IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: APALOO JA)

CIVIL APPLICATION NO. NAI 37 OF 1987

KABOCHA & 2 OTHERS……..…… APPLICANTS

VERSUS

KAMAU & ANOTHER…….....……..…RESPONDENT

(In an intended appeal from a ruling of the High Court at Nairobi, Shields J)

RULING

This is an application for extension of time to file an appeal. Under rule 4 of the Court of Appeal Rules, this court is empowered to enlarge the time on any grounds it deems just. This rule has been held to confer on this court unlimited discretion to extend time subject only to the requirement of justice. In this particular case, although notice of appeal was lodged within the time prescribed by the rules, the appeal was not filed within the 60 day period laid down by rule 81 of the rules. The reason preferred for this, is that although the proceedings and judgment of the court below were applied for on May 27 and June 9, 1986 respectively, they were only supplied on February 27, 1987 long after the prescribed period has expired.

If a copy of the letter applying for the proceedings was not sent to the respondent, then the applicant is entitled to rely on the proviso to rule 81 of the rules and exclude from the 60 days prescribed by the rules, the time required for the preparation and delivery of such copies. This period must be certified by the Registrar in what is popularly called a certificate of delay. No such certificate has been attached and I would normally have stood down the consideration of this matter until such certificate has been made available to me. The application for extension was brought on March 10, 1987, just eleven days after the alleged receipt of the proceedings. The time taken to do this is relatively short. It is not a long delay and I would have felt it right in those circumstances to make it possible for the applicant, to exercise his undoubted right of appeal, if I am satisfied that the period between May 27, 1986 and February 27, 1987 were indeed required for the preparation of the proceedings.

But counsel for the respondents has invited me, in any event to dismiss this application as incompetent in law. It is said, it seeks an order against a dead person and that such order cannot competently be made. What then are the facts on which this submission is based? The judgment in this case was delivered in favour of two respondents on May 20, 1986. On May 27, 1986 notice of intention to appeal against the judgment was lodged and served by Khanna & Company, advocates for the respondents, the very next day, that is, on May 28, 1986. On January 12, 1987, the first respondent died of a motor accident. At that date, although the appeal was not instituted within the meaning of rule 81 of the rules, an appeal was

initiated by the lodgment of a notice of appeal within rule 74(1) of the rule.

It seems to me that the rules evinced a clear intent that an appeal by or against a party should not be negated by the fortuitous circumstances of the death of either party. So rule 77 for instance, provides that the death of the respondent shall not render an appeal incompetent and that a notice of appeal shall be served on his legal representative. This rule has no application to this case because the notice of appeal was served on the respondents' agents in the first respondent's lifetime.

The only sense in which the appeal was inchoate before the 1st respondent's death, is that the appeal was not technically instituted within the requirement of rule 81. But that contingency was foreseen and catered for by sub-rule 2 of rule 83 which enacts that:

"An appeal shall not be incompetent by reason only that the respondent was dead at the time when it was instituted, but the court shall, on the application of any interested person, cause the legal representative of the deceased to be made a party in place of the deceased."

In the context of this case, it means that in an application like the present, where the respondents should be duly notified, the application for extension of time should be served on the 2nd respondent who is alive and on the legal representative of the 1st respondent who is dead. Section 2 of the Civil Procedure Act says:

"Legal representative" means a person who in law represents the estate of a deceased person."

No person can hold himself or herself out as such representative unless and until he obtained a grant of probate or letters of administration. (See *Majeno v Sherwanga* [1974] EA 322). Counsel for the 2nd respondent informed me that the question who is the proper legal representative of the late first respondent, is now the subject of a pending suit between his two widows.

The upshot of this, is that there is now no known or ascertained legal representative of the deceased on whom this application can properly be served. That being so, it does not seem right to me that the application should be dismissed as incompetent only on that ground. No blame attaches to the applicant because the 1st respondent passed away before the appeal can be duly instituted nor is he blameable because the widows chose to contest the right to representation. If the institution of an appeal is not legally incompetent because of the death of the respondent, then by the same token, intermediate procedural steps taken to perfect or otherwise regularize an intended appeal cannot be invalided because of the non availability of a legal representative on whom relevant notices can be served. In my opinion, the holding in *Dawson v Dove* [1971] 1 All ER 554 which decides that a writ issued against a person who is dead at the date of issue is incurably bad and cannot be cured by amendment, is inapplicable to this case. Not only was the 1st respondent alive when the present writ was issued, but he was alive when judgment was given and when the first steps for prosecuting an appeal, namely, the notice of appeal was lodged.

In my opinion, the clear object of rule 83 is to keep alive an appeal like the present. If that is right, I cannot accede to Mr Khanna's contention that this application is incompetent or that it ought on any sound ground of law to be dismissed.

The result is, that I propose to stand this application down *sine die* and will give it further consideration if the applicant produced to me, a certificate of delay duly certified by the Registrar and also satisfied me that a legal representative of the 1st respondent has been duly appointed and further, that this application was served on her or her duly authorized agent. I think the costs of this application should be costs in the cause. I make an order on those terms.

Dated and Delivered at Nairobi this 8th day of December, 1987

F.K APALOO

……..…….

JUDGE OF APPEAL