IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Apaloo CJ, Kwach, Cockar, Omolo & Tunoi JJ A)

CIVIL APPEAL NO 145 OF 1990

TROUISTIK UNION INTERNATIONAL

INGRID URSULA HEINZ ……..…… APPELLANTS

VERSUS

JANE MBEYU

ALICE MBEYU ……..….. RESPONDENTS

(Appeal from a Judgment and Decree of the High Court of Kenya

at Mombasa (Mr Justice Bosire) dated 17th October, 1989 in

HCCC No 172 of 1987)

JUDGMENT

This appeal was very well argued by counsel on both sides. However, when the submissions were concluded on the 6th October last, each and every member of the Court, independently, reached the same conclusions, namely, the appeal based on the competence of the action on the Law Reform Act must succeed.

The appeal was listed before a bench of three judges at Mombasa on the 20th July, 1993. When hearing opened, counsel for the appellants informed the Court, that he would seek a reversal of a judgment of this Court composed of the ordinary bench of three judges. The issue, he said, would be material to this appeal and invited us to consider constituting a full bench of five judges. When this matter was put to counsel for the respondents, he readily agreed.

In *Income Tax v T* [1974] EA 546, Spry, Ag VP, speaking for the Court said:

> "I would also remark that where it is intended to ask this Court to reverse one of its own decisions, the President should be asked to consider convening a bench of five judges although a bench of three has the same powers".

That request was made to us and acceded to. This explains the somewhat unusual composition of the Court.

We must now relate, briefly, the facts which are far from unique. A man of about 65 years of age by name John Katembe who was said to be a retired chief, lived in Mombasa. On the 10th April, 1984, he was, according to the evidence, walking along the Tom Mboya Avenue in that city. At about 8.00 am, he was knocked down and severely injured by a saloon car driven by the second appellant. The accident took place near a zebra crossing. He was taken to hospital but succumbed to his injuries. A bus driver who took him to the hospital, said he died in the course of examination by a doctor.

On the 10th March, 1987, the respondents who claimed to be widows of the deceased, brought an action in the High Court, Mombasa. They claimed that in knocking down and inflicting injuries on the deceased from which he met his end, the 2nd appellant was negligent. They therefore claimed damages under two pieces of legislation, namely, the Law Reform Act (cap 26) and the Fatal Accidents Act (cap 32) against the 2nd appellant and her employer. On the pleadings, both appellants denied negligence.

However, when trial opened before the High Court, the appellants admitted negligence and the learned judge was not troubled with any evidence or argument on that issue. After listening to and weighing the evidence presented to him, the judge, in a full and well reasoned judgment, awarded damages to the respondents under the two Acts.

With regard to the compensation under the Fatal Accidents Act, the learned judge lamented the paucity of evidence on which he could comfortably base an award. But he thought the respondents should not be denied compensation only on that ground and that it was his duty to do the best he could with the available material. And having done so, he reached a figure of Kshs 38,880 as damages. Although some of the grounds in the memorandum of appeal suggest that the quantum of the award was to be challenged before us, no complaint on the quantum of damages was addressed to us. In our opinion, the judge's approach to the paucity of evidence on the question of the loss of dependency was right and his eventual award was fair and reasonable. We have not been invited to disturb it. In any event, any invitation to us to interfere with that award, would not have had the slightest prospect of success. So, whatever may be the fate of this appeal in any other respect, we would affirm the damages awarded to the respondents under the Fatal Accidents Act as well as the modest sum of Kshs 6,100 awarded them for funeral and incidental expenses.

But the real battle that was fought before us, was on the learned judge's award of damages to the respondents under the Law Reform Act. Simply put, the appellants complained that the respondents lacked standing to present and prosecute a suit for the benefit of the deceased's estate. The reason they say, is because the respondents did not obtain letters of administration before commencing the suit. Accordingly, they say the award of damages made in their favour was void as was the action itself. The respondents replied that the suit was competently filed and that the judge's holding that it was a valid suit was right and should not be disturbed. To buttress their submission, they cited and relied on a decision of the ordinary bench of the court in the case of *Roman C Hintz v Mwangombe Mwakima* [1988] 1 KAR 482 decided on the 26th July, 1984. In that case, as in this, the capacity of a plaintiff to commence an action for the benefit of a deceased's estate under the Law Reform Act was disputed. In a split decision, the Court decided that such an action could be competently set on foot without first obtaining letters of administration.

The appellants say, that that case was wrongly decided or at any rate, is no longer good law and invited us to so hold. This is a bold submission and we must examine whether that contention is soundly based.

The common law rule on this matter is expressed in the Latin maxim "*actio personalis moritor cum persona*" that is, a personal action dies with the person. This rule was, to a large extent,supplanted by the Law Reform Act. That Act keeps alive, with few exceptions, causes of action which vest in a person since deceased. Accordingly, to determine who is empowered to enforce that chose in action, for what purposes, and when in point of time, one must look at that Act and allied relevant legislation. One such enactment, is the Law of Succession Act (cap 160). section 2 of that Act provides in mandatory terms, that unless any other written law provides otherwise, the provisions of the Act "shall constitute the law in Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act".

The Act came into force on the 1st July, 1981. The person whose death and succession gave rise to this suit, namely, John Katembe, died on the 10th April, 1984. To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82 (a) of the Law of Succession Act. That section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, section 3, the interpretative section, provides an all inclusive answer. It says "personal representative means executor or administrator of a deceased person". It is common ground that the deceased in this case died intestate. Therefore, the only person who can answer the description of a personal representative, is the administrator of the estate of the deceased. The next enquiry must answer the question, who is an administrator within the true meaning and intendment of the Act? section 3 says "administrator means a person to whom a grant of letters of administration has been made under this Act".

It is not in dispute that the two respondents who invoked the aid of the Court to agitate the cause of action which survived the deceased, were not persons to "whom a grant of letters of administration have been made under the Act" ie the Law of Succession Act. They did not even pretend to be such. The only capacity in which they sought to enforce the deceased's chose in action, was as dependants. As the professed widows and dependants of the deceased, it was within their legal competence to claim damages for loss of dependency under the Fatal Accidents Act.

But paragraph 8 of their amended plaint averred that "the plaintiffs bring the action under the Provisions of the Law Reform Act and the Fatal Accidents Act and the following persons as the dependants of the deceased, who have suffered loss and means of support and maintenance". The plaint then mentions the plaintiffs as widows and five minors.

Apart from other submissions, the appellants, by counsel, contended that as the respondents sought damages under the Law Reform Act without first obtaining letters of administration, they lacked standing and their suit was incompetent therefore. This was disputed by the respondents who, for their part, relied on the *Hintz* case to which we referred. The appellants replied that that holding was overruled in the subsequent holding of the Court of Appeal in *Virginia Otieno v Joash Ougo and another* [1988] 1 KAR 1048 decided in 1987.

The learned trial judge gave consideration to these conflicting submissions and in the end, resolved it in the respondents' favour. He held that the *Hintz* holding was still good law and that:

> "the plaintiffs in this case have the capacity to bring this action under the Law Reform Act having not purported to bring it as administrators of their deceased husband's estate without letters of administration".

Having so held, he proceeded to award damages in their favour. A close reading of the judge's judgment suggests that his real reason why he thought the respondents could competently sue to enforce the deceased's chose in action was because "they established a sufficiently close relationship with the deceased". So he pronounced categorically as follows:

> "I hold that the plaintiffs in this case had the capacity to bring this action under the Law Reform Act, not having purported to bring it as administrators of their deceased husband estate without letters of administration".

The learned judge did not advert his mind to the Law of Succession Act from which he could have derived a great deal of assistance and by which he was bound. Such help as he thought he could get was from the majority judgment in the *Hintz* case.

Now, what is the ratio of the judgment in that case? The leading judgment of the majority was delivered by Chesoni, Ag JA (as he then was). Having distinguished the English law from Kenya law, he said:

> "In the present case, the deceased's cause of action was a chose in action. It was property. In Kenya, I would say an intestate's property is transmissible to his personal representatives eg next

> of kin although it may also vest in his legal representative eg executor or administrator as the case may be. The deceased child's property was on his death therefore transmitted to and not vested in his father".

With great respect, we have not found it easy to comprehend what seems to be an authoritative statement of the succession law in Kenya. No customary notions were involved in this case. At common law, death by itself automatically divests the deceased of his chose in action. The reason for this is because in law, the dead have no rights. But no legal right is without an owner so it must be vested in a person or entity. According to English law before the Judicature Act 1873, the personal property of an intestate in the interval between death and the grant of letters of administration was deemed to be vested in the judge of the Court of Probate and since 1925, by the provision of the Administration of Estates Act of that year, the property of an intestate before grant vests in the President of the Probate Divorce and Admiralty division. In some Commonwealth jurisdictions, such right is vested in the chief Justice or some other statutorily designated body or entity. Our law of Succession Act (cap 160) did not provide for the vesting of an intestate's property between the date of death and the grant of letters in any entity. So Kneller, JA suggested in the *Hintz* case, that it will be vested in the Courts. Such a suggestion conforms with common law notions of the transmission of an intestate's right or estate. It ought to be remembered that all these temporary custodians of an intestate's rights are bare trustees only. But as soon as a grant is obtained, the right or estate vests automatically and by the force of the grant in the administrator.

With great respect, we find no warrant for Chesoni JA's statement that in Kenya an intestate's property is transmissible by the fact of death to his personal representatives whom he equates with his next of kin. Neither do we find any authority in law for his somewhat contradictory statement that the child's property was, on his death, transmitted to and not vested in his father. We think this statement, with respect shows some confusion of thought. If death by itself transmitted the estate to his father, why did it not vest it in him? If the chose in action was not vested in him and as it was not his own chose, then what standing did he have to enforce it by action? Clearly, he could not have done it under the Law of Succession Act (cap 160) or even the Indian Succession Act which was repealed in 1981. Then in the concluding sentence of his judgment, he said:-

> "For the reasons stated, I would hold that the respondent has capacity to sue under the Law Reform Act as the deceased's personal representative the cause of action having been transmitted to the respondent on his son's death".

It is to be noted that the learned judge did not say the cause of action "vested" in his father. If it was validly transmitted to him by law, why did the learned judge shrink from saying it was vested in him? That is the appropriate word in this branch of the law and that is the word used by the Law of Succession Act.

With profound respect, the concurring judgment of the late Nyarangi, JA was no more enlightening than his learned brother's. He quoted section 191 of the Indian Succession Act that:

> "Letters of administration entitle the administrator to all rights belonging to an estate as efficiently as if the administration had been granted at the moment after death".

But with respect, that section did not help his appreciation of the issue in this case.

If letters of administration vests all rights of an intestate in the administrator at the moment of death, what right would Mwang'oba's father have left to agitate his son's preserved chose-in-action if some other person than himself, were granted letters of administration? Surely, there would be no right which can provide a standing for himself or his "personal representatives" which in his terminology, means close relatives, to litigate his deceased sons's statutorily preserved chose in action? But it should be remembered that "personal representatives" as known in this branch of the law, are persons who obtain probate or letters of administration and not blood relatives however close. We think, with respect, both concepts were confused in the majority judgment.

The difficulty of the majority judgment can be shown by the following illustration. “A” and “B” are the deceased’s father and mother respectively. He was killed in a motor accident in circumstances which show that he has a cause of action against the tortfeasor; but he died intestate. “A” and “B” are estranged and live separate and apart from each other. “B” obtained letters of administration under the Law of Succession Act. “A” relied on the fact that the deceased was his close blood relative.

On the judgment of the majority, “A” has a right to administer his son’s estate which was “transmitted” to him by some unspecified law. If the two are in disagreement as to who should enforce their son’s chose in action, on the judgment of the majority, both have *loci standi* to sue although they are wearing two different hats. With respect, that is the “*reduction ad absurdum*” of the majority view. It is clear only “B” and not “A” has *locus standi* to enforce by action their son’s single chose in action under the Law Reform Act.

Had Bosire, J, in this case, applied the clear provisions of the Law of Succession Act, he would have been obliged to reach the conclusion that the deceased’s chose in action cannot properly be vested in or be agitated in court by wives *qua* wives. We think he was led into error by reliance on the majority decision in *Hintz* case which, in our opinion, is incapable of support.

This Court is not the only judicial organ that has felt unimpressed either by the reasoning or conclusion of the *Hintz* judgment. Our attention has been drawn to no fewer than three judgments of the High Court which felt unable to subscribe to the Hintz ruling that in Kenya, a plaintiff who has not obtained letters of administration has the right to enforce a chose in action belonging to an intestate’s estate. In *Kidede v Amin* (HCCC No.83 of 1978) (unreported), Simpson J, refused to award damages for loss of expectation of life to the estate of an intestate under the Law Reform Act as no letters of administration were taken. In 1988 in Ochola v Langat (HCCC No 3081 of 1986) (unreported), Shields, J refused to award damages under the Law Reform Act to a plaintiff who had taken no letters of administration in respect of an intestate’s estate. In 1990 in *Kuria v Shah* (HCCC No 122 of 1986)(unreported), Akiwumi, J (as he then was) concurred with the decision of Shields J in the *Ochola* case and declared as incompetent a plaint in which a plaintiff sought to sue in respect of an intestate’s estate without first obtaining letters of administration. That is the beaten track of the decisions.

