IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 3 OF 2003

BETWEEN

SULTAN HASHAM LALJI…………………..….………..…..… 1ST APPELLANT

BAHADURALI HASHAM LALJI……………......………….2ND APPELLANT

ESMAIL HASHAM LALJI…………………….…………….3RD APPELLANT

AND

AHMED HASHAM LALJI………………....……..……….1ST RESPONDENT

DIAMOND HASHAM LALJI……………………..…….2ND RESPONDENT

ATTA (KENYA) LIMITED.…………..……..……..……….3RD RESPONDENT

DIAMOND JAMAL.……………..……………..……….4TH RESPONDENT

AZIM VIRJEE……………………...…..……....……….5TH RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Nairobi (E.O.O'Kubasu J.) dated 21st day of July, 2000

in

HCCC NO. 189 OF 1998)
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RULING OF THE COURT

This appealis from the ruling of Hon. Justice E. O. O'kubasu J. A. dated 21st July, 2000 in Nairobi ***HCCC No. 189 of 1998.*** The same was scheduled for hearing on 18th February, 2012but on 2nd February 2012, learned counsel for the 3rd respondent ***Mr. Esmail*** filed a Notice of Preliminary Objection which he duly served on learned counsel for the appellant ***Mr. Katwa.*** When the matter therefore came up for hearing before us on 8th February, *Mr. Esmail* raised his Preliminary Objection, saying that this entire appeal had abated. On this point he was supported by ***Mr. Omuga*** and ***Mr. Lutta*** learned counsel for the

1st, 2nd, 4th and 5th respondents. According to *Mr. Esmail*, since the 3rdappellant was deceased, the entire Appeal had abated. He cited **Rule 96** of the repealed **Court of Appeal Rules** which was the relevant Rule applicable at the time the suit is supposed to have abated. That Rule provided that once a party died, any interested party would file for substitution of the dead party within 12 months of such death otherwise the Appeal "SHALL" abate.

His contention is that, the Rules do not say if the"sole appellant or sole respondent dies." He argued that under the **Interpretation** and **General Provisions Act (Cap 2** of the **Laws of Kenya**), "Singular" includes "Plural" and vice versa. It is his view therefore, that where one appellant or respondent in an Appeal dies, then the entire Appeal abates notwithstanding that there are other parties in the Appeal. He submitted that although suits before the High Court continue if the cause of action survives a deceased party, the "survival" principle does not apply in the Court of Appeal.

Mr. Omuga supported this view saying that there is no mention of an appeal

surviving a deceased at the Court of Appeal. He submitted that if that was so intended, the Rules Committee would have categorically said so in the Rules. *Mr. Lutta* aligned himself fully with these submissions.

On his part, *Mr. Katwa* for the appellants submitted that **Rule 96** anticipated one appellant and not more. He urged that the remaining appellants are entitled to pursue their rights. He asked the Court to give a broader meaning to the current **Rule 99** of the **Court of Appeal Rules**. He also urged the Court to apply the provisions of Article **159(2)(d)** of the **Constitution** and**Sections 3A** and **3B** of the **Appellate Jurisdiction Act.**

In response to *Mr. Katwa's* submission, *Mr. Esmail* maintained that **Sections3A** and **3B** of the **Appellate Jurisdiction Act**were not applicable to this matter nor was **Section 159(2) (d)** of the **Constitution** which was enacted long after the appellant had died. Incidentally, both parties relied on the case of ***MARY WANJIRU NJUGUNA ~VS~ HEZEKIA MATHARA*** **[2010]eKLR.**

In that case, Hon. Justice D.K.S. Aganyanya J.A. (as he then was) made the following finding:

"I do not believe these Rules apply where there is an existing Rule which according to its wording should be strictly complied with…..… The Court can apply the principles set out in Sections 3A and 3B of Cap 9 Laws of Kenya, say by ignoring the form in which the parties are cited……."

We agree with that finding by Hon. Aganyanya J.A. (as then was) and make a finding that **Sections 3A** and **3B** of the **Appellate Jurisdiction Act** cannot be applied in place of clear and unambiguous rules of procedure. In our view the provisions of **Section 159(2) (d)** of the **Constitution** cannot be applied retroactively. Even if that was possible, the said article only relates to "procedural technicalities" and the issue here is not one of procedural technicalities.

That said, we now come to the question as to whether the preliminary objection is meritorious or not.

We have carefully considered the same along with the submissions of all counsel herein. In our view, one of the basic principles of interpretation of statutes is to construe the words according to their plain, literal and grammatical meaning. If it is contrary to, or inconsistent with any express intention or declared purpose of the statute, or if it would involve an absurdity, repugnancy or inconsistency, the grammatical sense must then be modified, extended or abridged in order to avoid such an absurdity or inconsistency.

The court also has the duty to give such words the broadest meaning that is going to provide and not to circumvent justice. The court as the bastion of justice cannot abdicate this duty. If a provision in a statute is clear and unambiguous, one does not need to revert to the **Interpretation** and **General Provisions Act** for interpretation. In this case, our view is that we do not need to seek the interpretation of "the appellant" and "the respondent" from the statute of general interpretation.

Our finding is that those words are used in their singular meaning. If we were not to interpret the “Singular” to mean the “Plural” in this case as we are being asked to do by learned counsel for the respondents, then that would inevitably lead us to the absurd conclusion that if one appellant or respondent dies leaving other co-appellants/respondents, then the appeal by or against the living parties would abate. This would mean that the remaining co-appellants/respondents are denied their inherent right of access to justice.

The right of access to justice is a primordial right for every person and is a prerequisite to a fair trial. Surely, the Rules Committee could not have intended to take away that right from appellants or respondents who had the misfortune of losing one party in the suit through demise that they had nothing to do with.

Our interpretation of **Rule 96**(currently Rule 99)is that where there are several appellants/respondents and one of them dies, but the cause of action survives, the remaining parties’ right to continue with the appeal subsists and is not extinguished by the death of the party. Indeed, this Court has always continued to hear and determine such appeals to their logical conclusion.

The upshot of this is that we find the preliminary objection devoid of merit and dismiss it with costs to the appellants.

Dated and delivered at Nairobi this 16th day of March 2012.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

D. K. MARAGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR