IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Kneller, Chesoni & Nyarangi Ag JA)

CIVIL APPEAL NO. 72 OF 1983

BETWEEN

ROMAN KARL HINTZ.....APPELLANT

AND

MWANG'OMBE MWAKIMA.....RESPONDENT

(Appeal from the High Court at Mombasa, Bhandari J)

JUDGMENT

Nyarangi Ag JA This appeal raises a short point of law as to whether the respondent as plaintiff in the action before the High Court, had the capacity or right or title to sue under the Law Reform Act, cap 26.

The plaintiff is described as the male parent of the deceased Mwakima Mwang'ombe. Paragraph 4 of the plaint, which is the basis of the claim for damages under the act, states:

"4. On or about the 1st day of May, 1980 at about 9.00 am the said Mwakima Mwang'ombe, deceased was lawfully crossing the main MOMBASA/ NAIROBI Road at Samburu when the Defendant so negligently drove and managed his motor vehicle registration number KPQ 995 that he caused the same violently to collide with the said MWAKIMA MWANG'OMBE who thereby sustained severe injuries from which he later died in hospital.

PARTICULARS OF NEGLIGENCE

The defendant was negligent in:

a) Driving at a speed which was excessive in the circumstances;

b) Failing to observe or heed the presence of the deceased on the said road;

c) Failing to keep any or any proper look-out;

d) Failing to exercise or maintain any or any proper or effective control of his said motor vehicle KPQ 995;

e) Failing to stop, to slow down to swerve or any other way so to manage or control his said motor vehicle as to avoid the said accident;

f) Failing to have any or any sufficient regard for persons who were or might reasonably be expected to be using the said road.

g) Failing to apply his brakes in sufficient time or at all so as to avoid the said accident;

h) Driving in a manner that was dangerous to other persons using the said road.

Paragraph 5 describes the deceased as follows:

"At the time of his death the said MWAKIMA MWANG'OMBE was four years of age. He enjoyed good health, was a happy boy with a normal expectation of a healthy and happy life; and by his death his expectation of a happy life was considerably shortened and his estate has suffered damage."

Mr Inamdar for the appellant, contends that the cause of action vests in the child's estate and that the estate cannot be represented by anyone else but an administrator or executor. Mr Inamdar submitted that as on the first day of May, 1980, estates of Africans who were not Mohammedans, were governed by the Indian Succession Act, 1865, under which letters of administration were necessary before a right of any part of the property of a person who has died intestate can be established (section 190).

We were referred to a later Act, the Indian Succession Act, 1925. Section 213 of the 1925 Act which is the same as section 187 of the 1865 Act provides:

"No right as executor or legatee can be established in any Court of Justice unless a court of competent jurisdiction …… has granted probate of the will under which the right is claimed or has granted letters of administration with the will or with a copy of the will annexed."

Section 191 of the 1865 Act, states the effect of letters of administration in these terms:

"Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death."

Mr Inamdar submitted that the trial judge made the fundamental error of referring to the Fatal Accidents Act, cap 32, which deals with a different cause of action.

For the respondent, Mr Mbogholi-Msagha, argued that the cause of action survived the death of the deceased and was vested in his estate for the benefit of the estate. Moreover, the plaintiff is not an administrator or legal representative but is a personal representative capable of filing this action without any letters of administration. I see no reason for not accepting Mr Inamdar's view that by May 1, 1980, the Indian Succession Act 1865 applied to Non-Mohammedan Africans. I proceed to examine the relevant provision of the Law Reform Act.

Section 2(1) of the Act provides:

"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, or as the case may be, for the benefit of, his estate."

The proviso to the sub-section does not here apply.

The terms 'parent' and 'child' have the same meaning as they have for the purpose of the Fatal Accidents Act. Section 4 of the Fatal Accidents Act states, *inter alia*, that every action shall be brought by and in the name of the executor or administrator of the person deceased.

The Law Reform Act has no provision similar to section 4 and section 7 of the Fatal Accidents Act. There is a definite distinction between the Law Reform Act and the Fatal Accidents Act.

In the case of *Hilton v Sutton Steam Laundry* [1946] 115 LJKB 33, at page 35, it was held, *inter alia*, that:

"A claim under the Law Reform Act ….is a claim for the benefit of the estate; the money recovered falls into the estate and is subject to the will if any, of the deceased person and to the claims of his creditors. A claim under the Fatal Accidents Acts, on the other hand, has this difference, that the money recovered …. will go to the dependant(s) whether the action is brought by the personal representative of the deceased or by the dependant in her personal capacity."

The father of the deceased has claimed damages under the Law Reform Act not any rights. It is significant, in my judgment, that under the Fatal Accidents Act, the action has to be brought by and in the name of the executor or administrator of the deceased person. If it was intended that an action under the Law Reform Act would be brought by an executor or an administrator, specific provision would have been made accordingly. That would have been particularly so given that the Fatal Accidents Act commenced on February 8, 1946 whereas the commencement date of the Law Reform Act is December 18, 1956, ten years later.

Sub-section 3 of section 2 of the Law Reform Act provides:

"(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless either:-

a) proceedings against him in respect of that cause of action were pending at the date of his death; or

b) proceedings are taken in respect thereof not later than six months after his executor or administrator took out representation."

The role of an executor or administrator appears to be limited to a cause of action in tort in respect of which proceedings are taken not later than six months after taking representation. The reference to executor or administrator under section 4(5) of the Law Reform Act is confined to damages affected by contributory negligence and in section 5(2) of the Law Reform Act, an executor or administrator is assigned duties under the Workmen's Compensation Act. There is no other mention or reference to an executor or administrator in the Law Reform Act.

It seems to me, having regard to section 2 of the Law Reform Act, that a parent or next of kin or a personal representative can act as a representative of a deceased person and file an action for the benefit of an estate of a person deceased without a grant of probate or letters of administration to the estate. There is no express prohibition directed at personal representative or next of kin. There is no requirement that only an administrator or an executor can represent a deceased person.

The money recovered on behalf of the estate is put into the estate and would thereafter be subject to the claims of his creditors, if any. If the deceased made no will, the person wishing to deal with the estate has to obtain letters of administration. But that would be after damages recoverable for the benefit of the estate of the deceased person have been litigated and decided upon. The deceased's cause of action is a right which is transmitted to the personal representative or next of kin.

For the reasons given, I would hold that the plaintiff as the male parent of the deceased child was entitled to file this suit.

I would dismiss the appeal with costs.

Kneller JA. The issue in this appeal is whether or not the learned judge of the High Court (Bhandari J), erred in law in not upholding the preliminary objection of Mr Inamdar, the advocate for Roman Karl Hintz, the appellant.

The submission (which was also pleaded in paragraph 2 of the appellant's defence) was that, in the absence of a grant of probate or letters of administration of the estate of Mwakima Mwang'ombe, the

deceased, Mwang'ombe Mwakima, the respondent, had no cause of action against the appellant under the Law Reform Act (cap 26). Mr Mbogholi-Msagha, the advocate for the respondent, argued that he had, because he was the deceased's father .

The learned judge rejected Mr Inamdar's submission because he held the respondent was entitled to file the suit against the appellant by reason of not only S 2(1) of the Law Reform Act, but also the procedure set out in the provisions of section 7 of the Fatal Accidents Act (cap 32). Mr Inamdar argues that there are two errors of law in that ruling. First, the respondent's claim for damages was made under the Law Reform Act and not the Fatal Accidents Act. Secondly, a cause of action under the one is different from one under the other.

But first an outline of the pleadings and the facts alleged in them is necessary.

Mwakima Mwang'ombe was about 4 years old on May 1, 1980, and at about 9 am, the appellant drove his vehicle KPQ 995 into him at Samburu, a village that straddles the Mombasa-Nairobi road, and later the child died of his injuries in hospital. All this was admitted by the appellant.

The respondent, the father of the deceased, in a plaint dated May 25, 1982, (two years later) alleged the appellant's driving was negligent and he was liable in damages to the child's estate for his death and the loss of his expectation of a happy life. There were eight sub-paragraphs in the plaint setting out the details of this negligence. The appellant in his defence, denied these allegations of negligence and, instead, averred that the child's mother, who was carrying him, was negligent and solely to blame for this accident because she darted across the road in the face of the oncoming traffic without ensuring it was safe to do so, and when in fact it was dangerous to do so.