But by far, the highest judicial authority which, by necessary implication, repudiated the holding in the *Hintz* case is the oft cited *Otieno v Ougo* case decided in 1987. The question at issue in that appeal was the right of a widow to bury her intestate husband when she obtained no letters of administration to his estate. The Court gave vent to an important principle of law of universal application with respect to the right of a party to fulfil the role of an administrator of an intestate without obtaining letters of administration. The court, *inter alia*, observed:

“The administrator is not entitled to bring an action as administrator before he has taken letters of administration. If he does, the action is incompetent at the date of its inception”.

It is significant that Nyarangi, JA, who co-authored the *Hintz* judgment and who presided over the *Ougo* appeal, subscribed to this statement of the law or at any rate, did not dissent from it. It was he who stated in the now famous *Hintz* case that:

> “It seems to me, having regard to section of the Law Reform Act that a parent or next of kin or a personal representative can act as a representative of a deceased person and file an action for the benefit of a deceased estate without a grant of probate or letters of administration to the estate”.

The *Hintz* decision has stood for nine years, but its life was not undisturbed.

Its authority as a judicial precedent has been seriously undermined by the many cases to which we have referred. Perhaps, it is not uncharitable to conclude that its nine-year life was undeserved and we should now give this decision, whose life is in the balance, its “coup de grace” and lay it safely to rest.

Mr Pandya, who successfully relied on the *Hintz* judgment in the court below, submitted before us that it

was rightly decided and the interpretation put on the Law Reform Act in that case was correct. So he argued for its affirmance. But he put before us no reasoned argument which carried in our minds the slightest conviction that that case was other than wrongly decided. As a last ditch argument, he submitted that even if that case was wrongly decided, as it had stood for a long time, it should not be disturbed and cited in support, the judgment of the East African Court of Appeal in *Income Tax v T* [1974] EA 546.

In our opinion, that judgment lends no aid to the respondent's argument. Its main holding is that the judgment which was appealed against in that case, was not given *per incuriam*. The Court observed that a decision can only properly be said to be given *per incuriam* where it is given in ignorance or forgetfulness of some inconsistent statutory provision or some authority binding on the court concerned. It is plain that the *Hintz* judgment cannot, by any stretch of imagination, be said to have been given *per incuriam*. It was not given in ignorance or by oversight of any written law or binding decision. All the relevant written laws were considered as well as pertinent case law. Indeed, the learned presiding judge of the Court (Kneller JA) expressed his open disagreement with it. And as we have tried to show, his lone voice was the correct one. In our opinion, the true view is that that appeal was simply wrongly decided.

Mr Pandya then submitted that even if *Hintz* case was just wrongly decided, it has stood for a long time and has been acted upon in the belief that it was right. And on that account, it should be left undisturbed. Although counsel did not say so, he could only have been relying on the common law maxim "*communis error facit jus*" (common error sometimes passes current as law). In our opinion, that rule cannot properly be invoked in this case. The *Hintz* decision has not been an accepted law, much less universally acted upon. Even courts whose jurisdiction is inferior to this Court and who are ordinarily bound under our doctrine of *stare decisis*, have consistently defied rather than followed it. And it is impossible to see what rights can have been founded on it and by whom. We reject the argument that we should keep alive a decision that is plainly wrong and which has nothing but a disturbed life of nine years to commend itself.

Mr Khana invited us to say that the *Hintz* appeal was wrongly decided by the majority and that we should overrule it. In view of what we said in the foregoing paragraphs, we respond positively to that invitation and hold that the *Hintz* case is no longer good law, if it ever was. We think it must go, and the decision of Bosire, J which was founded on it, must go with it.

We conclude, therefore, that the damages awarded in favour of the respondents in the sum of Kshs 50,000/= under the Law Reform Act was wrong and ought to be set aside with costs. We do so order.

Dated and Delivered at Nairobi this 19th Day of October, 1993

F.K. APALOO

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CHIEF JUSTICE

R.O. KWACH

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JUDGE OF APPEAL

A.M COCKAR

…….

JUDGE OF APPEAL

R.S.C OMOLO

…….

JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL