

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

(MILIMANI COMMERCIAL COURTS)
Civil Case 423 of 2003

DELPHIS BANK LIMITEDPLAINTIFF

VERSUS

SUNIL BEHAL T/A KRISHAN BEHAL & SONSDEFENDANT

RULING

The Plaintiff has pending before court Chamber Summons dated 28th September, 2006. That application seeks the substitution of the legal representative of the deceased defendant to be joined in this suit. Before the application could be argued an objection was raised by the respondent's advocate. The Respondent stated that by virtue of Order XXIII of the Civil Procedure Rules the Plaintiff ought to have sought the substitution of the legal representative within 1 year. Failure to do so the suit abated. In this case the Respondent said that the Defendant died on 31st September, 2005. The Respondent said that the Plaintiff's application for substitution was filed on 2nd October, 2006. That it ought to have been filed on 1st October, 2006. The Respondent said that the Plaintiff had sat on their rights and therefore they had been caught by the provisions of Order XXIII and therefore, the suit has abated as against the deceased Defendant. In response Plaintiff's counsel stated that the Defendant died on 30th September. That accordingly the application for substitution although should have been filed on 1st October, that day fell on a Sunday and according to Order XLIX Rule 3 where the time of doing an act or taking proceedings expires on Sunday when the Judicial offices are closed such proceedings should be taken in the next day that the offices are open. The Plaintiff therefore, argued that the application was in time and the objection raised by the Respondent should be dismissed.

Although the Plaintiff counsel in oral submissions said that the Defendant died on 30th September 2005 the affidavit in support of the application for substitution states that the Defendant died on 31st September, 2005. It ought to be noted that the month of September does not have 31 days but rather has only 30 days. The Respondent in raising the present objection argued that the Defendant died on 31st September. The objection cannot be correct because of what has been stated hereinbefore. However, if indeed as argued by the Plaintiff that the last day to file the application for substitution was on a weekend, the Plaintiff would find respite in Order XLIX Rule 3 which provides as follows:-

“Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceedings cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open”.

The Plaintiff is the author of the present confusion as to the exact date of death of the Defendant. The Plaintiff even in filing the Chamber Summons failed to attach appropriate evidence to show the exact date the Defendant passed away. It is not enough for the Plaintiff to rely on newspapers clippings in an application like the one before court. It is in the interest of justice that leave be granted to the Plaintiff to file another affidavit in support of the Chamber Summons to bring out this issues clearly particularly on the date of death and also on the evidence that the persons the Plaintiff seeks to join that they are indeed legal representatives of the deceased Defendant. The end result is that the objection raised by the Respondent is rejected and is dismissed with costs to the Plaintiff. The Plaintiff is granted 14 days from

this date hereof to file a further affidavit in support of the Chamber Summons dated 28th September, 2006 in the terms stated herein before. Orders accordingly.

MARY KASANGO

JUDGE

Dated and delivered this 30th day of November, 2006.

MARY KASANGO

JUDGE