PATRICIA RAWNSLEY AND COLLIN TOWNSEND *v* GWENDOLINE MARTHA TOWNSEND

Supreme Court.
Lewanika, DCJ, Sakala and Mabilima JJS.
24TH January 2002 and 12TH September, 2002.
(SCZ Judgment No. 18 of 2002.)

Flynote

Civil Procedure – Appeals – Leave to appeal - Whether an appeal lies from the High Court without leave of the High Court or Supreme Court.
Family law – Divorce – Death of respondent – Ancillary relief – Whether action abates.

Headnote

This is an appeal from the decision of the learned trial Judge dismissing the appellants' appeal against the decision of the Deputy Registrar. The 1st appellant had applied before the Deputy

Registrar that the ancillary relief made in the divorce petition by the respondent which was pending before the court should be discontinued because the second appellant had demised and the action had abated.

The learned Deputy Registrar found that the respondent's application was twofold. There was an application for maintenance of the children of the family and an application by the respondent for a share of property. The Deputy Registrar ruled that the application for maintenance of children did not subsist against the 2nd respondent upon his demise because at the time of his death there was no order that had been made by the court pertaining to the application. He however ruled , relying on the Married Woman' Property Act of 1882 that the application for a share of the property did not abate because the respondent had a subsisting right to the property if she made a substantial contribution to its acquisition, and this right did not arise as an incidence of divorce. The learned Judge on appeal upheld the decision of the Deputy Registrar. The 1st appellant appealed against the decision of the learned Judge.

Held:

(i) In terms of Section 24 (1) of the Supreme Court Act, no appeal lies from an order made in Chambers by the Judge of the High Court without the leave of the Judge or if that has been refused without the leave of a Judge of the Supreme Court.

(ii) In the event of the death of the respondent in an action for divorce, a claim for ancillary relief does not abate.

Legislation referred to:

1. Married Women's Property Act of 1882 s. 17.
2. Matrimonial Causes Act 1973, ss. 23 and r. 73 (1).
3. Law Reform (Miscellaneous Provisions) Act Cap 74 s. 2 (1).

Work referred:

Order 15/7/21 of the Rules of the Supreme Court (White Book) Order: 15/7/10; 15/7/20; and 15/7/21.

Case referred to:

Maconochile v *Maconochile* [1987] 2 All E.R. 326.

R. Simeza of Simeza Sangwa and Associates for the appellant.
M. Mutemwa of Mutemwa Chambers for the respondent.

Judgment

MAMBILIMA, JS, delivered the Judgment of the Court.

This is an appeal from the decision of Kakusa, J, dismissing the appellant's appeal against the decision of the Deputy Registrar given on 24th July, 2000. The 1st appellant had applied before the Deputy Registrar that the ancillary relief made in the divorce petition by the respondent which was pending before the Court should be discontinued because the 2nd appellant had demised and the action had abated.

The learned Deputy Registrar found that the respondent's application for ancillary relief was twofold. There was an application for maintenance for the children and an application by the respondent for a share of the property. The Deputy Registrar ruled that the application for maintenance of the children did not subsist against the 2nd respondent upon his demise because at the time of his death, there was no order that had been made by the Court pertaining to the application. He however ruled, relying on the Married Women's Property Act of 1882, that the application for a share of the property did not abate because the respondent had a subsisting right to the property if she made a substantial contribution to its acquisition and this right did not arise as an incidence of divorce. The learned Judge on appeal upheld the decision of the Deputy Registrar. The 1st appellant has now appealed against the decision of the learned Judge advancing three grounds of appeal.

In the first ground, the appellant is contending that the learned Judge ignored the issue that was before him as contained in the grounds of appeal in that he addressed matters which were satisfactorily determined by the Deputy Registrar and were neither a subject of appeal, nor argued at the hearing of the appeal. Under this ground the 1st appellant argues that the learned Deputy Registrar satisfactorily settled the question as to whether or not an application for ancillary relief made in a divorce petition survives the death of the respondent. The Deputy Registrar ruled that the application survives the death of a

respondent unless an order had \been made before his demise. The 1st appellant however, raised issue with the learned Deputy Registrar's application of the provisions of the Married Women Property Act of 1882. Counsel for the 1st appellant submits that the learned Judge's ruling on this issue appears to reverse the findings of the Deputy Registrar and yet there was no cross-appeal from the respondent. The Judge held that although death of a party causes such matters to abate, the Court had a discretion to entertain deserving applications in matters which affect children. According to Counsel, the Judge ignored the fact the application for property settlement which was made in the petition was not made on behalf of the children, but on the respondent's behalf. The two children who are not minors have their own action still pending against the Administrator of the estate of the 2nd appellant and they were not entitled to benefit from the application for ancillary relief by the respondent.

In the second ground of appeal, the appellant stated that the Judge erred in law by allowing extraneous matters to influence his Judgment when he stated that he was not comfortable with the 1st appellant. Under this ground of appeal, Counsel referred us to portions of the Judgment where the learned Judge expressed what can be termed as 'grave reservation' on the conduct of the 1st appellant. Under one such portion, the learned Judge stated, "Here is a co-respondent who through her adulterous association with the respondent, the marriage came to an end. The co-respondent first wrestled the marriage from the petitioner and now she desires to take away the estate through the petitioner and the two children of the petitioner and the respondent". According to Counsel such statements by the Judge were unfortunate and clearly demonstrated his state of mind at the time he was making the ruling. Counsel submits that the issue before the Judge was merely to determine whether or not the application for ancillary ruling made in a petition under Rule 73 (1) and Section 23 of the Matrimonial Causes Act is similar to an application under Section 17 of the Married Women's Property Act, 1882. He goes on to state that since the application made by the petitioner in the Court below was one for property adjustment under Section 23 and Rule 73 (1) of the Matrimonial Causes Act, the Court can only decide on the issue before it as to whether it still had jurisdiction in the light of Order 15/7/21 of the Rules of the Supreme Court and decided cases.

The third ground of appeal is that the learned Judge erred in law by taking the interest of the two children as a basis for his ruling. Under this ground, the 1st appellant argues that the application for property adjustment was made for the benefit of the respondent and not the two children of the family who in any case are not party to this action.

In response, learned Counsel for the respondent submitted on the first ground of appeal that the Judge in the court below was on firm ground in holding that the respondent's application did not abate by reason of the demise of the 2nd appellant on 27th November 1996. He went on to state that some of the ancillary reliefs which were sought by the respondent in her application were: a child periodical payments order under which the respondent sought an order from the Court that the 2nd appellant should pay to the children of the family such periodical payments as a lump sum payment to her and the children of the family; a periodical payment order under which the respondent sought to secure the payment to herself such monthly sum as the court thinks reasonable; and a transfer order under which the respondent sought an order for property adjustment.

Counsel argued before us that these orders which were being sought by the respondent did not terminate on the death of the 2nd appellant. Relying on Order 15 Rule 7/10 of the Rules of the Supreme Court, Counsel submitted that in the instant case, the cause of action

survived and the 1st appellant who is the executor has been added. Counsel also referred us to a number of authorities and to provisions of the Law Reform (Miscellaneous Provisions) Act, which provides in its section 2 (1) that:

"2(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against him, or as the case may be, for the benefit of, his estate: provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.

We have considered the submissions by Counsel and the issues raised. The 1st appellant's application to discontinue or strike out the action was made under Order 15/7/10 of the Rules of the Supreme Court. This Rule provides:

"If a sole defendant dies and the cause of action is one that survives, the plaintiff may obtain an Order to continue the proceedings as against the executor or administrator of the deceased defendant, or such executor or administrator may himself apply to be substituted or added as a defendant... but unless and until such executor or administrator is added, the action cannot be continued".

This rule clearly envisages an action continuing against an executor or an administrator of a deceased defendant. With regard to matrimonial causes, the position of the law has been ably amplified by the authorities to which learned Counsel for the respondent referred the court below and this court. As the House of Lords stated in the case of *Maconochile* v*. Maconochile (1):*

"To say that the Court has no jurisdiction in a divorce suit after the death of one of the parties because the suit has abated is to confuse the cause and effect. It would be manifestly unjust to either the surviving spouse or the estate of the deceased if (proceedings) were frozen by the death of a party regardless of the Justice of the case***".***

The learned Judge in the court below rightly found that while the death of the spouse would abate the proceedings for divorce in as far as the existence of the marriage is concerned, other aspects of causes relating to the matrimonial proceedings do not abate. The respondent had sought orders in respect of the two children of the family and herself, which included a lump sum payment and an order for property adjustment. It is not therefore correct to state that the children of the family were not intended to benefit from the ancillary relief application which was before the court. While an application for maintenance or other periodic payments may abate on the death of a respondent, it could not be the same for an application for a lump sum payment or property settlement. Since these applications were before the court, the Judge cannot be entirely faulted for having taken the interests of the children in arriving at his ruling.

The 1st appellant argues in her first ground of appeal that the Judge in the court below ignored the issue which was before him in the appeal. In this respect, Counsel referred to the Deputy

Registrar's application of the provisions of the Married Women Property Act of 1882. We have carefully perused the ruling of the learned Judge and we find that the Judge did not address his mind to this point but to the general position of the law. We have also perused the ruling of the learned Deputy Registrar against which the 1st appellant had appealed to a Judge in Chambers. The relevant portion of the judgment reads:

“The Petitioner’s application for a share of the property should in my view, be looked at differently. Section 21 of the Married Women’s property Act, 1882 gives every woman civil remedies in her own name against all persons, including her husband, for the protection and security of her own separate property. In any question between husband and wife as to the title to or possession of property, either spouse may apply to the Court under Section 17 of the said Act for the determination of such question. The Court may make such order with respect to the property in dispute as it thinks fit.”

To us, this passage, demonstrates that the Deputy Registrar was alive to the options which the respondent could resort to, to protect and pursue her interests and rights in the property which was acquired during the subsistence of the marriage. In our view, this was a prudent direction in an application which sought to abate or discontinue an action while the respondent’s applications were pending before the court. We do not get the impression that the respondent’s application was going to be decided under Section 21 of the Married Woman’s Property Act, unless there was an application to that effect.

In the second ground of appeal, the 1st appellant raised issue with the other orbiter comments of the learned Judge. We would agree that the comments in issue impugned the objectivity of the Judge. The comments went beyond the issues which were before the learned Judge. We are satisfied however that any umpire who was properly directed by the facts of the case and the law applicable would have reached the same conclusion.

Consequently, we find no merit in this appeal, it is dismissed with costs.

Appeal dismissed.