

**IN THE COURT OF APPEAL, FIJI**  
**[APPELLATE CIVIL JURISDICTION]**

**Civil Appeal No. ABU 0028 of 2017**  
**(High Court at Suva in Family Case No. 15/SUV/0446)**

**BETWEEN** : **DAYA WATI** of 15 Kanace Road, Valelevu, Nasinu,  
Domestic Duties  
*Appellant*

**AND** : **HARI DUTT** (as the personal representative of **DWARKA** aka  
**DWARKA DEO NARAYAN**, (Deceased) of 210 A Street, South  
Francisco, California 94080, USA, Retired  
*Respondent*

**Counsel** : **Mr. A. K. Singh** (at 9.30 am) former Counsel for the Appellant  
(Appearing on Court's request)  
**Mr. M. A. Khan** (at 11.30 am) for the Respondent

**Date of Hearing** : **15 June 2020**

**Date of Ruling** : **19 June 2020**

**ORDER**

**Background Events**

- [1] This matter was listed initially before me on 1 April, 2020. On that occasion the Appellant was absent and unrepresented. The Respondent was represented by Counsel, Mr. A. Khan who brought to the attention of Court that the Appellant's written submissions were due by the 8<sup>th</sup> of May, 2019 on account of an order made by Court on

29 March, 2019 and since that order, as revealed from the Record, has not been complied with, Mr. Khan moved that the appeal be deemed to have been abandoned.

- [2] Having noted on a perusal of the Record that the Appellant had complied with other antecedent steps he was obliged to take to prosecute her appeal including the payment of security for costs I declined to make an order for abandonment and directed the Registrar to notice the Appellant for 9 April, 2020. Covid – 19 having intervened, when the matter was thereafter called on 27 May, 2020, Mr. Khan on behalf of the Respondent brought to the attention of Court that he has reliably learnt that the Appellant had become deceased.
- [3] Consequently, I directed the Registrar to ascertain the fact Mr. Khan had brought to the notice of Court, to make a site inquiry at the given residential address of the Appellant and also make contact with the Appellant’s Counsel on Record.
- [4] The officials of the Registry had succeeded in making contact with the Appellant’s Counsel who had appeared for her in the past who out of deference to Court (Mr. A.K.Singh) appeared today (on 15 June, 2020) and informed Court that the Appellant had withdrawn his brief sometime back. Accordingly, he moved that he be discharged from any further proceedings in this case.
- [5] After the conclusion of the hearing, Mr. Khan for the Respondent having appeared in Court, out of deference to this Court’s request to assist Court, the Registry (through the committed efforts of Ms. Sanita, Court Officer) placed before me a Report (in response to my directives). It was reported that:
  - (a) No notice of the ongoing proceedings could be served on anyone on the given address of the Appellant appearing in the Caption because the same is not specific and;
  - (b) It was found out that neither the Appellant nor anyone of the Appellant’s family was residing anymore at the said given address.

### The Factors that warranted consideration before making my Orders

- [6] 1. Without evidence as to whether the Appellant was deceased, although both Mr. Singh and Mr. Khan, whom I have found to be responsible wards of Court, struck common ground in saying that they are of the belief that the Appellant had become deceased nevertheless that was not evidence I could have taken into consideration in that regard.
2. If, during his lifetime, the Appellant had moved out of his given abode it was incumbent upon him to have left a forwarding address to enable this Court to execute process which evidently he had failed to do.
3. No one, who could have been said to be claiming under the Appellant to vindicate whatever rights in this Appeal also have taken any interest in this matter. I say whatever rights because the action was one in regard to “a marriage” between the Appellant and the Respondent.

### Determination

- [7] The facts as recounted above have created a legal junction leaving it in the hands of Court to make appropriate orders. The Record in this case is itself dead what at times has been described or referred to as a “Dead Docket” (whether on account of “Non-prosecution or being regarded as being “deemed to have been abandoned”).
- [8] If I were to go on the premise that the Appellant is deceased, I cannot make an order for dismissal of the Appeal in as much as, in my view, such an order would be rendered “null and void”. A Court cannot make an order against a deceased person.

- [9] For the same reason, I cannot say, retrospectively that the Appeal is “deemed to have been abandoned” which was the submission made by Mr. Khan on 1 April, 2020 which I have adverted to earlier (vide: paragraph [1] above), quite apart from the problems that may very well arise in the context of the provisions of Rule 17 of the Court of Appeal Act (Cap.12).
- [10] Through all this scenario the Respondent is left crying to reap whatever benefits of his victory obtained in the High Court and to see that finality is reached in this matter.
- [11] Accordingly, I proceed to hold that, in this matter regarding the Appeal on Record as having been “abated”.
- [12] I am mindful of the fact that, the concept of abatement is not expressly found in the Statute book of Fiji. However, given what I have articulated above, the facts and circumstances not permitting me to make an Order for ‘abandonment’ or ‘non-compliance’, I felt a mixture of the elements contained in them are “caught up” in the “concept of abatement” which simply means, the interruption of a legal proceeding, which is the eventuality that has come to pass in the matter under consideration.
- [13] In the facts and circumstances as recounted above, although I could not find a basis to make a determination in this matter through the conduits envisaged in Rule 6 of the Court of Appeal Act (Cap.12) (read with Order 25 Rule 9 of the High Court Act) and Rule 7 (a) thereof (Cap 12), I derived some guidance from the Indian Case of **Cheladma Venkata Ram Rao v Engu Narayan and Ors** [AIR] 1963 AP 168.

[14] In that case, out of five appellants, two appellants had died and no substitution in their room had been done or no legal representative proceedings had been taken. It had been argued *inter alia* that, the appeal in respect of the deceased appellants stood abated. This was conceded by the opposing Counsel and the Andhra High Court was seen acknowledging that position. Although the court in that case was interpreting statutory Rules of Court in India, I adopt that thinking in principle in the absence of any statutory provisions prohibiting the same.

[15] Accordingly, regarding the jurisdiction conferred on me under Section 20(1) (k) of the Court of Appeal Act, I proceed to make my orders in this matter as follows:

**Orders of the Court:**

1. This Appeal is abated and proceedings in this matter are terminated.
2. The Registrar is directed to take this matter off the roll of Appeal cases.



*Almeida Guneratne*

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**Almeida Guneratne**

**Justice of Appeal**