REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE NO 128 OF 1962

MASULAL MAGANLAL RAWAL……. PLAINTIFF

VERSUS

MANEKLAL MAGANLAL RAWAL ……..……. DEFENDANT

RULING

This case was on 24th February, 1989, posted to come for hearing with effect from 21st November, 1989, for four days. However, on 20th November, 1989 the defendant brought an application for orders, *inter alia*, that this suit had, by the time the order by consent dated 24th September, 1976 was made, abated; or in the alternative that the present plaintiff is not the proper legal representative of the original plaintiff or the substituted plaintiff, Bai Mena d/o Umedram Bhagwan Pandya, and, therefore, not entitled to continue with the suit. The application was expressed to be brought under Order XXIII rules 5 and 3(1) and (2) Civil Procedure Rules, and section 3A of the Civil Procedure Act. The application was posted to come for hearing on the day the hearing of the suit was to commence. Consequently it became necessary to consider it before embarking on the hearing of the suit.

Mr Satish Gautama appeared with Mr KM. Pandya and B Patel for the plaintiff. Mr. Nagpal appeared with Mr NM Doshi for the defendant. Mr Gautama did not think the application was competent. So he raised a preliminary point in an attempt to arrest it. The crux of his submission was to the effect that the defendant having earlier consented to the substitution of the present named plaintiff in place of Bai Mewa d/o Umedram Bhagwan Pandya, (Mena) he thereby waived his right to rely on limitation under Order XXIII Civil Procedure Rules, by dint of the provisions of section 39 (1)(b) of the Limitation of Actions Act. In his view estoppel can be raised *in limine*, and urged me to hold that the defendant is estopped from relying on limitation under Order XXIII Civil Procedure Rules, a defence he had waived.

Mr. Nagpal on the other hand did not think estoppel is a matter that can be raised *in limine*. In his view such a matter requires the calling and examination of witnesses or the adduction of affidavit evidence. It was further his submission that estoppel does not arise at all in the instant matter in his view because the order of 24th September, 1976, was made on a dead suit and was therefore of no effect.

It was common ground that the application which was made seeking an order to substitute the present plaintiff for Mena (dated 15th September, 1976) was made after the suit had abated pursuant to the provisions of) Order XXIII rule 3(2) Civil Procedure Rules. It was also common ground that the defendant, notwithstanding such abatement, consented to the substitution of the present plaintiff. The crux of the preliminary point raised, which is one of law, is whether the consent order had the effect of resuscitating the suit for estoppel to lie.

Mr Nagpal was of the view that parties cannot by agreement confer jurisdiction on the Court where none exists. What I understood him to be saying , although he denied it, was that the Court had no jurisdiction to make the order dated 24th September, 1976, because by then there was no suit the same having abated.

It was trite law that a point *in limine* must be one which when accepted avoids the necessity of the hearing of a matter pending for determination. By dint of Order XXIII rule 3(2) Civil Procedure Rules, at the expiry of 12 months after the death of a sole plaintiff in a suit a vested right accrues to the defendant to rely on the defence of limitation if no application is brought to substitute the plaintiff. That is what happened in this case. Twelve months elapsed before an application was brought. An application was brought after the suit had abated. The application was not argued. The parties respective legal counsels appeared and announced to the court that they had a proposed order, by consent, which they wanted the court to consider and record. The Court duly recorded the order which was in terms that the present plaintiff be brought on record as plaintiff in place of Mena who had died more than twelve months therebefore. The defendant cannot be said to have been ignorant of the provisions of Order XXIII rule 3(2), above. The application was brought under sub rule (1) of the same rule. The defendant was all along represented by legal counsel. Consequently it is my view that the advocate, whoever he was, fully addressed his mind to the issue of limitation but nonetheless consented to the plaintiff coming on record out of time.

Had the parties not entered into a consent order with regard to the orders which were sought in that application the court would have considered the application on the merits. One of the issues which the Court would have certainly addressed its mind to, and which it probably did before recording the consent order, was whether it could grant the orders to substitute the plaintiff.

As was stated by Crabbe JA in the case of *Mehta v Shah* [1965] EA 321 at p 330, the object of any limitation enactment is to prevent a plaintiff from prosecuting "stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time." It is not to extinguish claims. By the bringing of the application to substitute the plaintiff it was made clear both to the Court and the defendant that the estate of the deceased plaintiff was desirous of continuing the prosecution of the cause of action which had survived for the benefit of the estate notwithstanding that the suit had abated. The defendant's counsel must have known that by consenting to the coming on record of the present plaintiff he was not only waiving a defence which was available to the defendant but was also consenting to the revival of the suit. The effect was, to my mind, that the time for filing the application for substitution was enlarged by consent and with the approval of the Court. The approval of the court was nothing but exercise of judicial discretion in the matter.

The above view is buttressed by a commentary in the book, *AIR Commentaries on Civil Procedure Code*, by Chitaley and Rao, 6th Ed, Vol. 3 P. 3424 which reads:

"Where an application to add legal representatives is filed after the period of limitation has expired, the Court may either set aside the abatement by getting an application filed for the purpose and then substitute the legal representative, or in exceptional cases, even treat the application as one to set aside the abatement and pass necessary orders thereon.

Where such an application is allowed without objection, the time will be deemed to have been extended and the legal representatives to have been properly brought on the record." (Emphasis supplied).

The commentary is on provisions of the Indian Civil Procedure Code which are identical to our 0.23 rules 3 and 8 Civil Procedure Rules. They are therefore of great persuasive authority. I adopt them with the result that I hold that estoppel arises. The defendant is estopped from making an about face to challenge an order he voluntarily consented to be made, and I venture to say, in the full view of his rights under the rule he now seeks to rely on.

Nothing else has been said or raised which would vitiate the consent order. It was a valid order of the Court which in any case this court lacks jurisdiction to challenge the application sought to be arrested not being one for review; nor is it an application to set the order aside. This court is not sitting on an appeal.

I concede that estoppel may not at all times be raised successfully as a point *in limine*. It depends on the circumstances of each case. In the circumstances of this case I am of the firm view and so rule that it lies with the result that I uphold the preliminary objection. The application filed in court on 20th November, 1989, is incompetent and is accordingly struck out. I order that suit proceed to hearing.

Dated and Delivered at Mombasa this 22nd Day of November, 1989

S.E.O. BOSIRE

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JUDGE