IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Madan, Law JJA & Hancox Ag JA)

CIVIL APPEAL NO 38 OF 1982

BETWEEN

ISMAIL ADAM SULEMAN .....APPELLANT

GULAM RASUL MARDAT .....APPELLANT

AND

NAWAZ TRANSPORT COMPANY.....RESPONDENT

JUDGMENT

The late Mr Mohamed Haji Mirdor carried on business during his lifetime under the name or style of Nawaz Transport Company. He died at Mombasa on July 20, 1979. Interim letters of administration to his estate were issued on October 1, 1979 by the High Court at Mombasa to Ismail Adam Suleman and Gulam Rasul Mardat with powers, *inter alia,* to continue running the business as they deemed fit and to pay the debts of the deceased.

The appellant filed a suit against Nawaz Transport Company, which was described in the plaint as a registered business carrying on a transport business at Mombasa, for the recovery of Kshs 258,912 hiring charges in respect of a lorry let on hire by the appellant to the suit defendant. The suit was filed in accordance with the provisions of order XXIX rule 9 which provides:

> "9. Any person carrying on business in a name or style other than his own name, may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules under this order shall apply."

The summons was served upon the first-named administrator Suleman on April 15, 1981 with a copy of the plaint and the notice of service stated:

> "Take notice that the summons served herewith is served upon you as a partner or as a person having the control or management of the partnership business or in both characters."

The administrators entered appearance in the firm name under protest. They applied to the court for an order to set aside the service of the summons on Suleman and also the *ex parte* judgment and the consequential decree passed in the suit upon the grounds stated in an affidavit jointly sworn by them. Their application was not made in their own name or as persons wrongly served, or as persons who denied they were liable as partners at any material time in which event they would have had to proceed under rule 7(1) by entering appearance stating therein that they did so as 'a person served as a partner in

the defendant firm, but who denies that he was a partner at any material time', and such appearance as long as it stood would be treated as an appearance for the firm.

The idea of serving a notice to inform the person in what capacity he was being served was taken from rule 4 and the marginal note thereto pursuant to the enabling words in rule 9 (supra) that so far as the nature of the case will permit all rules under order XXIX shall apply.

Rule 4 reads:

> "Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed in writing given at the time of such service, whether he is served as partner or as a person having the control or management of the partnership business, or in both characters, and in default of such notice, the person served shall be deemed to be served as partner."

The marginal note reads: 'Notice in what capacity served.' Rule 3 provides:

> "(1) Where persons are sued as partners in the name of their firm, the service of summons shall be effected either:
> (a) upon any one or more of the partners; or
> (b) at the principal place at which the partnership business is carried on within Kenya upon any person having, at the time of service, the control or management of the partnership business there; or
> (c) as the court may direct. (2)..."

The summons and notice were served upon Suleman for himself and his co-administrator as persons having the control or management of the firm's business. The remaining words in the notice saying that the summons was served upon Suleman as a partner of the partnership business or in both characters were, in this case, redundant and inapplicable and were to be ignored, the same having been taken and included in the notice unthinkingly from rule 3(1)(b) (supra). The enabling words in rule 9 must mean that all rules under order XXIX shall apply *mutatis mutandis*. The administrators knew they were not served as partners for they were not partners and the firm was not a partnership firm. They were trying to have the service upon the firm set aside. A person so served is to be treated as a partner for procedural reasons as is made clear in the corresponding English order LXXXI rule 9 1973, I *Supreme Court Practice*, p 1217 which reads:

> "9. An individual carrying on business within the jurisdiction in a name or style other than his own, may be sued in that name or style as if it were the name of a firm, and rules 2 to 8 shall, so far as applicable, apply as if he were a partner and the name in which he carries on business were the name of his firm."

The grounds sworn in the joint affidavit of the administrators were that the deceased was the sole proprietor of the business which he carried on in the name of 'Nawaz Transport Company', that after the deceased's death the administrators 'continued and were still continuing to carry on the business in the same trading name', that the service of the documents on Suleman was irregular and of no effect in law because (a) on the date the summons was issued against the defendant company its sole proprietor was already dead, and no suit can be filed against a dead person, and (b) the service of the summons upon Suleman purportedly 'as a partner or as a person having the control or management of the partnership business or in both characters' was misconceived, and there was no suit in existence legally at the time of such service.

Kneller J granted the administrator's application relying upon a number of English and Indian authorities which were brought to his attention. He held that the service in the suit was not good service. It was on one administrator of the estate of a deceased sole proprietor who used it to carry on in a style or name other than his own. It was for a debt incurred by the deceased during his lifetime and not by the administrator or administrators after it. They were not partners in the firm. They were not sued as the

deceased's legal representatives. The suit in fact was against a dead man in his alias and a nullity right from the beginning even though at the outset the respondent did not know he was dead. The suit was *infructous* and no amendment could make it fruitful.

Order XXIX rule 9 is taken verbatim from order XXX rule 10 of the Indian Civil Procedure Code. The provisions of Indian rule 10 are almost a verbatim reproduction of order XLVIII A rule 11, not order LXXXI rule 9, of the English Supreme Court Rules (supra). The word 'person' in English rule 11 has however been substituted by 'individual'. The English must have felt the need to remove the possibility of the word 'person' being interpreted to include the plural under the general clauses interpretation legislation to avoid confusion with actual partnership.

Kneller J said that the decisions of the English and Indian courts were not binding but certainly of persuasive value and they were undoubtedly good law and they would be applied to the facts of the application before him. Quite so, Kneller J's ruling was correct according to the authorities which he considered save that one of the grounds of appeal against his ruling is that he erred in holding that the claim was for a debt incurred by the deceased during his life and not by the administrator or administrators after it; there was no evidence before him as to when the debt was incurred, no particulars having been asked for. If anything someone from the defendant firm acknowledged in writing a debt of Kshs 247,922.35 to the plaintiff on January 10, 1980.

I do not consider myself bound by the English and Indian decisions, good law though they may be. As far as I can ascertain there is no local decision on this point. I feel free to make my own decision. I would prefer to rely upon the reasoning of the Calcutta High Court in *Jamunaram Poddar Firm v Jamunaram Bhakat* [1944] AIR 31 (Calcutta) 138. This case was not, unfortunately, brought to the notice of Kneller J. The judgment of the two learned judges - Mitter and Blank JJ, ran as follows:

> "The learned subordinate judge was quite right in saying that at that stage the averments of the plaintiffs as contained in their plaint must be assumed to be true ..."

The material statements in the plaint in our case were that the defendant (Nawaz Transport Company) was a registered business carrying on business at Mombasa, and the plaintiff had given on hire a lorry to the defendant for carrying on its business on agreed terms during 1978-1979. The defendant had failed or neglected to pay the sum of Kshs 258,912 being the balance due and owing by the defendant to the plaintiff in respect of such hiring and other incidental charges, though the defendant 'have' admitted its indebtedness.

The judgment of the Calcutta High Court continued:

> "[The subordinate judge] came to the conclusion that: 'the plaintiff's decree in the Chaibassa suit was against a firm which had no legal existence in the eye of the law, it being neither a corporation, nor a firm of partners, governed by any contract between them ... That being so, the decree in the Chaibassa Court was a decree against a non-existent person, and hence it was a nullity and the execution case following from it including the sale of the disputed house property at Dhulian are all null and void and of no effect whatsoever.'
>
> We may at the outset observe that the learned subordinate judge failed to notice an important provision of law, namely order XXX rule 10, [which] enables a person to sue in [his] assumed name. This distinction which has been made in order XXX itself has, in our judgment, been made in the interest of commerce ... different and weighty considerations would apply when [a person] is sued by another person in the assumed name in which he carries or has carried on business.
>
> Business may be carried on by correspondence ... and goods may be sold on credit on such orders. A producer or merchant living in one part of the globe cannot be expected to know or make enquiries and in some cases it is not possible for him to know or make inquiries as to who is the owner of the business that is being carried on in an assumed name, and in most cases he would only know the name of the real owner after he had brought the suit for the defendant then must

> appear in his own name (order XXX rule 6). If it were to be held that a decree obtained ... in a suit instituted against the assumed name is a void decree, it would lead to manifest hardship, would open up a wide door to fraud and would sap the credit on which the commercial dealings largely rest. In our opinion order XXX rule 10 rests on these considerations and they must be kept in view in construing that rule ..."

The administrators are still carrying on business in the firm name more than three years after the grant of letters of administration to them. The registration under the Registration of Business Names Act (cap 499) shows that Mohamed Haji Mirdor is carrying on business under the business name of Nawaz Transport Company since August 4, 1971. Upon his death the administrators did not comply with section 9 of the Act and file a notice of change in the particulars with the registrar general or with rule 6 of the Registration of Business Names Rules 1975 when they obtained letters of administration with power, *inter alia*, to continue running the business of the deceased as they seemed fit.

Order XXIX rule 9 makes sueable businesses in the name in which they are carried on by persons who thus conceal their names. That is what the administrators are doing in this case, but they say the firm cannot be sued in its own name even in respect of an acknowledged debt owing by it. That is plain nonsense. If successful, the administrators' contention would open the door wide to fraud. The suit was not filed against a dead person, it should be looked upon as having been filed against a business firm which is carrying on business and which may be sued under the rules of order XXIX, an artificial person though it may be, but it is created by statute by the application of the Civil Procedure Rules. The decree will not be a nullity.

One thing is certain. Unless the administrators have made themselves otherwise vulnerable, they need not feel concerned personally for order XXIX rule 6 states that where a summons is served in the manner provided by rule 3, upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued. Rule 6 being applicable *mutatis mutandis* as stated earlier the word 'partnership' should be deemed not to exist in it.

I would allow the appeal with costs, set aside the order of the High Court and substitute therefor an order dismissing the administrators' motion with costs to be paid by them personally, and also the costs of the appeal.

As Law JA and Hancox JA agree it is so ordered.

Law JA. I have read in draft the judgment prepared by Madan JA with which I am in full agreement. Like Madan JA I consider that the question to be decided in this appeal is *res integra* in that it is governed by no Kenya decision having effect as precedent, and must therefore be decided on principle. Again, like Madan JA I am of the view that the correct principles are enunciated in the Indian case of *Jamunaram Poddar Firm v Jamunaram Bhakat* [1944] AIR 31 (Calcutta) 138, although the decision in that case is against the preponderance of judicial opinion in India. In the instant case the business in the registered firm name has been carried on by two individuals, the personal legal representatives of the deceased Mirdor, whose name still appears in the register as the person carrying on business under the firm name although he died more than three years ago. It would be wrong in principle, in my view, to allow these two individuals to claim protection from legal process against the firm by pretending that the firm ceased to exist with the death of Mirdor. The firm did not cease to exist, it has been carried on by the two individuals not only in their capacity as administrators of Mirdor's estate but also their personal capacities as 'persons' within the meaning of the word 'person' in order XXIX rule 9; and that word, in accordance with section 3(4) of the Interpretation and General Provisions Act (cap 2) includes the plural. It should be noted that although the corresponding English rule was amended in 1973 by substituting the word 'individual' for the word 'person' that amendment has not been made in Kenya. I adopt whole-heartedly what was held by the learned judges in the *Jamunaram Poddar Firm* case, that:

> "If it were to be held that a decree obtained ... in a suit instituted against the assumed name is a void decree, it would lead to manifest hardship, would open a wide door to fraud, and would sap the credit on which the commercial dealings largely rest."

By a parity of reasoning, I consider that public policy demands that the service of process in the instant case, which was effected in accordance with rule 3(1) of order XXIX on a person having, at the time of service, the control or management of the business, was good and valid service.

For these reasons, I agree that this appeal succeeds, and I concur with the orders proposed by Madan JA.

Hancox JA. The appellant and former plaintiff sued in the High Court to recover Kshs 258,912 unpaid hire charges in respect of a lorry KTB 349/ ZA 3656 during 1978 and 1979. The gross amount stated in a document headed in the respondent/defendant firm's name, and said to have been acknowledged by means of a signature thereon, is Kshs 309,902.95, from which the appellant's brother and manager swore in his affidavit of March 12, 1982 20% was wrongfully deducted, instead of the agreed 10% commission. If, however, the correct 10% was deducted the amount due would have been Kshs 278,912.65, but as Kshs 20,000 was paid by cheque on August 18, 1980, nearly 13 months after the death of Mohamed Haji Mirdor, then the sum due was Kshs 258,912, as claimed.

On October 1, 1979 the two successful applicants in the notice of motion to set aside service of the summons, (for the sake of convenience I shall call them 'the administrators') received a grant of interim letters of administration, which authorised them to administer the estate of Mirdor Ltd, *inter alia*, as follows:

> "(b) to demand call in and collect all assets, moneys due under book debts rents and/or outstanding amount owing or belonging to the deceased and to give valid and effectual receipts and/or discharge therefor;
> (c) to continue running the business of the deceased as the Petitioners may
> (d) to pay the deceased's debts including the salaries and wages of the deceased's staffs and the rent and other expenses relating to the deceased's Office"

Nevertheless, when they came to be sued on April 27, 1981 they entered an appearance 'under protest' and their advocates referred to this in their letter of May 22, 1981, stating, *inter alia*:

> "Please note that Nawaz Transport Company is no longer in existence and instead it is being wound up by its administrators and would request you to accordingly amend your plaint, before we file our client's defence herein."

Since that letter refers to 'discussions' between the two advocates in the case, it is possible that Mr Doshi was informed orally that Mirdor was dead, but if not, I would regard that letter as definitely misleading in that, instead of saying that the sole proprietor (as registered in the Business Names Registry according to the certificate dated August 24, 1971) had died, it said that the company was no longer in existence and that 'it' was being wound up by 'its', not 'his', administrators. Yet in their affidavit in support of the motion the administrators said:

> "That after the deceased's death we as Administrators' (that is to say Administrators of the deceased) (and not otherwise) continued and are still continuing to carry on business in the same trading name."

The first direct mention of the death of the Mirdor appears to be in the letter of March 3, 1982. It is almost impossible to escape the conclusion from this sequence of events that the administrators wished to continue to run the business, enjoying the fruits thereof and the goodwill of the firm's name, and yet keep this card up their sleeves, as it were, if they were in danger of having to disgorge the firm's assets by meeting its just liabilities. Even as late as February 19, 1982 the respondent's advocates said they were 'taking instructions', one presumes from the living, and asked Mr Doshi (the advocate) to withhold further action (meaning execution). The preceding day they had said that Mr U Khann was in India, but that they 'hoped' that on his return he would apply to set aside the *ex parte* judgment which Mr Doshi had obtained because 'of some misunderstanding on your part'. What misunderstanding? Clearly the real misunderstanding was that induced, or at the very least acquiesced in, by the very same advocates, namely that the previous sole proprietor was still alive. Is it conceivable that Mr Doshi would have sued

Nawaz and then allowed the matter to drift on all that time if he had known the true position? I think not. To my mind this reprehensible course of conduct by the administrators is very close to coming within the doctrine of 'holding out', to which statutory expression is given in section 18 of the Partnership Act, cap 29.

At all events, having failed to get agreement to the setting aside of the *ex parte* judgment, entered on December 8, 1981, the administrators, through their advocates, filed the notice of motion to set aside the service of the summons on March 6, 1982, and it was heard and decided by Kneller J in their favour shortly after. Several Indian authorities were cited before the High Court, but not, so far as I can see, *Jamnadhar Poddar Firm v Jamunaram Bhakat* [1944] 31 AIR (Calcutta) 138. As a result the court was invited to consider authorities which were to the effect that since no suit can be brought against a dead person the fact that he had been carrying on business in another name could not alter that position. I instance *Rampratab v Gavrishankar* [1924] Bombay Law Reports 109. There the deceased had died in 1919, but his son, the defendant, continued the business in the firm's name Baharilal Bishambhardass, of which the deceased was sole proprietor. The facts were slightly different in that the plaintiffs knew before the institution of the suit that the deceased had died. But they did not realise the significance of this until objection was raised to the suit as framed, whereupon they successfully applied to sue the defendant in place of Baharilal Bishambhardass. The judge commented that the amendment should not have been allowed, as the original suit was against a wrong person, 'but against no person at all.' Had the deceased lived he could have been sued either in his own name, or under order XXX rule 10 of the Indian Rules of the Supreme Court, in the name of Baharilal Bishambhardass as if it were a firm name.' That rule was almost a verbatim reproduction of the then order XLVIII rule 11 of the English Rules of the Supreme Court, and is followed closely by our order XXIX rule 9. While that rule enables a person to be sued in what I may call his assumed name as well as his real name, it does not really translate him to the status of a firm or partnership. As has been said, it gives him an alias for the purpose of assisting his business and, perhaps, creating goodwill. As Lindley LJ observed in *M'Iver v Burns* (1895) 64 LJ Ch 681, (a partnership action in which the defendants Scottish partners unsuccessfully contested the setting aside of a summons served on the manager of his business in England) at 682:

> "The first ten rules of [order XLVIII A] relate to actions by and against partnerships only. But partnerships can now be sued in the name of the firm which they could not before. Inasmuch as before they had to be sued in the names of the persons who composed the firm, it was necessary to frame some rules to carry out the procedure and rules 1-10 of order XLVIII are addressed to matters of that kind. Then comes rule 11 which really has nothing to do with the partnership rules, but which is tacked on to apply to the case of a single individual who carries on business in the name of a firm or, as it is expressed, under some name other than his own."

I do not regard *Hari Bhandhu Pal v Messrs. Hari Mohan Mohimchandra Kaihashchandra & Hiralal Saha* [1930] AIR (Calcutta) 931 as necessarily supporting the administrators' position, because that was a case in which the sole proprietor of the one-man firm died while the suit was pending. Accordingly Ghose J's remarks as to the futility of a suit brought against a one-man firm where the sole proprietor had already died are, strictly, *obiter*. Obviously if the plaintiff, or those advising him, know that their opponent is dead then the most sensible course is to proceed against his legal representatives. This indeed, is stated in the text of the commentary to order XLVIII A rule 11 (now order LXXXI rule 9 of the English Rules of the Supreme Court), with, as Kneller J said, no authorities in support thereof. In that rule, as Law JA has observed the word 'individual' has been substituted for 'person'.

I have always understood the concept of 'person' to be wider than that of 'individual'. For instance in the *Shorter Oxford English Dictionary* it is recognised that in law a 'person' can mean not only a human being but a body corporate, whereas the definition of an 'individual' is a 'single human being'. *Jowitt's Dictionary of English Law* states that a firm of partners is not a person apart from the provisions of the Interpretation Act 1889, section 19 of which is similar to section 3(4) of our Interpretation and General Provision Act, cap 2. In *Davey v Shawcroft* [1948] 1 All ER 827 it was held that a committee of workmen and employees of a steelworks, and unincorporated collection of individuals, constituted a 'person' carrying on an undertaking within art 74 of the Coal Distribution Order 1943. The word 'person', however remains in our rule and it seems to me that to apply it to more than one individual carrying on

the business in the name in which the deceased proprietor formerly did so, does no violence to the construction of the rule by Lindley LJ that I have set out above because the business was being carried on by a single individual, and was only subsequently continued by two persons using the same name.

Another Indian authority, apart from the *Jamnadhar Poddar Firm* case (supra) which to my mind is in truth in support of it, is the *Oudh* case, *Hafiz Abdul Razzaq v Rauf Ahamed* [1936] AIR 245, because, even though the debts were incurred by the deceased's widow and son some twelve years after his death they were nonetheless carrying on business in the same name as that used by the deceased. The court said:

> "Further it is not denied ... that the business is still carried on under old style of Hafiz Abdul Razzak Haji Abdus Samad. In these circumstances it was perfectly correct for the plaintiff to have sued the members of the firm by the name of the firm."

Then the identical rule was quoted and the court continued:

> "As Abdul Qadir is admittedly carrying on business in the name of the firm mentioned above, he was correctly sued in such name."

So there is authority that an action can be brought against a firm of which the deceased was sole proprietor which is continued by his successors.

The last Indian case referred to by Mr Inamdar was *Indian Red Lead Factories Co v Purshottamdas Narsingdas* [1960] AIR (Calcutta) 327, in which one of the points taken for the defendant was that new parties had been brought on record in place of the joint family trading name. It was held that only the mask of the trading name was being removed and that the same persons were still there. It was therefore a case of misdescription and not one of substitution of new parties. Mr Inamdar has submitted that that court had 'declined to follow' *Poddar's* case. With the utmost respect I do not see any conflict between that case and the 1960 case. Although the court said that the assumed family trading name could not be used for the purpose of procedure in court it had just said previously that order XXX was not applicable to the case in question, as it was in *Poddar's* case.

Finally in *Dawson (Bradford) Ltd v Dove* [1971] All ER 554, of which we were provided only with a photocopy of the headnote, it is stated as a general principle of law that a writ cannot issue against a dead man, for the reason that the court cannot exercise its jurisdiction over the person of the defendant. That case concerned the substitution of the two executors for the deceased in the same action, and had nothing to do with maintaining an action in the name which the deceased had used. Having read the draft judgments of Madan JA and Law JA, I find myself in complete agreement with the reasoning set out in their respective citations from *Poddar's* case. In my view the administrators cannot be heard to say that the firm does not exist, or that they are not personally carrying on the business of Nawaz Transport Company. I would therefore allow the appeal and I concur with the orders proposed by Madan JA. I have been authorised to add my views regarding unclear photocopies of documents. I refer in particular to pp 24, 25 and 27 of my record which are virtually illegible. It is quite wrong that we should have to glean sometimes vital information illegible in certain documents by reference elsewhere, or miss it altogether. It is the responsibility of the party producing the record to ensure that it, and all of it, is legible. I echo the words of Slynn J in the *Employment Appeal Tribunal*, The Times, January 3, 1981 when he said:

> "Documents sent in to the Employment Appeal Tribunal which were too faint to photocopy would not be included in the tribunal's bundle. Any delay or adjournment caused by the parties' failure to provide legible documents might result in an order for costs against the party responsible. Illegible documents made it impossible for members of the Appeal Tribunal to read them in advance or at the least substantially increased the reading time."

Dated and delivered at Mombasa this 6th day of April, 1983.

C.B MADAN

……

JUDGE OF APPEAL

E.J.E LAW

……

JUDGE OF APPEAL

A.R.W HANCOX

……

Ag.JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR