated appeal.

7. It must be noted that these pronouncements on rule 96 are no longer authoritative as the former rules were repealed upon the Court of Appeal Rules, 2010 coming into force on the 17th September 2010. In these current rules, a new sub-rule under rule 99, being sub-rule 3, was introduced as reproduced hereinabove. Rule 99(3), which was in force when the present application was filed, clearly gives this Court jurisdiction to revive an abated appeal if sufficient cause is shown as to why the appeal did not continue. Therefore, the argument that there is no competent appeal upon which an application can hinge is misplaced.

8. The next question, therefore, is whether or not the applicant's explanation as to the reason for delay amounts to sufficient cause. The reasons given for the delay is that the legal representative of the appellants was not aware of the pendency of the appeal, and that by the time she sought the necessary documents in order to file the present application, the appeal had already abated.

9. Upon consideration of the submissions of the parties, I find that the explanation as to the reason for the delay amounts to sufficient cause that would enable the applicant benefit from the provisions of rule 99(3) of this Court's rules. It is clear that once the applicant became aware of the appeal, she took the necessary steps to obtain the requisite documents for filing the application for substitution. Consequently, the applicant has shown sufficient cause as required under rule 99(3). In the result, this application is allowed and the orders sought be and are hereby granted in terms of prayers Numbers 1 and 2 in the Notice of Motion filed on the 12th November 2015. The costs of this application shall abide the outcome of the appeal.

10. Orders accordingly.

Dated and Delivered at Nairobi this 4th day of March, 2016. P. KIHARA KARIUKI, (PCA)

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR



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