Now, the first step is to consider the remedy the child had if he had lived. A cause of action in negligence arose and vested in him at the moment he was injured, and the measure of damages, if he could prove Hintz was liable, included fair compensation for his injuries and such loss of expectation of life as was caused to him by that tort. The child had a right of proceeding in a court of law to recover pecuniary damages for the infliction of a wrong. This is a legal chose (thing) in action and it was his while he lived. He was a minor when he was injured so, if he survived, his suit had to be instituted in his name by a person who in that suit is called his 'next friend'. Order XXXI rule 1(1) Civil Procedure Rules. It would probably have been his father, the respondent.

The child died, however, before his suit was instituted and the question which then arose was what was the fate of his chose in action? At common law in England, it was destroyed by his death because an action in tort

was regarded originally as purely punitive and only later as compensatory. *Actio personalis moritur cum persona* is the latin expression for this. [A personal action dies with the person].

The effect of this rule was largely abolished by the Law Reform (Miscellaneous Provisions) Act, 1934, which provided that on the death of a person all causes of action subsisting against or vested in him should survive against, or for the benefit of, his estate, with the exception of defamation, seduction, enticement of a spouse, and claims for damages for adultery.

And here in Kenya by section 2(1) of the Law Reform Act:

"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, or as the case may be, for the benefit of, his estate;

Provided that, this sub-section 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 claim for damages on the ground of adultery."

The Law Reform Act began on December 18, 1956, and it is still in the Laws of Kenya and applies to everyone here. Mark how it exactly follows the English Act. So English authorities may well be helpful. The damages are recoverable directly for the benefit of the estate of the deceased, little Mwakima Mwang'ombe, not directly for the benefit of his dependants or relatives, however close. A claim under it is a claim for the benefit of his estate and is subject to the will, if any, of the deceased and the claims of his creditors. Such a claim under the English Act can only be brought by an administrator. Denning LJ (as he then was) in *Burns v Campbell*, [1951] 2 All ER 965 (CA).

The rights conferred by that part [Part II] of the Law Reform Act for the benefit of the estates of deceased person are in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Kenya Fatal Accident Act (cap 32) or the 3. Carriage by Air Act, 1932 (22 and 23 Geo, 5 C 367) of the United Kingdom: see section 2(5) Law Reform Act.

Mwakima Mwang'ombe's action was expressly brought under the Law Reform Act, though it was incorrectly labelled the Law Reform Act (Miscellaneous Provisions) Act, and not the Fatal Accidents Act.

Let me, for a moment, make a detour through the Fatal Accidents Act. Under that Act, Hintz was liable to an action for damages in respect of the death of Mwakima Mwang'ombe, if it were proved to have been caused by his wrongful act, neglect or default and it was such as would, if he had not died, have entitled him to maintain an action and recover damages for his injuries: section 3 (*ibid*). It is not one Mwakima Mwang'ombe could have filed had he lived.

The action is for the benefit of the wife, husband, parent and child of the deceased and not for his estate. The claim is for injuriously affecting the family of the deceased. T*he Vera Cruz* (No 2) (1884) 9 p96.

It has to be brought by and in the name of the executor or administrator of the deceased within 6 months of his death. Section 4 (*ibid*). If no action is brought within that 6 months by the executor or administrator then it can be brought by and in the name or names of all or any of those persons for whose benefit the action may be brought, namely, the wife, husband, parent and child of the deceased, section 7 (*ibid*), but it must be begun within 3 years of the date of the death of the deceased; see the proviso to section 4 (*ibid*). Any money recovered by a successful claimant under this Act will go to the deceased's dependants and none to his creditors. It does not form part of the estate of the deceased person, but goes, as through a conduit pipe, to the dependants who are entitled. Lord Greene MR in *Hilton v Sutton Steam Laundry*, [1949] 115 LJK BD 33, 35 (CA).

Mwakima Mwang'ombe died on May 1, 1980, and 3 years from then was May 2, 1983, so his father is now time barred from bringing an action for his benefit under sections 3 and 7 of the Fatal Accidents Act. Had his learned advocate understood the full import of the point about, in my view, the incapacity of the deceased's father to sue Hintz under the Law Reform Act, which was taken on June 23, 1982, in paragraph 2 of Hintz's written statement of defence, he would have had just under a year, to amend the plaint or file another action with a claim by the father under the Fatal Accidents Act.

Returning to the claim for the benefit of the estate of Mwakima Mwang'ombe under the Law Reform Act against Hintz, the problem arises of who, according to local law, can bring it. The Law Reform Act is silent on the matter unlike the Fatal Accidents Act.

