REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL CASE NO. 12 OF 2002

KIBAI ARAP BUSIENEI)

SUSANA CHEPKOSGEI)

TABRANTICH KIPROTICH

(suing for themselves and on behalf of 16 **others)……PLAINTIFFS**

VERSUS

PETER BOISIO NGETICH)

JOSEPH ARAP CHERUIYOT) ……..……DEFENDANTS

KIMORONG MIBEI)

RULING

I delivered a ruling in this matter on 11.3.2004 in which, I dealt with the issue of the value of the subject matter and the quantum, which should be considered for the purposes of taxation. I also dealt with who should pay the costs therein.

Though notices had been issued, the plaintiffs who were not represented when the ruling was delivered and who feel dissatisfied by my ruling, have now moved this court for an order that they be granted leave to appeal against the said ruling. They also pray that the costs of their application be in the cause.

Apart from the fact that they feel aggrieved by the said ruling, the plaintiffs who I shall now refer to as the "applicants", and who filed the Notice of Appeal within the required time, contend that if their application is allowed, the respondents stands to suffer no prejudice.

The application is however opposed on the grounds that though the 1st plaintiff died on 8/5/2003, a year before the Ruling, no substitution has been made, and in the circumstances, the deceased could not have instructed the Firm of Nyairo & Company Advocates to appeal on his behalf, that the application is not only defective but that it is improperly before this court and out to be struck out. It is also the respondent's contention, that it is the applicant's intention is to delay the finalisation of the matter.

The application is brought under Order XLII rule 1 (3) and (4) of the Civil Procedure Rules and Section 75 of the Civil Procedure Act.

It was the submission of Mr. Nyachiro, learned counsel for the respondent, that the contentious ruling

was pursuant to a reference by both parties to this court, which reference has to proceed by way of a case stated and that in the circumstances Order XLII would not apply in aid of the applicants, as the said reference sought a conclusive determination of the rights of the parties herein in respect of the case stated, and that in any event, the Advocates Remuneration Rules under which the said reference was made, do not provide for an appeal.

Mr. Kuloba, learned counsel for the applicants was of the view that the ruling did not finally determine the rights of the parties and that it was not therefore a decree, but an interlocutory order for which he requires leave to appeal, and also that he was not required to apply for leave before filing his Memorandum of Appeal which was filed a day before the application that is now before me.

The aforementioned Order XLII rule 1 (3) and 4 Rules stipulate that:

> *(3) An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either informally at the time when the order is made, or within 14 days from the date of such order.*
>
> *(4) An application for leave to appeal shall be by summons or orally at the time of the making of the order.*

Section 75 of the Civil Procedure Act stipulates that "*An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted -*

> *(a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;*
>
> *(b) an order on an award stated in the form of a special case;*
>
> *(c) an order modifying or correcting an award;*
>
> *(d) an order staying o r refusing to stay a suit where there is an agreement to refer to arbitration;*
>
> *(e) an order filing or refusing to file an award in an arbitration without the intervention of the court;*
>
> *(f) an order under section 64;*
>
> *(g) an order under any of the provisio ns of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;*
>
> *(h) any order made under rules from which an appeal is expressly allowed by rules.*

(2) No appeal shall lie from any order passed in appeal under this section".

The Advocates Act is an Act, which was enacted purely to amend and consolidate the law relating to advocates, a perusal of the Advocates Act and rules reveals that no reference is made to appeals on matters emanating there-from. Is it then to be assumed that orders granted by court in pursuance of references to court are not subject to appeal? It does not prescribe the mode of procedure between the advocates and it would therefore be expected that in a contentious matter, parties would have to fall back to the Civil Procedure Act for guidance, which Act makes provisions for procedure in Civil courts.

Therefore, though the specified rules of the Advocates do not make reference to an appeal, I am however of the humble opinion that where such reference is lacking, a party should fall back to the Civil

Procedure Act and Rules where he would find that the abovementioned Section 75 (h) of the Civil Procedure Act would cater for his needs and interests.

It is therefore, my humble opinion that, a party should be granted audience by a higher court where he can ventilate his views, if and when he is aggrieved by the ruling emanating from a case stated; such as this one. On that ground alone, I would find that Mr. Kuloba has a recourse to the Court of Appeal; subject however to obtaining leave as is required under Order XLII rule 1.

Be that as it may, Order XXIII rule 3(1) of the Civil Procedure Rules stipulates that:-

> *"Where one of two or more plaintiffs di es and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, sh all cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit."*

It is common ground that one of the appellants in the intend appeal died before my ruling was delivered. It cannot be gainsaid that it was important that substitution be made or it be seen that an effort has been made towards achieving the goal. But no efforts, has appear to have been made in this instance and in my opinion, an appeal cannot be made by a deceased person.

Before I proceed further, it is important to note that a Memorandum of Appeal had already been filed herein. It is thus imperative that I distinguish between a Notice of Appeal and a Memorandum of Appeal in relation to orders for leave to appeal against a decision of the court.

The Black's Law Dictionary 7th Edn, describes the Notice of Appeal as "*a document filed with a court and served on the other parties, stating an intention to appeal a trial court's judgment or order…….*"

It has been found to be an uncomplicated document and indeed Musoke J.A of the former Court of Appeal for East Africa described it in Njagi v Munyiri [1975] EA 179,180 I as " *no more that is a formal written information to the court of an intention to appeal, and it may be withdrawn at any time. It is normally lodged as a matter of course. Upon payment of a small fee, by any party wishing to appeal against a decision of a superior court, irrespective of whether the intended appeal has merits or not and no documents of the superior court are required at this stage."*

The same finding would apply to a Notice of Appeal filed by a litigant who wishes to appeal against the decision of the subordinate court.

But how different is the Notice of Appeal different from a Memorandum of Appeal, and how would it affect a litigant who failed to seek and obtain leave to appeal against a ruling of the nature that I delivered on this matter.

Order XLI rules 1, 1B and 2 of the Civil Procedure Rules stipulates that

> *"(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.*
>
> *1B (1) The appellant may amend his memorandum of appeal without leave at any time before the court gives directions under rule 8B.*
>
> *(2) After the time limited by subrule (1) the court may, on ap plication by summons, permit the appellant to amend his memorandum of appeal."*

An application of this nature can only lie after a litigant has filed a Notice of Appeal, but once a Memorandum of Appeal is filed, it can be safely assumed that an appeal is already in place and to grant leave at this stage would be tantamount to putting the cart before the horse, a situation that should not be

allowed. Leave must be sought before the Memorandum of Appeal is filed, which can only lead me to the conclusion that this application has not only been brought as an afterthought, but that it is misconceived, and I do dismiss it with costs.

I

Dated and delivered at Eldoret this 23rd day of July 2004

JEANNE GACHECHE

JUDGE

Delivered in the presence of:-