REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION NO. 134 OF 2004

CHANDULAL BHIMJI RACH …….……..…… APPLICANT

AND

DR. PAUL TITUS OBWAKA ……...…….RESPONDENT

***(An application for extension of time to file and serve a record of appeal from a ruling of the High Court of Kenya irobi (Aluoch, J) dated 31st May, 2000* in H.C.C.C. NO. 2389 OF 1995)**

****

R U L I N G

There are two relevant applications that have been filed in the Court of Appeal. The first to be filed was by notice of motion dated *14th June 2004* (hereinafter "*the Extension application*"). It is Civil Application No. NAI. 134 of 2004. The applicant is Chandulal Bhimji Rach who is represented by Mr. Rustam Hira. The Respondent is named as Dr. Paul Titus Obwaka.

The main relief sought in the *Extension application* is for Orders that:-

"*This Honourable Court be pleased to grant to the applicant herein leave to file and serve a Record of Appeal out of time.*

That the costs of the application be provided for."

The application was supported by an affidavit of Mr. Rustam Hira which I need not refer to *in extenso* at this stage in my Ruling.

Mr. Hira deponed that the judgment intended to be appealed against was delivered on ***31st May 2000*** by Justice Joyce Aluoch although it appears to have been written and signed by Waki J as he then was. The judgment ended with the following paragraph**:-**

"***Judgment will therefore be entered in favour of the Plaintiff*** *(Dr. Titus Obwaka)* ***for that sum*** *(earlier described as Shs.555,000/-)* ***with interest thereon at court rates from the date of filing suit until payment. The costs on that admitted amount are also awarded to the plaintiff.***

The balance of the claim shall proceed to trial in the normal names *(sic-?"manner").* ***The application succeeds in part. Only half the costs of the application will be awarded for the plaintiff/applicant."***

The other application (hereinafter "***the Substitution Application****")* is dated ***28th September 2005*** and was

drawn and filed by ***Kamere & Co Advocates*** who were stated to be "*Advocates for the Respondent"*. Dr. Paul Titus Obwaka was named as the respondent in the heading to the application. The following orders, citing ***rule 83*** of the Court of Appeal Rules (the Rules) were sought**:-**

1. THAT Mary A. A. Obwaka, Enoch Olando Obwaka, and Nicholas Akula Obwaka be substituted in place of Dr. Titus Obwaka late deceased in this case as the Respondent.

2. THAT the costs of and incidental to this application abide the results of the said application.

The grounds for the **Substitution Application** were**:-**

*1. **That** the respondent /plaintiff is now deceased.*

*2. **That** he died on **6th March, 2004** leaving this matter pending in the Court.*

*3. **That** the legal representatives of the deceased wish to proceed with the matter pending in Court in place of the deceased.*

When this matter came before me as a single Judge on ***28th March 2007*** Mr. Simon Kamere appeared for the Estate of Dr. Obwaka and Mr. Were (holding brief for Mr. Hira) appeared for Mr. Rach.

Both the ***Extension Application*** dated 14th June 2004 and the ***Substitution Application*** dated 28th September 2005 were numbered "*Civil Application Number NAI 134 of 2004"*. Both applications were required by ***rule 52*** to be heard by a single Judge of the Court.

In a replying affidavit dated 21st March 2006 Mr. Hira deponed inter alia that "***the present application for substitution is incompetent and untenable as one year has elapsed since the death of the deceased respondent and consequently the suit has abated pursuant to the provisions of Order XXIII particularly as the cause of action does not survive the deceased."***

Mr. Kamere, the advocate for the Estate of Dr. Obwaka addressed me in support of the ***Substitution Application***.

He drew my attention to a letter written by Mr. Rustam Hira for Mr. Rach dated 23rd March 2007 addressed to the Deputy Registrar of the Court of Appeal informing the Deputy Registrar that the Suit in the Superior Court being HCCC No 2389 of 1995 abated after the demise of the plaintiff, no application having been made in time for substitution of the plaintiff.

Mr. Rach wished to appeal against the decision of the superior court and, in order to do so, he considered that he needed an extension of time to file and serve the record of appeal.

He further considered that it was necessary for applications for the substitution of the personal representatives of the deceased to be effected both in the superior court and in this Court.

Order XX111 rule 1 of the Civil Procedure Code provides that**:-**

"***The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues."***

Order XX111 rule 2 does not appear to be relevant since it applies only "where there are more plaintiffs and defendants than one,....." whereas in the present case there was only one plaintiff and one defendant.

Orders XXIII rule 3 (1) provides "Where ..... a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the

legal representative of the deceased plaintiff to be made a party and shall proceed with the suit."

Orders XXIII rule 3 (2) provides "Where within one year no application is made under subrule (1), the suit shall abate as far as the deceased plaintiff is concerned, and on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff."

It would appear from ***Orders XXIII rule 3 (2)*** that the suit in the ***High Court*** has abated with the result that the judgment in favour of the deceased Doctor against Mr. Rach can no longer be enforced.

Mr. Rustam Hira, wrote a letter to the Deputy Registrar, Court of Appeal dated 23rd March 2007 and copied to Kamere & Co reading as follows:-

"***Dear Sir,***

RE : Civil Application No. NAI 134 of 2004

I refer to the above mentioned application which is scheduled for hearing on 28th March 2007 and wish to inform you that the suit in the Superior Court being High Court Civil Case Number 2389 of 1995 abated after the demise of the plaintiff and no application was made in time for substitution of the plaintiff.

