



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)**  
**CIVIL CASE 1821 OF 1999**

**GANIJEE GLASS MART LTD ..... 1<sup>ST</sup> PLAINTIFF**

**PAN AFRICA GLASS INDUSTRIES LTD ..... 2<sup>ND</sup> PLAINTIFF**

**NAJMUDIN JIWJI GANIJEE ..... 3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**FIRST AMERICAN BANK LTD ..... DEFENDANT**

**RULING**

This is an application by the Defendant (by chamber summons dated 8<sup>th</sup> September 2006) for substitution of one RASHIDA RAJABALI GANIJEE (hereinafter called RASHIDA) and one KHADIJA NAJMUDIN JIWALI GANIJEE (KHADIJA), in place of the 3<sup>rd</sup> Plaintiff, NAJMUDIN JIWJI GANIJEE who is now deceased. It is brought under Order 23, rule 3 of the Civil Procedure Rules and is supported by the affidavit of one ROSEMIN KARIM BHANJI, an advocate of this court and the legal advisor/company secretary of the Commercial Bank of Africa, which is said to have acquired the entire equity, assets and liabilities of the

Defendant with effect from 1<sup>st</sup> July 2005. There is also a Further Affidavit sworn by FREDRICK NGATIA, the Defendant's learned counsel, filed on 26<sup>th</sup> January 2006.

The application is opposed upon the grounds that it is premature, fatally defective and an abuse of the court process. There is a Further Affidavit filed on 7<sup>th</sup> February 2007 pursuant to order of court of 1<sup>st</sup> February 2007. It is sworn by one IJAZ HUSSEIN GANIJEE, a director of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs. I cannot see on the court record any original replying affidavit.

The following facts are not in dispute:

1. The 3<sup>rd</sup> Plaintiff died on 3<sup>rd</sup> May 2006.
2. He left a Will in which he named RASHIDA and KHADIJA as the executors.
3. As such executors RASHIDA and KHADIJA filed **Nairobi High Court CC No. 485 of 2006** to

safeguard the interests of the estate of the deceased 3<sup>rd</sup> Plaintiff in relation to some property. See paragraph 3 of the Supporting Affidavit and the documents annexed thereto.

4. The said executors have already applied for probate of the Will vide **Nairobi High Court Probate & Administration Cause No. 1235 of 2006**. See paragraph 2 of the Supplementary Affidavit. But probate has not been granted as yet.

The legal issue that arises in this application is whether those executors can be substituted in place of the deceased 3<sup>rd</sup> Plaintiff in this suit under rule 3 of Order 23 of the Civil Procedure Rules. That rule provides for substitution of the legal representatives of a deceased plaintiff where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone. The court was not addressed as to whether or not the cause of action survived or continues to the surviving 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs alone following the death of the 3<sup>rd</sup> Plaintiff. I shall proceed on the basis that it did not so survive or continue.

I have considered the submissions of the learned counsels appearing, including the cases cited. “Legal representative” is defined in Section 2 of the Civil Procedure Act, Cap. 21 as:

**“.....a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued”.**

Section 80 of the Law of Succession Act, Cap. 160, provides as follows:

**“80. (1). A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such.**

**(2) A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of the grant.”**

It is immediately clear that whereas in intestacy the legal representative of a deceased person will act on behalf of the estate of the deceased only from the date of the grant of letters of administration, where the deceased has left a Will the executor of such Will, can act as such from the date of death of the deceased. Such executor will from the date of the deceased’s death be entitled to intermeddle in the estate of the deceased, so long as such intermeddling is consistent with his duties as such executor. Indeed RASHIDA and KHADIJA have already intermeddled in the estate of the 3<sup>rd</sup> Plaintiff by **filing Nairobi High Court CC 485 of 2006** aforesaid. This position of the law is buttressed by the following quote in the text **WILLIAMS ON WILLS**, 7<sup>TH</sup> Edition, page 225, as quoted in the unreported case of this Division (Kasango, J.), **High Court Civil Case No. 543 of 2005, LALITABEN KANTILAL SHAH V SOUTHERN CREDIT BANKING CORPORATION LTD:**

**“Since the executor derives his title from the Will and all the estate and interest in the testator’s property vests in him on the testator’s death he can do any act before probate, which is a mere authentication of his title”.**

If an executor is entitled to intervene on behalf of the estate of a deceased person before grant of probate, any other person ought to be entitled to sue such executor on behalf of the estate of the deceased before grant of probate. It has been previously held so by two judges of this court in the case of **KOTHARI V QURESHI AND ANOTHER [1967] EA 564**. The relevant holdings in that case were:

- (i) The executor had validly been named a party to the suit under Orders 23 and 24 of the Civil Procedure Rules, and the appeal was to proceed.**
- (ii) It was not necessary that probate of the will be granted before the executor could be made a**

**valid party to the suit as representative of the deceased.**

I therefore do not accept the argument by learned counsel for the Plaintiffs, Mr. Nyakundi, that whereas the executor is entitled to act on behalf of the estate of the deceased from the date of the death of the deceased, including institution of suits, that he cannot be sued on behalf of the estate of the deceased because the act of being sued, as put by Mr. Nyakundi, is not the act of the executor. I think, with respect, that this argument is both self-serving and fallacious. Surely what is good for the goose must be good for the gander. It is only logical that the law have uniform application. The application is not premature, nor fatally defective, nor an abuse of the process of the court as urged for the Plaintiffs.

I am persuaded by the arguments of the learned counsel for the Defendant, Mr. Ngatia, that it will be in accordance with the law to substitute the executors of the deceased 3<sup>rd</sup> Plaintiff's Will in his place in this suit, notwithstanding that probate of the Will has not as yet been granted. I will in the event allow the application as prayed. Costs of the application shall be in the cause.

**DATED AT NAIROBI THIS 22ND DAY OF FEBRUARY, 2007**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED ON THE 22ND DAY OF FEBRUARY, 2007.**