

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA**

**CORAM: HON. LADY JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ.
HON. LADY JUSTICE C.N.B. KITUMBA, JA.
HON. MR. JUSTICE S.B.K. KAVUMA, JA.**

CIVIL APPLICATION NO. 109 OF 2004

AMRIT GOYALAPPLICANT

VERSUS

- 1. HARI CHAND GOYAL**
- 2. SUBASH GOYAL**
- 3. ASHOK GOYAL**
- 4. ROADMASTER CYCLES (INDIA) LTD.....RESPONDENTS**

[Arising out of Civil Appeal No. 10 of 2004]

**(An appeal from the judgment of the High Court (Commercial Division) at
Kampala in High Court Civil Suit No. 432 of 2001 dated
25th September 2003 before Justice James Ogoola)**

RULING OF THE COURT

When this application was called for hearing, Mr. Masembe Sewanyana Kanyerezi, counsel for Applicant/Respondent objected to the commencement of the hearing of the application, which he himself filed in court, to strike out Civil Appeal No. 10 of 2004 pending in court between the parties. The objection was based on the ground that since the filing of the application, the 1st respondent, Hari Chand Goyal had passed away and to date there has been no substitution of his legal representative on the record.

Counsel contended that unless and until such substitution is made, the hearing of both the application and the appeal cannot validly proceed. Relying on Rule 96 of the Court of Appeal Rules Directions, 1996, counsel pointed out that it was essential to have the legal representative of the deceased on record to prosecute the application and the appeal.

Counsel cited the case of **Ahmed Bin Ahmed Kassim Kisais Vs Syed Abdulla [1958] EA 60**. He explained that the rationale in that case was to guard against injustice to a non party who should not be bound by a decision made in his absence. Such person would be justified to return to Court to have the case retried and that the doctrine of res judicata would not be applicable. Counsel then prayed Court to stay the hearing of this application until proper substitution of the 1st respondent by his legal representative.

In reply, Mr. Oscar Kambona, counsel for the Appellant/Respondents opposed the objection. He confessed he was at a loss as to whether this was an objection or an observation which required no Court ruling.

However, while conceding to the provisions of rule 96 of the Court of Appeal Rules Directions, 1996, he argued that in the circumstances of this case, substitution was not essential. To him, this was only a procedural matter and he had got instructions to oppose the application from the deceased prior to his death. He contended that as far as he was concerned, those were sufficient instructions for them to proceed with this application.

With regard to the appeal, counsel argued, the non substitution would not cause any substantial injustice. According to him, any legal representative of the deceased would not give instructions contrary to those given by the deceased before he died.

Counsel relied on the case of **Kothari Vs Quresh and Another [1967] EA 564**. He, in particular, referred Court to holding no. (ii) where it was stated that it was not necessary that probate of the will be granted before the executor could be made a valid party to the suit as a representative of the deceased.

We heard the submissions, legal arguments advanced and the authorities cited by counsel. The provisions of rule 96 of the rules of this Court area clear. It is a requirement of the rule to

substitute a deceased party with his legal representative on the application of any interested person or on the Court's own motion. In our view, it was essential for counsel for the respondent to obtain instructions from the legal representative of the deceased.

With regard to the appointment of a legal representative of the deceased on Court's own motion, as correctly stated by counsel for the applicant and as held in the case of **Kothari** (supra) cited by Mr. Kambona, there must be a will and an executor before the executor is made a party in place of the deceased. We however concede that the executor need not have the grant but has to be introduced to court as the personal representative of the deceased.

It would be inconceivable for counsel to continue relying on instructions of a deceased person to conduct the proceedings before Court.

In the result, the objection or observation is upheld. The hearing of the application is hereby stayed pending the substitution of the deceased's legal representative.

Before taking leave of this matter, we would like to express the view that if conferencing had been held, it would probably not have been necessary for Court and counsel to spend such valuable time to resolve the aforesaid objection. The Registrar is, therefore, directed to make necessary arrangements for the scheduling conferencing of both this application and the pending appeal between the parties.

Each party to bear its costs.

Dated at Kampala this 21st day of June 2006.

L. E. M. Mukasa-Kikonyogo

Deputy Chief Justice.

C.N.B. Kitumba

Justice of Appeal.

S.B.K. Kavuma

Justice of Appeal.