In the circumstances I feel that there is no need of proceeding with the hearing of Civil Application No. Nai 134 of 2004 at the moment as I do not know the parties to proceed against.

Yours faithfully,

Rustam Hira."

For the reasons stated above I consider that this letter was correct in stating that H.CCC No. 2389 of 1995 abated after one year from the demise of the plaintiff, no application having been made in the high court for substitution of the plaintiff within one year of the plaintiff's death.

It is now necessary to turn to the position in the Court of Appeal.

Rule 77 of the Court of Appeal Rules (the Rules) provides**:-**

"***A notice of appeal shall not be incompetent by reason only that the person on whom it is required to be served was dead at the time when the notice was lodged but a copy of the notice shall be served as soon as practicable on the legal representative of the deceased."***

This Rule does not say anything about substitution and appears to envisage service of the Notice of Appeal on the personal representative of the deceased irrespective of whether or not such personal representative has been substituted.

The facts with regard to a Notice of Appeal by Mr. Rach from the decision of the high court would appear, from the affidavit in support of the application, to be that it was lodged on 16th June 2000 and served on Kamere & Company, the advocates for Dr. Obwaka on 2nd August 2000 long before Dr. Obwaka died in 2004.

Rule 96 (1) of the Rules provides**:-**

"***An appeal shall not abate on the death of the appellant or the respondent 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."***

This sub rule, in my view, assumes that the appeal has been instituted ***before*** the death of the appellant or the respondent. It would appear not to have any application to a situation in which a notice of appeal has been lodged, but no appeal has yet been instituted. If I am right as to this then it follows that ***sub rule 96 (2)*** does not apply in the present situation and no abatement of any appeal has occurred pursuant to any of the Rules.

Rule 96 (2) of the Rules provides**:**

"***If no application is made under sub rule (1) within 12 months from the date of death of the appellant or the respondent, the appeal shall abate."***

It might appear from ***rule 96 (1)*** and ***(2)*** *supra* that since no application was made by either Mr. Rach, or by the legal representative of the deceased, or by any other interested person the "*appeal"*, if any, has abated.

However there was a submission before me from Mr. Kamere that there was no appeal in existence. He submitted that ***rule 96*** only takes effect where an appeal has been instituted and so the rule envisages that there is an appeal in existence. Mr. Kamere contends that in the present situation there is merely an application for extension of time to file a record of appeal but no appeal is as yet in being.

Mr. Kamere relied on ***rule 83 (1)*** and ***(2)*** which states**:**

"***(1) An appeal shall not be instituted in the name of a person who is dead but may be instituted in the name of his legal representative."***

"***(2) 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 an interested person, cause the legal representative of the deceased to be made a party in place of the deceased."***

I am of the view that an appeal can only abate by virtue of ***rule 96 (2)*** after such appeal has been instituted. Where, as in the present situation no appeal has yet been instituted, it is open to an intended appellant to give notice of appeal within the time prescribed by ***rule 74 (2),*** or any extended period arising from a successful application for extension of time that may be granted under ***rule 4*** of the Rules.

If an extension of time is granted under ***rule 4*** and an appeal is instituted within that extension, and in accordance with ***rules 81*** and ***83*** of the Rules, such appeal will be in being. It will have been validly instituted. The rule governing when an appeal which has been validly instituted shall abate is ***rule 96 (2)*** of the Rules. That rule provides that an appeal shall abate within 12 months from the date of death of the appellant or respondent.

In my view if the date of death of the appellant or respondent precedes the institution of the appeal, the appeal will abate immediately it is instituted.

The Rules do not say that the appeal shall abate within 12 months of the date of institution of the appeal ***or*** within 12 months of the date of death of the appellant/ respondent ***whichever is the later.***

Since the Court will do nothing in vain it is necessary to consider whether such an appeal, made possible by the grant of an extension of time, is bound to abate consequent upon no application having been made under ***rule 96 (1)*** to cause the legal representative of the deceased to be made a party in place of the deceased within 12 months from the date of death of the appellant or respondent.

I have come to the reluctant conclusion that for me to grant an extension of time to institute an appeal would be to act in vain since such appeal would immediately abate. If it were not for this I would have granted an extension as the delays were not inordinate in my view.

For these reasons ***I hereby order*** that the application by notice of motion for extension of time dated ***14th***

June 2004 in ***Civil Application No. 134 of 2004*** is hereby dismissed with costs.

With regard to the ***Substitution Application*** dated 28th September 2005 I see no reason why that application should not be allowed as prayed in case there is need for any further litigation in this Court on behalf of the deceased.

Accordingly ***I hereby order*** that**:-**

1. MARY A. A. OBWAKA, ENOCK OLANDO OBWAKA AND NICHOLAS AKULA OBWAKA be substituted in place of DR. PAUL TITUS OBWAKA late deceased in this case as the respondent

2. The respondent's costs of this substitution application shall be paid by the applicant to the respondent.

Dated and delivered at Nairobi this 18th day of May, 2007.

W. S. DEVERELL

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR