

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO. 02(i)-27-2008(K)

GUAN TEIK SDN BHD
(MENGGANTIKAN LIM OO GUAN, SI MATI)

... PERAYU

(Dalam perkara Mahkamah Rayuan Malaysia
Permohonan No. K-02-152-1996

Antara

Guan Teik Sdn Bhd
(Menggantikan Lim Oo Guan, Si Mati)

... Perayu

Dan

1. Haji Mohd Noor Bin Haji Yakub
2. Sopiah Binti Omar
3. Habsah Binti Yaakob
(sebagai wakil diri Harta Pusaka Haji Haron bin Omar, si mati)
(menggantikan Haji Haron bin Omar, si mati) ... Responden)

KORAM: ZAKI TUN AZMI, CJ
ARIFIN ZAKARIA, CJM
AUGUSTINE PAUL, FCJ

JUDGMENT OF ZAKI TUN AZMI, CJ

1. I have had the privilege of reading the draft judgment of my learned brother Augustine Paul FCJ. I decided to write one of my own.
2. The issue at hand in this appeal is whether in an application under Rule 41 of the Rules of the Court of Appeal, consent must be obtained from one Md. Zaini bin Haji Mohd Noor (the son to and one of the heirs to the estate of the first plaintiff) to appoint him to be a representative to the estate of the deceased first plaintiff.
3. To understand better my judgment, it is necessary to cite only some of the relevant facts.
4. This case originated in the High Court in Alor Setar in the year 1981. Two of the original plaintiffs and the original defendant passed away.

The second and third plaintiffs were substituted. There is sufficient evidence from the record to show that parties dragged on the hearing of this case. I must say, this is another good example that delay in prosecuting an action can cause a lot of inconvenience to all concerned and cause injustice.

5. The action arose as a result of a dispute relating to the sale and purchase of a piece of land that was alleged to have taken place seven years earlier in February 1974. As a result of the dispute arising from that sale and purchase of the land, a caveat was lodged in respect of the said land.
6. Between the date of filing and the hearing of the case, an application to strike out the suit under Order 18 Rule 19 was filed. In 1986 the defendant filed a judgment in default against the counterclaim. In 1988, two years later, the defendant filed an application for show cause for want of prosecution. In 1989, an application was filed to amend the defence. The trial was not concluded until 1996. Judgment was given in favour of the plaintiffs.
7. The defendant appealed to the Court of Appeal which was not heard until 1999. The appeal was allowed with costs on 12.7.1999, as below:

“...

ADALAH DIPERINTAHKAN bahawa:-

(a) Rayuan dibenarkan dan perintah Hakim Mahkamah Tinggi yang membenarkan tuntutan Plaintiff dengan kos bertarikh 12.2.96 diketepikan;

(b) Perintah Hakim Mahkamah Tinggi yang menolak tuntutan-balas dengan kos diketepikan dan tuntutan-balas tersebut adalah dibenarkan;

(c) Deposit RM500.00 dikembalikan kepada Perayu; dan

(d) Kos rayuan ini dan kos di Mahkamah Tinggi akan dibayar oleh Responden-Responden kepada Perayu.”

[Note the wordings of paragraph (d) on liability for costs]

8. The plaintiffs' motion for leave to appeal was dismissed by the Federal Court in 2000 and therefore it is for the Court of Appeal to decide on costs, which notice was only filed by the defendant in 2007.
9. Before the question of costs was decided, the first plaintiff (now respondent in the appeal to the Court of Appeal) died. The defendant (now appellant) sought to appoint Md. Zaini bin Haji Mohd Noor, one of the sons of the first plaintiff/respondent.
10. The issue mentioned in paragraph 2 above was highlighted by the Court of Appeal only when dismissing the defendant's motion to replace the first plaintiff. The Court of Appeal in arriving at the conclusion that consent is required before a person can be appointed as a legal representative, followed the case of *Pratt v. Passenger Transport Board; Green v. Vandekar*¹. That English case is based on the English provision of Order 16 Rule 46 of the Rules of the Supreme Court which reads as follows:

“If in any cause, matter, or other proceeding it shall appear to the court or a judge that any deceased person who was interested in the matter in question has no legal personal representative, the court or judge may proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent his estate for all the purposes of the cause, matter, or other proceeding, on such notice [then the notice is specified] and the order so made, and any order consequent thereon, shall bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the cause, matter, or proceeding.”
(Emphasis mine)

¹ [1937] 1 All ER 473

11. The Malaysian provision on the other hand under Rule 41 of the Rules of the Court of Appeal 1994 provides as follows:

“Where by reason of marriage, death or bankruptcy, or any other event occurring after the commencement of an appeal, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the appeal, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained ex parte on application to the Court, upon an allegation of such change, or transmission of interest or liability, or of any such person interested having come into existence.” (Emphasis mine)

12. Be it the English provision or the Malaysian provision, the appointment of the person to represent the estate of the deceased person is discretionary. How is discretion to be exercised on the facts of this case? If we are to follow *Pratt v. Passenger Transport Board*; *Green v. Vandekar*², the consent of the person to be appointed as a party is necessary. When the consent of the appointee is not obtained, a number of problems can arise. What if the person appointed as a party decides to:

- a. just ignore the appointment, or
- b. not to take any action to respond to it, whether by not applying to set aside the appointment, or
- c. not to respond to any consequential orders which the court may make against the estate?

² supra

This can happen as it did in a number of English cases³. He may ignore the order because he is not interested to share in the assets of the estate or because the estate is insolvent⁴. If that happens, the estate will be prejudiced.

13. Aside from that, this case before us relates to taxation of costs. Costs has been awarded against the estate in favour of the appellant. The letters of administration for the estate, as said above, has not been taken out. In *Meredyth and Two Others v. Hughes and Others*⁵ Lord Chief Baron said:

“Before the costs were taxed one of the plaintiffs died: the master proceeded with the taxation, and made his certificate, notwithstanding the surviving plaintiffs objected to the taxation on the ground that suit was abated. On an application to quash the certificate, the Court held that the proceedings were regular.”

14. In my opinion, in any case where costs is awarded against several parties without specially mentioning how the liability is to be distributed, the liability is joint and several.

15. In *Aspden v. Seddon*⁶, the then Master of the Rolls followed the decision in *Meredyth and Two Others v. Hughes and Others* and held in that case that:

“... the defendants were equally entitled to have the costs taxed against the surviving plaintiffs in the absence of a legal representative of the deceased plaintiff.”

³ See *Re Curtis and Betts* [1887] W.N. 126; 23 Digest 213, 2516, *Watts v. Official Solicitor* [1936] 1 All ER 249

⁴ See *Curtis v. Caledonian Fire and Life Insurance Company* [1881] [Vol. XIX] Ch. 534 and *In re Richerson. Scales v. Heyhoe* (No.2) [1893] 3 Ch. 146

⁵ (1839), 3 Y. & J. 188

⁶ [1877] W.N. 207

16. Following this argument, the appellant before us can proceed with taxation of costs against the other two respondents. This is another reason why the court can exercise its discretion not to appoint a personal representative.
17. It is argued by the appellant that because the application can be made *ex parte*, any person can be appointed as representative as the order can be set aside under Rule 43. In my opinion, it should not be read that way.
18. The fact it can be made *ex parte* is insufficient to enable the applicant to just nominate any person. The term *ex parte* means that the application can be made and the absence of the party against whom the order is made. Some of the situations where *ex parte* orders are made are:
 - a. the application is urgent, or
 - b. when it is proven that to inform the other party would defeat the purpose of the order e.g. injunction, or his presence is not necessary.
19. Even if there is a representative already appointed, the party concerned may still apply *ex parte* i.e. without the representative being present in court. In this instance, again it is the estate which will be prejudiced, not the representative, if the representative chooses not to respond to any order obtained *ex parte*.
20. In my opinion therefore, the intended representative must give his consent. Once he has consented to represent the estate, the application can still be made *ex parte*.

21. It is also in my opinion that a discretion properly exercised should not be disturbed even though another judge of another court in the same position would have exercised the discretion in a different way. A judge must have reasons to decide on an order based on the facts of each case.

22. For reasons stated above, the answer to the question based on the facts of this case is in the positive. The appeal is dismissed with costs.

Dated : 29 May 2009

ZAKI TUN AZMI
Chief Justice

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