The child's father, it will be recalled, pleaded he was suing Hintz for the benefit of the estate of his deceased son. His advocate submitted that he did so in a representative capacity and in the plaint he had set out how that capacity arose as order VII rule 4 (cap 21) enjoins. So, because his son died, his legal chose in action survived for the benefit of his son's estate and his capacity was that of a representative of the child's estate.

Is that correct? The Law of Succession Act (cap 160) which repealed the Indian Law of Succession Act and the Indian Probate and Administration Act, came into operation on July 1, 1981, and amended, defined and consolidated the Kenya Law relating to intestate and testamentary succession and the administration of the estates of deceased persons. It has universal application to all cases of intestate or

testamentary succession to the estates of deceased persons dying after July, 1981, in Kenya and to the administrator of those estates. Section 2(1) (*ibid*). The child died before the Law of Succession Act came into operation. So Mr Inamdar turned to sections 190 and 331 of the Indian Succession Act (Act X of 1865) which read as follows:

"No right to the property of a person who has died intestate can be established in any Court of Justice, Right to unless letters of administration have first been granted by a Court of competent jurisdiction."

And:

"The provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Mohamedan, or Buddhist; nor shall they apply to any will made, or any intestacy occurring, before the first day of January 1866."

Mr Inamdar urged that these sections are clear and their effect is that when Mwakima Mwang'ombe died intestate, his legal chose of action against Hintz survived for the benefit of his estate but no one could establish his right to it in any court in Kenya unless letters of administration had first been granted by a court of competent jurisdiction unless the child were a Hindu, Mohammedan or Buddhist and there was no pleading or suggestion that Mwakima Mwang'ombe was any of those.

There are three points to be made about that section. First, the principle underlying it is that, for the estate of an intestate governed by this 1865 Indian Act, letters of administration are compulsory before the action is instituted because without them the estate would be unrepresented and a decree passed in favour of it or against it would be a nullity. (Would the father be paid the damages awarded? Would he or the estate pay the cost of the action if it failed?). Secondly, it is enough if letters are first granted to anyone entitled to it (including a plaintiff) but it does not say the plaintiff must obtain them. Thirdly, in May 1980, when Mwakima Mwang'ombe died, it applied to Africans and the history of how that came to be is this.

The whole of the Indian Succession Act, 1856, save for section 331, was applied to Kenya by Article 11(b) of the East African Order in Council, 1897 and then section 331 was also applied by Order of the Secretary of State of September 30, 1898.

The provisions of the Application to Natives of the Indian Acts Ordinance 1903, which commenced on February 5 that year, persuaded Barth J (as he then was) to hold that the Indian Succession Act did not apply to Africans; *Benjawa Jembe v Priscilla Nyondo* (1912), 4 EACA 160, 161.

That Ordinance became the Amendment to Applied Indian Acts Ordinance (1907) (No 10 of 1907) and, in due course, the Indian Acts (Amendments) Ordinance (cap 2) of the Revised Edition of the Laws of Kenya, 1948 of which section 9(1) reads as follows:

"(1) The Provisions of all Indian Acts already applied or hereafter to be applied shall apply to Africans to the extent herein provided or as may be expressly declared by Ordinance but not otherwise.

(2) The following Indian Acts as amended from time to time are hereby extended to Africans:-

The Land Acquisition Act, 1894

The Telegraph Act, 1885.

(3) The provisions of all applied Indian Acts shall extend to Africans in so far as they refer to the following matters:-

The protection of life and property

The maintenance of order.

The collection and payment of revenue fees or charges either generally or locally.

The Post Office

Railways and tramways

Telegraphs.

The [Indian] Probate and Administration Act, 1881 (5 of 1881) was applied to Kenya from November 4, 1898, by Order of the Secretary of State made on September 30, 1898. (No 22 of 1898).

The effect of all this, it was thought, was that section 9 of the Indian Acts (Amendments) Act read as a whole, excluded the application of those Indian applied Acts to Africans, and to prevent the grant of probate or letters of administration to them. See *Miney Frances v Samuel Bartholomew Kuri* as Administrator of the Estate of Samuel Nelson Bartholomew deceased (1951), 24 KLR 1.

And that was even so after 1963 until on October 1, 1965, (and not February 23, 1965, as the report would have it) the High Court (Farrell J) in *Re Maangi* [1968] EA 637, 639 (K) held that section 9 in so far as it had the effect of precluding the application of the Indian Probate and Administration Act to Africans, was discriminatory within the terms of section 26 of the Constitution. This meant, section 9 of the Indian Acts (Amendments) Acts had to be construed as if the Indian Probate Administration Act was mentioned in its sub-section(2). The learned judge then directed that letters of administration intestate should issue to Mrs Alice Marthi Maangi, an African, the widow of Mr Muturi Maangi, an African Inspector of Police.

Section 26(4)(b) of The Constitution, however, permitted the passing of any law making any provision that is discriminatory in itself or its effect with respect to adoption, marriage, divorce, burial, devolution of property on death or other, matters of personal law.

Farrell J in *Re Maangi*, considered this question: did the Indian Probate and Administration Act come within the terms ‘devolution of property on death’? or ‘other matters of personal law’? He held it did not do so. It was an Act that dealt with procedure, and not with devolution of property, which is a matter of personal law because it concerns who are to be the beneficiaries, but rather with the transmission of property which is a matter of general law, and the appointments of administrators, is part of the machinery under the general law for the transmission of the property of the deceased.

That was a decision of the High Court which has not been challenged in the past twenty years. It did not, however, touch on sections 190 and 331 of the Indian Succession Act, 1865 for it dealt with the Indian Probate and Administration Act.

Nevertheless, in my judgment, it would have been discriminatory not to apply sections 190 and 331 of the Indian Succession Act to Mwakima Mwang’ombe’s estate, because discrimination can work in more ways than one, and these sections deal with the protection of the child’s property (including his legal chose in action) and the appointment of an administrator of his estate is part of the machinery under the general law for the protection of his property. See de Lestang J in *Miney Frances v Samuel Bartholomew Kuri as Administrator of the Estate of Samuel Nelson Bartholomew* (*ibid*) at p 3.

He died on May 1, 1980, so his estate was subject to that written law which applied to it then.

After July 1, 1981, the administration of it had to proceed, as far as possible, in accordance with the Law of Succession (cap 160) which commenced on that date according to its section 2. The plaint was filed on May 25, 1982, and, in my opinion, is subject to the provisions of that Act.

The right of action, vested in the deceased himself for his injuries, passes under the Law Reform Act to his personal representative and is for the benefit not of the dependants of the deceased, as has been spelt out earlier, but for this estate. See Munkman’s *Damages for Personal Injuries and Death,* 6th ed 135.

According to section 2 of the Law of Succession Act, a personal representative is someone who has been granted letters of administration to the estate of the deceased intestate.

Among the powers which a personal representative has, subject only to any limitation imposed by his grant, is one to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate. Section 82(a) Law of Succession. This, in my judgment, is a pointer to who has the right to bring this action under the Law Reform Act for the estate of Mwakima Mwang'ombe. It will not necessarily be the deceased's father who is the "personal representative" for he may be a lunatic or have been estranged from the deceased or out of the country or even in detention, and so forth. The provisions of this Act are to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of the estates of deceased persons.

These are many instances of limited grants in the registry in Mombasa, which Mr Msagha-Mbogholi could have followed eg In the matter of the *estate of the late Karichwa Pola, Probate and Administration* cause 25 of 1982; In the matter of *the estate of the late Thomas Kazungu Kavivya Kazau,* Probate and Administration Cause 100 of 1982. Someone in each has been given a grant for the purpose of filing such an action. See also S 54 of the Law of Succession Act.

It may well be that, in many instances, the sole heir or one of the heirs of a child, is his or her father, but without a grant, general or limited, of letters of administration to the estate, the heir cannot represent that estate and bring an action on its behalf because, until the grant is obtained by someone, the estate (and the legal chose in action) is vested in the court. The form of the grant bears this out. When the grant is obtained the estate and the legal chose in action pass automatically to the administrator.

The situation is the same in England though there, they vest after the death of the intestate in the head of the division of the Supreme Court which deals with the administration of estates. *Ingall v Morgan* [1944] 113 L J K B 298, 299 (CA). Ingall, the father of a minor son killed in a motor accident who brought a representative action under order III rule 4 (thus confessing he was not suing in his own right, and, generally, that he had no right in the action to prosecute any claim except in his representative capacity) alleged falsely but innocently, that he was the administrator of the estate of his deceased son. The Court of Appeal, held, among other things, that the father had no shadow of title to his son's legal chose in action which survived for the benefit of the estate under the Law Reform (Miscellaneous Provisions) Act 1934, until he had a grant of letters of administration to the estate.

So here, too, in my respectful view, Mwakima Mwang'ombe, the respondent father, did not at common law or in equity or under any written law before or after the Law of Succession Act of Kenya, have the right tobring this action under the Law Reform Act because the chose in action had not vested in him when he filed the plaint and has not done so to this day and, if that is correct, then the action was, and always remained, incompetent and if that were correct, it would seem that he has lost the possibility of recovering about Kshs 2,500 for the estate of his son.

In the result, sorry though, I would have been compelled to come to this conclusion, Mr Inamdar is right and the appeal, in my view, should be allowed with costs here, the ruling of Bhandari J reversed with costs and the suit of the respondent father in the High Court be dismissed with costs.

But this is not the judgment of my brethren, so the result in fact is that, the order of the court is that the appeal is dismissed with costs.

Chesoni Ag JA. The respondent's four year old son, Mwakima Mwang'ombe, died as a result of a traffic accident when a motor vehicle driven by the appellant collided with him on May 1, 1980, along the Mombasa/Nairobi road.

In May, 1982, the respondent, father of the deceased, filed a suit against the appellant claiming damages under the Law Reform Act (cap 26). In the written statement of defence filed on his behalf by his advocate, M/s Bryson, Inamdar & Bowyer, the appellant contended that in the absence of a grant of probate or letters of administration to the estate of the deceased, Mwakima Mwang'ombe, the respondent

had no cause of action against the appellant under the Act. When the suit came up for hearing in May, 1983, Mr Inamdar, therefore, raised a preliminary objection based on the aforegoing contention. He relied on section 2(1) of the Act which reads:

"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, or vest as the case may be, for the benefit of his estate."

Mr Inamdar further prayed in aid, section 190 of the Indian Succession Act, 1865, which he correctly said, applied in Kenya until July, 1981, when it was repealed by the Succession Act (cap 160). Section 190 provided as follows:

"190 …. No right to any part of the property of a person who has died intestate can be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction." (underlining is mine).

Mr Inamdar developed his argument on the lines that the deceased child died as a result of injuries which preceded death and so, when he was injured, a cause of action was vested in him to recover damages for the injuries. That cause of action was a chose in action and therefore property which was assignable and transferable and I would add, transmissible. Mr Mbogholi Msagha for the respondent argued that the law does not specify who should sue for an estate of a deceased person under the Act, although he added, the plaintiff should be related to the deceased by consanguinity (that I take to mean the plaintiff should be the deceased person's next of kin).

The preliminary objection was rejected by Mr Justice Bhandari and the appellant appealed to this court.

The issue in this case is whether the respondent has the capacity to sue on behalf of his deceased child's estate. He is suing on the deceased's cause of action and not seeking to establish a right to his (deceased's) property. The respondent is not laying any claim to any part of the deceased's property. I would therefore not hold that section 190 of the Indian Succession Act applies in this case. That section applies to someone seeking to establish a right or claim to part or the whole of a deceased person's property and, even then, the letter of administration (in case of an intestate) do not have to be obtained by the plaintiff, but by anyone entitled to the grant – see Paruck on the Indian Succession Act [1925] 2nd edn p 294. The respondent was not claiming to be entitled to the fruits of the cause of action, for in the plaint (paragraph 5), he said that the estate of the deceased had suffered damage. Had the respondent claimed to be entitled to the money recoverable under the cause of action, then he might have been required first, to obtain a letter of administration as he would, in that case, be claiming a right to the deceased's property.

Mr Inamdar cited the English cases of *Davies & Another v Powell Duffryn Associated Collierries Ltd* [1941] 1 2L ER 657; *Hilton v Sutton Steam Laundry* [1946] 115 LJK B 33 and *Burns v Campbel*l [1951] 2 ALL ER 965 to support his contention that a plaintiff under the Law Reform Act must first obtain letters of administration. He said the position is the same in England. In the three cases, the plaintiffs purported to sue as administrix of the deceased's estates as far as the suits under the English Law Reform (Miscellaneous Provisions) Act, 1934 were concerned, when in reality the plaintiffs had not taken out the letters of administration. Similarly, in *Ingall v Morgan* [1944] 113 LJKB 298, the plaintiff purported to sue as administrator of his son's estate under the same act, but they had the capacity described in the writs. In our case, as Mr Mbogholi Msagha pointed out, the respondent has neither purported to sue nor described himself as administrator of his son's estate. He had described himself as the male parent of his son, that is, the next of kin of his deceased son, and there is no dispute that he is so. There is, in my opinion, a fundamental difference between the law in Kenya and in England on the position of an intestate's property. In England, an intestate's property, including choses in action, formerly vested on death in the ordinary, but now, by virtue of statute (the Administration of Estate Act), such property vests in the President of the probate division until he grants letter of administration to someone: *Ingall v Morgan ibid* p 303. For the President to vest the intestate's property in the new administrator, he, in my opinion, is effecting a transfer of such property which can be done only with the authority derived from letters of administration. In the present case, the deceased's cause of action was a chose in action. It was

property. In Kenya, I would say an intestate's property is transmissible to his personal representative eg next of kin although it may also vest in his legal representative eg executor or administrator as the case may be. The deceased child's property was, on his death, therefore transmitted to and not vested in his father. The English cases cited are, in my opinion, distinguishable and what is said in those English authorities as to who may sue under the English Law Reform (Miscellaneous) Act, 1934, is of little, if any, assistance to our courts.

The position in the commentary to section 190 of the Indian Succession Act by Paruck *supra*, clearly related to a person seeking to establish a right to the deceased's property. In such a case, there must be someone against whom judgment of the court can be enforced. Munkman on *Damages for Personal Injuries & Death* 6th edn, says:

"p 135 para (iv) ….. Under the Law Reform (Miscellaneous provisions) Act 1934, the right of action vested in the deceased himself for his injuries is transmitted to his personal representatives."

p 136 ….. any right to damages for personal injuries which was vested in the deceased person, is now transmitted to his personal representative."

Mr Mbogholi Msagha, in my view correctly, argued that the deceased child's father could sue as the deceased's personal representative. The phrase "personal representative" does not mean the same as "legal representative". The latter is defined in section 2 of the Civil Procedure Act and it means "a person who in law represents the estate of a deceased person …" It includes an administrator or executor. The phrase personal representative, on the other hand, is defined in *Stroud's Judicial Dictionary*, 4th edn as 1. (except when otherwise controlled by a context) being synonymous with Legal Representative 2. An executor (though he had not taken probate) of a surviving trustee, was such trustee's "personal representative' within Trustee Act 1850; so also one of the next of kin might be, though not an executor (underlining mine). 5. "Personal representative" held contextually, to mean descendants of children of testatrix (*Rainford v Knowles* 59 LT 359), or the phrase may mean next of kin.

By virtue of section 2(1) of the Law Reform Act, damages recovered under that Act go to the deceased's estate and not to his personal representatives as beneficiaries, regardless of who sues for the estate. It is subject to the deceased's will, if any, and to the claims of his creditors before his personal representatives, even when they are heirs, can gain through participation in the estate. The cause of action vested in a deceased person before his death is, as I have already stated, on his death, transmitted to his personal representatives, who, in my view, do not require letters of administration to sue for damages for the benefit of the deceased's estate under the Law Reform Act. However, letter of administration are required to deal, in administration, with the damages recovered by the estate as a result of the action brought by the personal representative or anyone else.

The right of action under the Law Reform Act is quite distinct from the right of action under the Fatal Accidents Act (cap 32). Each act is independent of the other. As already said, under the Law Reform Act, the right of action is for the benefit of the deceased's estate whereas under the Fatal Accidents Act, the right of action is for the benefit of dependants of the deceased person. The learned judge, therefore, with respect, did not have to apply the provisions of the Fatal Accidents Act when considering the preliminary objection which was raised under the Law Reform Act. Nevertheless, in my opinion, the learned judge still arrived at the correct conclusion.

For the reasons stated, I would hold that the respondent has capacity to sue under the Law Reform Act as the deceased's personal representative, the cause of action having been transmitted to the respondent on his son's death, but any money recovered would, of course, go to the estate of his deceased son. I would in the result, dismiss this appeal with costs.

Dated and Delivered at Mombasa this 26th day of July 1984.

A.A.KNELLER

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AG. JUDGE OF APPEAL

Z.R.CHESONI

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AG.JUDGE OF APPEAL

J.O.NYARANGI

.....

AG.JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR