



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL NO. 18 OF 2013

BETWEEN

COSMAS BULUMA APPLICANT

AND

ESAU NAMULANDA FIRST RESPONDENT

BERNAD OKWARA BALONGO..... SECOND RESPONDENT

(An appeal from a ruling of the High Court of Kenya at Busia (Kibunja, J.) dated 29th April, 1997 in H.C.C.A. NO. 6 OF 1997

JUDGMENT OF THE COURT

1. On 14th September, 2007 the appellant filed an application in the High Court of Kenya at Busia seeking, *inter alia*, that the decree of the High Court dated 31st May, 1998 be reviewed and/or set aside.
2. In his short affidavit in support of the application, the appellant stated that sometimes in 1992, jointly with his deceased father, the late **Richard Buluma**, they filed a suit, **Busia RMCC NO. 56 of 1992**, against the respondent. While the hearing of the case was ongoing, the appellant's father died. The appellant chose to proceed with the case above and it was determined in his favour.
3. The respondent filed an appeal to the High Court but did not name the late Richard Buluma as one of the parties, although no formal order had been made to remove his name as a party.
4. The appeal was decided in favour of the respondent and the court remitted the case back to the lower court, which in turn referred the matter to the area Land Disputes Tribunal. The Tribunal decided in favour of the appellant. It specifically ordered the parties to respect the boundaries that had been established by the District Surveyor. The appellant was not entirely happy with the turn of events. He sought a review of the High Court judgment, the gravamen of the application being that "*the appeal was filed without the name of the first plaintiff*", his late father.
5. The application for review was opposed by the respondents. They stated that the appellant's father died when the initial case was still pending before the magistrate's court and the appellant told the

court that he would proceed with it alone. That being the case, the appellant's deceased father could not be cited as a respondent in the appeal before the High Court. The respondent further stated that there were no new facts to warrant a review of the High Court's decision.

6. In his considered ruling, **Kibunja, J.** observed that the appellant's father died on 30th July, 1994, and judgment in Busia RMCC No. 56 of 1992 was delivered on 14th March, 1997, about two years and eight months after the death of the appellant's father.

7. The learned judge further held that the issue of demise of the appellant's father was all along known to both parties and was not raised before the High Court. Consequently, there was no discovery of new and important matter or evidence which could warrant a review of the High Court judgment.

8. The learned judge went on to state that the order sought to be reviewed was made on 21st May, 1998 and the application for review was filed on 14th September, 2007, almost 9 years thereafter. The delay was inordinate, the court held. The court found no merit in the application, and dismissed the same in its entirety.

9. Being dissatisfied with that decision, the appellant preferred an appeal to this Court. Some grounds of appeal as set out in the Memorandum of Appeal that was drawn and filed by the appellant in person consists of grounds that are largely not relevant, considering the scope of the application that was before Kibunja, J., as they relate to the merit of the High Court decision. The learned judge was dealing with an application for review and his task was to consider whether the grounds for review as set out under **section 80 of the Civil Procedure Act and order XL1V**, (as it then was), had been satisfied.

10. We have carefully reviewed the impugned ruling and we entirely agree with the learned judge that the trial magistrate in rendering her decision was well aware that the appellant's father had died. At the time the appellant was represented by an advocate and he had informed the trial court that he wanted to proceed with the case as the only plaintiff in the suit. The claim by the late Richard Buluma abated one year after his death, and it would have been unprocedural to name a deceased person as a respondent in the appeal that was subsequently filed against the trial court's decision.

11. We also agree with the learned judge that the application for review did not satisfy the provisions of **section 80** of the **Civil Procedure Act and Order XL1V rules 1 & 2** of the Civil Procedure Rules (repealed). There had been no discovery of new and important matter or evidence that was not within the knowledge of the appellant at the time when the High Court delivered the impugned decision.

12. All in all, we find no merit in this appeal and consequently dismiss it in its entirety. The appellant shall bear the costs of appeal.

DATED and delivered at Kisumu this 6th day of November, 2015

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb,

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR