**Hadija v Iddi**

**Division:** High Court of Kenya at Mombasa

**Date of judgment:** 25 October 1973

**Case Number:** 85/1972 (19/74)

**Before:** Sir Dermot Sheridan J

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*[1] Probate and Administration – Limited grant – For purpose of action against deceased – Grant may*

*be made when no suit pending – Indian Succession Act* 1865, *s.*222.

**JUDGMENT**

**Sir Dermot Sheridan J:** On 7 January 1972 Krishnalal Liladhar Ved and Damyanti Krishnalal Ved petitioned the court under s. 222 of the Indian Succession Act 1865 (hereinafter referred to as “the Act”) for the issue of letters of administration to their nominee, Addi Bin Ramdhani, the defendant in the present suit, to represent the estate of John Ovino Ohulu, deceased, limited to the purpose of being made a party to the suits which they proposed to institute in this court for the recovery of special and general damages for injuries sustained by them in an accident on 13 January 1969 on the Nairobi-Mombasa road which they allege were caused by the negligent and reckless driving by the deceased. The petition went on to recite: (1) on 10 April 1971 the deceased died at Mombasa, intestate, leaving a widow, the present plaintiff, as his heir and the only person entitled to take representation to his estate; (2) the deceased was unemployed prior to his death and left no assets; (3) the widow had expressed her unwillingness to act and had refused to apply for and obtain a grant of Letters of Administration to represent the deceased. Her memorandum of renunciation was annexed to the petition. The petition was accompanied by a chamber summons under r. 3 (1) of The High Court (Practice and Procedure) Rules applying for the matter to be heard urgently. The supporting affidavit of Mr. K. M. Pandya, advocate, averred: (1) that on 4 January 1972 it was learnt that the deceased had died on 10 April 1971; and (2) that the time for filing the suit would expire on 13 January 1972. On 20 January 1972 the petition was granted as prayed. On 22 March 1972 the plaint in the present suit was filed. After reciting the above facts it goes on: “7. At the time of the death of the deceased no suits were pending in which he was a party, nor was any of the aforesaid intended suits a suit touching the matters at issue in any cause or suit pending at the time of the death of the deceased.” It concludes by praying for an order that the grant issued to the defendant in Probate and Administration Cause 1 of 1972 be revoked or annulled. The defence raises matters which are no longer in issue. It denies para. 7 of the plaint and states in para. 6: “that in the circumstances of the case the court in the exercise of its powers correctly issued to the defendant grant of Letters of Administration limited for the purpose of representing the deceased’s estate in the said two suits.” Mr. Anjarwalla, for the plaintiff, submitted that the issue was limited to a construction of s. 222 of the Act under which the petition was brought whereas Mr. Inamdar, for the defendant, reserved the option, in case I held that the section did not apply to this suit because of its express terms, that there was a lacuna in the Act which should be filled by invoking s. 3 (1) (*c*) of the Judicature Act (Cap. 8). He argued that this was a question of the jurisdiction of the court which could not be decided by reference only to s. 222 and which did not need to be pleaded. S.222 of the Act provides: “When it is necessary that the representative of a person deceased be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the said cause or suit, and until a final decree shall be made therein, and carried into complete execution.” Mr. Anjarwalla submitted that the section covered two cases in which representation might be granted to a nominee of the parties in a suit: (1) where there is a pending suit which is “the said suit” in line seven of the section; or (2) where a suit may be commenced and that suit is touching the matters at issue in “the said cause or suit” which is the pending suit. A suit is defined in s. 2 of the Civil Procedure Act as meaning “all civil proceedings commenced in any manner prescribed” and “prescribed” means “prescribed by rules”. S. 81 of the Act provides for the making of rules by a Rules Committee and the Civil Procedure Rules, as amended from time to time, were made under that provision. The nature of a suit was considered in *Mandavia v. Rattan Singh*, [1968] E.A. 148. A suit is “pending” as soon as commenced and until it is concluded: *Stroud’s Judicial Dictionary*, 3rd ed., Vol. 3, p. 2141. It is not in dispute that there was no pending suit when the applicants petitioned for a limited grant for the purpose of filing a suit. On the second limb of s. 222 Mr. Anjarwalla argued that the words “in the said cause or suit” in the tenth line refer to the earlier mention of the word “suit” and by such reference it must be confined to a pending cause or suit. A new suit may be commenced provided that it is touching the matters at issue in the said pending cause or matter. For example the applicants might wish to sue another party in a suit which is pending. A new suit will be touching all the matters in issue between the parties and not the matters at issue in the said cause or matter. Mr. Inamdar pointed out that if this construction is correct the applicants would be completely without a remedy against a wrongdoer who is dead at the time the suit is sought to be filed and whose heir has renounced his or her right to apply for letters of administration of the estate. For instance if B and C were passengers in a car driven by A and were injured in an accident as a result of A’s negligent driving and he was killed in the accident then unless his heirs take out letters of administration B and C would have no legal remedy for damages caused by A’s negligence. Mr. Inamdar submitted that, while s. 222 is inelegantly drafted, it deals with two situations: (1) relates to a suit which is already pending; and (2) relates to a suit which is intended to be filed. He stresses the distinction between the words “or in any other cause or matter” in line seven with the word “suit” in the earlier part of the section. The words “in the said cause or matter” in line ten can only refer to “any other cause or matter” which appear earlier. Otherwise if they were referring to a pending suit the words would have been “said suit” or “said pending suit”. The other cause or suit does not have to be in the same court or between the same parties as in a pending suit. It covers a suit which may be commenced arising out of a dispute between the parties. There is no justification for limiting the words “touching the matters at issue in the said cause or suit” to a pending suit. Considering that s. 222 of the Act has been in existence since at least 1865 and bearing in mind the number of High Courts in India there is a remarkable dearth of authority on its construction. In the Indian Succession Act 1925 it is reproduced as s. 251 and the commentary by Paruck, 4th ed., p. 487 merely says: “The suit may be one already filed or intended to be filed”. It refers to *Khotodad v. Bai Jerbai* (1938), 62 Bom. 64 but that case is of no real assistance as it dealt with the substitution of a deceased defendant in a pending suit. In *The Law of Succession* by Bashu, 4th ed., p. 732 the scope of the section is said to cover commencing or substantiating proceedings in Chancery and it goes on to refer to English cases. In *Gibbs v. Roy*, 85 C.L.J. 280 it was decided that “rationally the appointment of an administrator ad litem is to enable the court to make a decree in respect of a person who is dead so that the decree may be binding on his estate. It is a matter of convenience and procedure and when the claim against the estate is about to be barred by limitation, it is also matter of necessity”. There the defendant was appointed under s. 251 of the 1925 Act “in a suit to be commenced” by the plaintiff and the judgment states that this is the usual form in which a grant is made to an administrator ad litem. Although this decision is not binding on the courts in Kenya it is a persuasive authority and in the interests of uniform construction of an Act which is applicable in both countries I think that I should follow it. As I agree with Mr. Inamdar’s construction of the section it becomes un-necessary for me to reach any firm conclusion on his second argument which assumes that s. 222 of the Act did not cover the present case. The petition was fairly and squarely based on s. 222 and I doubt whether outside provisions can or need be invoked to justify the grant. Of course it would be futile for the petitioners to apply at this stage to amend their petition or to bring a fresh petition as the suit would be time barred. However in deference to Mr. Inamdar’s argument and as I think it helps to consider the position of an administrator ad litem I will try and summarise it. The jurisdiction of the High Court is set out in s. 3 (1) (*a*), (*b*) and (*c*) of the Judicature Act. The Indian Succession Act is a written law falling under (*b*) and if it is not exhaustive in any particular matter recourse may be had under (*c*) to the substance of the common law, doctrines of equity and statutes of general application in force in England on the 12 August 1897. He referred to *Secretary of State for Foreign Affairs v. Charlesworth, Pilling*, [1901] A.C. 373 and *Said bin Seif v. Shariff Mohamed Shatry* (1940), 19 K.L.R. 9 which considered situations which might arise where the appropriate Indian Applied Act might not fit the case and recourse might be had to para. (*c*) in s. 3 (1) of the judicature Act. Mr. Inamdar pointed out that the Act which was to amend and define the Law of Intestate and Testamentary Succession in British India was not a Consolidating Act and therefore was not exhaustive and recourse could be had to other enactments, or general principles of law, on points not covered by it: *Das’s The Arbitration Act*, 2nd ed., p. 3. On the other hand Mr. Anjarwalla referred to the elaborate provisions relating to limited grants in Part XXX of the Act. In England the Court of Probate Act 1857, s. 73 enabled the Probate Court to make a limited grant where “it is necessary or convenient by reason of the insolvency of the estate . . . or other special circumstances, to appoint some person to be administrator of the personal estate of the deceased other than the person who would have been entitled to the grant”: *In re Elizabeth Wensley* (1882), 7 P.D. 13. *In the estate of A. B. Simpson*, [1936] P. 40 a similar grant was made where the deceased’s only estate was the benefit of a third party indemnity policy effected with a Motor Insurance Company and the person injured in the accident desired to claim damages against the estate of the deceased, as in the present case. Similarly in *In the goods of Knight*, [1939] 3 All E.R. 928 the grant was made to the Official Solicitor limited to his defending the proposed action. I have no reason for believing that s. 222 of the Act was not designed for the same purpose as s. 73 of the Court of Probate Act 1857, as subsequently amended, and that this purpose is reflected in its wording. The suit is dismissed with costs. *Order accordingly.*

For the plaintiff:

*HAT Anjarwalla*

For the defendant:

*IT Inamdar* and *PS Talati*