IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Hancox JA, Chesoni & Nyarangi Ag JJA)

CIVIL APPEAL NO. 1 OF 1982

BETWEEN

MORJARIA.....APPELLANT

AND

ABDALLA.....RESPONDENT

(In an appeal from the High Court at Nakuru, Mead J)

JUDGMENT

On March 8, 1979 the named respondent to this appeal (ADIJAH) and the two named appellants (Ranchod and his wife, Hariben) for breach of an alleged agreement, made in 1976, whereby the appellants said to have agreed to sell to the respondent two plots in Nakuru, No LR 451/453 at the junction of Race Course Road and Kenyatta Avenue, and LR 451/49/ 26 West of Pandit Nehru Road. The respondent alleged that he had paid a total of Kshs 220,000 of the agreed price of Kshs 650,000, the appellants, of which they acknowledged receipt, and a further Kshs 30,000 to their advocate, Mr K M Patel, of Nakuru. The respondent therefore sought orders of specific performance against the appellants, or alternatively the return of the total of Kshs 250,000 paid to the appellants and their advocate, plus what were described as mesne profits, calculated from the first such payment until final determination of the case.

It being alleged that there was no valid appearance entered after due service of the summons, the respondent applied for and obtained that which was described as interlocutory judgment on March 22, 1979 and on May 7, 1979 Nyarangi J (as he then was) gave judgment for the respondent for specific performance, mesne profits and costs after formal proof. Mead J refused to set aside these two judgments (on application before him on the ground of lack of service) on October 23, 1981, and it is from his decision that the substantive appeal is brought.

The previous proceedings before this court concerned two preliminary objections taken by Mr Khanna, who appears for the respondent, Adijah, of which the first related to the proposed addition of a new party (by way of a supplementary record), on Mrs Hiraben Jirji Chelabhai Gokani, on the grounds of her alleged half share in one of the properties concerned. Unfortunately, Hariben died on July 3, 1980, with the result that there was a consent order in the High Court substituting Ranchod, as administrator of the Estate of Hariben, as second defendant, and, the proceedings before Mead J, continued, and this appeal was filed, with Ranchod acting in both capacities. By a further misfortune, before the substantive appeal

could come on, Ranchod died on January 14, 1984, and Bhavin, the son of Ranchod and Hiraben has now applied by Notice of Motion to this court under Rules 42 and 96:-

(a) That he be made a party to the appeal in place of Ranchod

(b) That he and his step mother Lalita, be made parties in place of Hiraben.

This application is firmly resisted by Mr Khanna, on the grounds that rule 96 permits the substitution of a validly appointed legal representative, where one of the parties to an appeal has died, and that no valid appointments have been made in respect of either the female or the male deceased. Mr Khanna, on the basis of *Re Crowhurst park, Sims-Hilditch v Simmons* [1974] 1 AER 991, submitted that an appointment under rule 96 could only be made where a full grant of probate or letter of administration had been made, and not limited grants, as in this case, it not being disputed that each deceased left a will appointing executors.

In *Re Crowhurst park* a tenancy was held in trust for a company by deceased, and his widow applied for certain reliefs under the Landlord and Tenant Act, 1954, and also executed a deed under section 36(1) of the Trustee Act, 1925, purporting to appoint herself a trustee of the tenancy for the company in place of her husband. It was held that her failure to obtain probate in the United Kingdom (although she had done so in Jersey, where the deceased had died), whether or not there was any objection by the other side, meant that she could not produce her title so as to obtain the required relief. Thus, even though she could bring an action before the grant of probate, as her title derived from the will, she could not obtain a decree until probate was granted. In that case no limited grant had been made.

In a recent decision, *Gurbaksh Singh and Others v Bank of Credit and Commerce International*, Civil Appeals 52 and 53 of 1982, this court said, *inter alia*:-

“Returning to rule 96 (*ibid*) the important words “legal representative” concern us in this application. Who is the legal representative of the late Ajit Singh? According to section 2 of the Civil Procedure Act (cap 21) “Legal representative” means a person who in law represents the estate of a deceased person ...” There are no difficulties these days in connection with estate duly certificates. We do not know one way or another if anyone has objected or is likely to object to the will or the grant of probate in due course to the executors. No one has applied for a limited grant. A question might arise as to whether any person is or is not the legal representative of the deceased appellant and then the appropriate court would have to decide it: See O XXIII rules 5 and 10 Civil Procedure Rules.”

“We would observe that of the three alternative people presented as suitable “legal representatives”, one is not an appointed executor under the will, and another has been mentally ill, and although believed to have recovered we have not been furnished with evidence of this supervening fact. Moreover, he is beyond the jurisdiction.

We are not to be taken as stating that in no circumstances will the court accept as a legal representatives of a deceased appellant the executors of his will before grant of probate. In the circumstances of this application, however, we decline to substitute Harbans Kaur, the widow, or Alrik, the third appellant, on his own as the legal representative of Ajit the deceased appellant.”

Mr Khanna submitted, and we agree, that the High Court’s jurisdiction to granted representation is contained in sections 53 and 54 of the Law of Succession Act (cap 160). Since it is common ground that probate has not yet been granted in this case of Ranchod, and though we are informed that administration was granted in the case of Hariben with the will annexed, we only need to consider the latter section, because this matter has only now arisen due to Ranchod’s death. The section provides that a court may, according to the circumstances of each case, limit a grant of representation, which it has jurisdiction to make, we emphasise those words, in any of the forms described in the fifth schedule to the Act. Accordingly we also agree with Mr Khanna that Rule 96, despite the use of the word “shall” nevertheless only enables this court to appoint as a party to the appeal a person who has been properly made a legal representative by the High Court in exercise of its powers under the Act. To hold otherwise would mean

that an incompetent person might be appointed a party to the appeal, as might have happened, for instance, in *Gurbaksh Singh's case*, where the fifth appellant, who was an executor, had been temporarily of unsound mind. We therefore turn to the paragraphs in the fifth schedule to which Mr Khanna referred, and to the relevant rules in the Probate and Administration Rules, and to consider them in relation to the two limited grants that have been made in this case. The first was by Aganyanya J on February 24, 1984, but signed by Platt J, in High Court Succession Case 120 of 1984, and the second by Masime J on February 27, 1984, in High Court, Nakuru, Succession Case 9 of 1984. The second of these grants is annexed to Bhavin's supporting affidavit and is in his favour, as follows:-

"To commence carry on or defend all actions and other proceedings touching the properties or any part thereof and affairs or touching anything in which the deceased may be in anyway concerned and especially to represent the deceased in Civil Appeal No 1 of 1982 in which the deceased is the co-appellant."

In general for the purpose aforesaid to perform every other act whatsoever in or about the properties of the deceased as amply and effectually to all the aforesaid intents and purposes as the deceased could have done in her own proper person.

Of the three paragraphs in the fifth schedule to which Mr Khanna referred only paragraph 14 has any relevance. It states:

"When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in the suit, limited for the purpose of representing the deceased therein, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution."

We therefore have to consider whether the words "pending suit" are wide enough to cover a pending appeal. For this purpose we have to decide whether this appeal is a suit, because appeals are provided for by statute. Under section 2 of the Civil Procedure Act, "suit" means all civil proceedings commenced in any manner prescribed. According to Jowitt's *Dictionary of English Law,* Second Edition, Volume 2 page 1718, the "suit" means a following, any legal proceeding of a civil kind brought by one person against another. The Shorter Oxford English Dictionary (Vol II) offers several definitions of 'suit', one of which is:

"pursuit, prosecution, legal process."

The appeal is a civil proceeding between the parties which originated before the High Court. Under section 47 of the Law of Succession Act, a judge of the High Court has jurisdiction to entertain an application, determine any dispute and make such orders as may be expedient. It would be illogical and futile if paragraph 14 did not relate to a suit as well as to an appeal.

In the case of *Bhagat Singh v Chauhan and Others* (1956), 23 EACA 178, there is this passage (per Briggs JA as he then was) which is directly on the point, and with which we completely agree, at page 186:-

"an appeal in Kenya from a subordinate court may itself be a "suit" in that it is a proceeding "commenced" in manner prescribed etc. This is in clear opposition to the Indian view but I think it may well be justified first by the special definition of "suit" as opposed to the governing decision in India that a suit is ordinarily a proceeding started by a plaint. Secondly I think that according to ordinary conceptions an appeal is something different from the cause from which the appeal sprang.

I think the Kenya Legislature may well have intended to provide that an appeal shall be treated as a new proceeding and therefore "commenced" when the appeal is instituted, and that, if the appeal is brought "in manner prescribed" by the Ordinance and Rule it is itself a "suit" in which a judgment may be

pronounced..”

The case of *Mityana Ginners Ltd v Public Health Officer, Kampala*, (1958) EA 339, was distinguishable because in that case the proceedings concerned were by way of appeal to the magistrate under section 132 of the Uganda Public Health Act, and not commenced in a manner prescribed to regulate the procedure of courts. Reverting to the instant case there can, we think, be no doubt that an appeal is a civil proceedings, commenced in a manner prescribed, and therefore falls within the definition of a suit. Consequently the High Court has power under paragraph 14 to grant representation for the purpose of a pending appeal. While we do not agree with Mr Gautama, who appears for the applicants, that this court cannot question or go behind the respective orders made by the High Court with regard to this case, we are satisfied that in so far as the order of Masime J granted limited letters of administration to Bhavin for the purpose of representing Hiraben in this appeal, it was a valid order under section 54 and paragraph 14 of the fifth schedule. We now turn to the other order which is purportedly made “*ad colligenda bona*”. This form of grant was inappropriate in the present case. This is self evident from rule 36 of the Probate and Administration Rules, to which Mr Khanna drew our attention, and of which sub-rule (1) and (2) are in these terms:-

“(1) Where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration *ad colligenda bona defuncti* of the estate of the deceased.

(2) Every such grant shall be in Form 47 and be expressly limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of estate and until a further grant is made.”

The purpose of this form of grant is to collect the property of a deceased person where it is of a perishable or precarious nature, and where regular probate or administration cannot be granted at once- see Jowitt’s *Law Dictionary*, Volume 1 at page 45. It can include, for example, the vesting of a lease in the person in whose favour the grant is made, because it is obvious that the value of a lease would diminish with the passage of time, and therefore delay in the regular or general grant would justify its immediate disposal by someone who can deal with it for the benefit of the estate. This occurred in *Whitehead v Palmer*, [1908] 1 KB 151, where Channel J held that the defendant, as administrator colligenda bona, with power to sell or dispose of a lease, had correctly attempted to find a purchaser and was liable for mesne profits for the period he had actually occupied the premises in question.

However, we do not think that the appointment of a person “*ad colligenda bona*” can possibly include the right to stand in the shoes of the deceased for the purpose of instituting an action, or, indeed, an appeal, especially where there is a specific provision, paragraph 14 of the fifth schedule, designed for this purpose. The Latin verb “*colligere*” means to collect, bring together or assemble, and we are satisfied that this form of grant is only to be used for the purpose we have indicated, and not for purpose of representation in a suit or in an appeal. Moreover, as Mr Khanna observed, this grant did not follow Form 47 in the first schedule to the rules as rule 36(2) requires. Notwithstanding the foregoing, the grant of February 24 is specifically limited to “the purpose only” of representing the deceased, that is to say Ranchod, in the present appeal. In our judgment, therefore, it is those words which should be looked at for the purpose of determining this part of the application. In themselves, they constitute a valid grant pursuant to rule 14, and we are prepared to regard them as such. There is no need to resort to the earlier part of the grant, which in our view is surplusage. We would therefore consider that which we may call the operative part of the Grant by Aganyanya J on February 24 as a valid order enabling Bhavin and Lalita to represent Ranchod, who was a party in his own capacity, in this appeal. A further difficulty, however, arises. It will be observed that the form of the Motion is to appoint (1) Bhavin to represent “the first appellant now deceased”, whom we take to mean Ranchod himself, and (2) Bhavin and Lalita to represent “the second appellant now deceased”, whom we take to mean Ranchod in his representative capacity for his deceased wife Hariben. Yet the Grants are expressed the other way round, that of Masime J dated February 27, appoints Bhavin only to represent Hariben, in place, of course, of Ranchod in his representative capacity, and that of Aganyanya J dated February 24, appoints Bhavin and Lalita to

represent Ranchod in his personal capacity. Mr Khanna did not notice this, or if he did, he did not take the point, and neither, obviously, did Mr Gautama's office.

In the circumstances, however, despite the inverted form of the motion we consider our powers under rule 96 to be sufficiently wide to do that which is clearly right in this case, namely to cause Bhavin and Lalita to be made parties to the appeal in place of Ranchod himself, and for Bhavin to be made a party in place of Ranchod in so far as he was an appellant in his representative capacity. We therefore so order. But in view of the gross error in the form of the application we consider that the costs therefore should not be reserved or abide the result the result of this appeal, as we might otherwise have decided, but the applicants should pay the costs of this application to the respondent in any event. We do no more than observe finally that it would appear that Mr Gautama himself is described in the body of the document as the person moving the court. Orders accordingly.

Dated and Delivered at Nairobi this 4th day of April 1984.

A.R.W.HANCOX

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JUDGE OF APPEAL

Z.R.CHESONI

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AG.JUDGE OF APPEAL

J.O.NYARANGI

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AG.JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR