REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO 418 OF 1975

FRANCIS BEDFORD PIM .....APPLICANT

VERSUS

FRANCIS RUTH HELEN MORTON.....DEFENDANT

JUDGMENT

This is an application by the executors of the plaintiff , now deceased, to be substituted as plaintiffs in his place so that the suit may proceed.

The action is a claim for the return of Shs 20,000 said to have been paid by the plaintiff to the defendants as part of the purchase price on the proposed purchase of a house, the agreement for which was subsequently cancelled by mutual consent. The suit was filed on 9th July 1975 and a defence and counterclaim were filed on 18th October of the same year.

Before any further step was taken, the plaintiff died on 23rd March 1976 and probate of his will was granted to the present applicants on 2nd May 1978. It was stated that the delay in extracting probate was due to an insufficiency of assets in Kenya to enable the Kenya estate duty to be discharged.

Mr Anjarwalla, who appears for the applicants, contends that the position is governed by section 4(1)(e) of the Limitation of Actions Act (to which I will refer as “the new Act”) replacing the Indian Limitation Act 1877, and that the relevant period within which the application may be brought is therefore six years, with the result that the application is made within time. Alternatively, he submits that the application is the first step taken by the applicants as executors to recover for the estate of the deceased whatever sum is due to it in the matter and that, therefore, the application is in effect a new proceeding in which they are in the position of original plaintiffs and therefore well within any relevant period of limitation.

Mr Shah, representing the defendant, disputes the proposition that the new Act could have been intended to increase to six years the period of six months within which the application would have had to be brought under the Act of 1877, and submits that there must have been an error in the drafting of the new Act to produce this apparent result. He points by way of analogy to the case of the omission of section 106 of the Civil Procedure Ordinance 1924 in the statutory revision of that Ordinance in 1948, which, being clearly the result of an oversight, was held in *Dhanesvar v Manilal M Shah* [1965] EA 321, to be inoperative. He submits also that section 4(1) of the new Act should apply only to fresh suits and not to those pending at the date of commencement of the Act. Alternatively, he relies upon rule 2(p) of the Civil Procedure (Amendment) Rules 1978, which amends order XXIII, rule 3(2), of the Civil Procedure Rules

by the substitution of the period of one year for the term "the time limited by law" and contends that, since more than one year had elapsed since the death of the plaintiff, the application must fail.

The effect of the repeal of the Act of 1877 by the new Act is no doubt to substitute for the periods of limitation in the earlier Act the corresponding periods prescribed by the new Act, which, in the case either of an action founded on contract or an action for which no other period of limitation is provided, is by virtue of section 4(1) six years from the date of accrual of the cause of action.

I agree with Mr Shah that, prior to the coming into force on 1st December 1967 of the new Act, the general position as to limitation was governed by the Act of 1877 which, by section 4 and the Second Schedule (Part III), provided that an application by the representative of a deceased plaintiff to have his name substituted for that of the deceased must be brought within six months of the death, and the question is therefore whether this twelve-fold increase was intended and should be given effect to.

The new Act is somewhat more comprehensive in design than its predecessor and I am unable to accept the proposition that any of the numerous provisions of the 1877 Act was intended to be excluded from its operation. From this it would appear to follow that the immediate effect of section 4(1)(e) of the new Act must have been to replace the period of six months in the relevant provision of the 1877 Act and, therefore, to import a period of six years into order XXIII, rule 3(2).

However, the new Act has now been followed by the Civil Procedure (Amendment) Rules 1978, already referred to, which came into operation on 1st July 1978 and in which rule 3(2) of order XXIII is amended by substituting a period of one year for that comprehended by the expression "time limited by law", which, as I have held, is six years. Whether this amendment to order XXIII, rule 3(2), conflicts with section 4(1) of the new Act and is therefore *ultra vires* does not arise at present and I will assume that the new statutory period of one year is applicable where the period of six months formerly applied.

A question does arise, however, as to whether this new provision is to be given retrospective effect. If it is then, on the facts before me, the present application should fail for the time bar calculated from the death of the plaintiff on 23rd March 1976 would have taken effect on 23rd March 1977, which is itself more than twelve months prior to the date of the amendment.

In my view this cannot be the position. Section 27 of the Interpretation and General Provisions Act declares that all subsidiary legislation shall, unless it is otherwise expressly provided in any written law, be published in the Gazette and shall come into operation on the date of such publication. By virtue of section 22 of that Act, subsidiary legislation:

> may be made to operate retrospectively to any date, not being a date earlier than the commencement of the written law under which such subsidiary legislation is made,

but it would seem that to give subsidiary legislation this effect would require reasonably clear words, either expressed or implied. In *Municipality of Mombasa v Nyali Ltd* [1963] EA 371, the former Court of Appeal for Eastern Africa, without reference to the Interpretation and General Provisions Act and dealing with the matter as a question of principle, arrived at a similar view. Indeed, the precise situation which has arisen here is covered in the words of Newbold JA who had to consider the increase in time introduced by the Kenya (Procedure of Appeals to Privy Council) (Amendment) Order in Council 1963, for the bringing of an application for leave to appeal Her Majesty in Council. He said at page 375:

> If instead of increasing the time limit it had reduced it, could it possibly be argued that if the application had been made within the previous time limit nevertheless it was bad because it had not been made within the new time limit?

For these reasons I hold that the present application succeeds and I direct that the applicants, as executors of the deceased plaintiff, be made parties as plaintiffs and be at liberty to proceed with the suit; and I further direct, as requested by the applicants, that the costs of the application be costs in the cause.

The applicants also seek an order that this suit be revived. This no doubt is sought as an alternative to the relief which I have granted and therefore does not now arise. I should add, however, that if the decision at which I have arrived be incorrect and that the suit has already abated, then I am satisfied that, on the facts admitted by the defendant, an order should be made in pursuance of order XXIII, rule 8(2) to revive the suit, the applicants being substituted as plaintiffs, on the same terms as to costs as mentioned above.

Application granted

Dated and delivered at Mombasa this 25th day of October 1978.

L.G.E HARRIS

JUDGE