



Munyoki & another (Suing as the legal representatives and administrator of the Estate of Joseph Sukure Sukumer (Deceased)) v Wekesa (The legal representative and administrator of the Estate of Peter Mukhwana Wekesa (Deceased) (Civil Suit 65 of 2020) [2023] KEHC 1904 (KLR) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1904 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 65 OF 2020
DO CHEPKWONY, J
FEBRUARY 24, 2023**

BETWEEN

RHODA KAVUTHA MUNYOKI 1ST PLAINTIFF

BENEDICT OIPAKI SUKUMER 2ND PLAINTIFF

**SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATOR OF THE
ESTATE OF JOSEPH SUKURE SUKUMER (DECEASED)**

AND

**VICTOR WEKESA (THE LEGAL REPRESENTATIVE AND
ADMINISTRATOR OF THE ESTATE OF PETER MUKHWANA WEKESA
(DECEASED) DEFENDANT**

JUDGMENT

1. The Plaintiffs brought this action against the Defendant *vide* a Plaint dated 10th September, 2020 for recovery of special damages and general damages under both the Law Reform Act and the Fatal Accidents Act arising out of a tragic road accident allegedly caused by the negligence of the late Peter Mukhwana Wekesa (Deceaseds Defendant).
2. The Brief facts are that on the 5th November, 2017, while Joseph Sukure Sukumer, the deceased (Plaintiff) and four others were travelling in the deceased Defendant's Motor Vehicle Registration Number KCA XXXS Toyota X-Trail got involved in an accident at Bonje Area along the Mombasa – Nairobi Highway after the deceased (Defendant) who was then driving the said motor vehicle, lost control over the same while negotiating a sharp bent. Consequently, the motor vehicle overturned, rolled severally and finally landed on a ditch. Further, as a result of the accident, the deceased Plaintiff suffered extensive injuries to which he later succumbed. It is contended in the Plaint that the Defendant



was driving the motor vehicle too fast in the circumstances and in a manner which he could not properly exercise control over the vehicle.

3. The Plaintiffs have pleaded the doctrine of res ipsa loquitur and that at the time of death, the deceased Plaintiff was thirty-eight (38) years old, enjoyed a happy life and was employed as Head of ICT at SMEP Microfinance where he was earning a gross monthly salary of ksh 311,951/=. Further that the deceased Plaintiff at the time of his demise, the deceased (Plaintiff) was survived by two dependants being his minor daughter and a wife hence his life expectancy was cut short by the said death. The estate of the deceased Plaintiff is also said to have suffered special damages of ksh 7,138,000.00 for treatment costs and ksh 3,450/= for filing and obtaining copies of letters of Administration and sought the court to award the same.
4. In response thereto, the Defendant filed a defence dated 12th October, 2020 on 13th October, 2020. The Defendant denied the Plaintiff's claim in its entirety and on a without prejudice basis alleged that if the accident occurred as averred, then the same was without the negligence on the part of the deceased (Defendant) and was inevitable notwithstanding the exercise of all reasonable care and skill.
5. The suit proceeded to full hearing on 27th April, 2021 whereby the Plaintiffs called three witnesses while the Defendant closed his case without calling any witness.

The Evidence

6. The first witness (PW1) called by the Plaintiffs was no 91772, P.C Anne Wambui who testified that while driving Motor Vehicle Registration Number KCA XXXS on 5th November, 2017, the deceased (Defendant) lost control while attempting to negotiate a sharp bent at a corner and as a result the vehicle crossed to the opposite lane and rolled severally before finally landing in a ditch. The Deceased (Defendant) died on the spot while the deceased (Plaintiff) succumbed to the injuries sustained three months later while undergoing treatment at Coast General Hospital. She added that although the matter is still pending investigations under Mariakani Inquest no 1 of 2019, the evidence from one of the passengers who survived the accident was that the deceased (Defendant) was driving at high speed. PW1 produced the police abstract for the Plaintiff as P, Exhibit 1 and a postmortem report conducted on the deceased (Plaintiff) as P. Exhibit 2.
7. On cross-examination, PW1 stated that she did not visit the scene of accident and since the matter is still pending investigations, its unable to tell who the culpable party was.
8. Eric Nganga Kariuki, (PW2) adopted his witness statement dated 26th November, 2020 as his evidence in chief and further testified that on the fateful day on 5th November 2017, the deceased (Defendant) had offered to drop him together with the deceased (Plaintiff) and two other persons at the Mombasa SGR station to catch the train which was leaving for Nairobi at 0800 hours but upon reaching Bonje area, the Deceased (Defendant) lost control while negotiating a sharp corner. According to PW2, it was drizzling, and the Deceased had applied emergency breaks resulting in the vehicle losing control, and it rolled to the opposite lane and landed in a ditch. PW2 testified that the Deceased (Defendant) was over speeding in manner he could not properly exercise control of the vehicle as before the accident happened, he had noticed the speed was 100 Km/h. He added that the accident was self-involving without interference of any other vehicle and had the impact of throwing four of the five passengers out of the vehicle.
9. On cross-examination, PW2 stated that although the deceased (Defendant) was driving at a speed of 100km/h, the recommended speed for small vehicles on highways is 120km/h. That the Deceased Defendant was speeding to help them catch the train. However, although he insisted that everyone in



the motor vehicle had their seat belts on, he was unable to explain how four of the five passengers were thrown out of the vehicle.

10. PW3, Rhoda Munywoki, who is the deceased (Plaintiff's) wife testified that the deceased had spent three months in I.C.U after the accident before he succumbed to the injuries sustained and was survived by two dependents, being herself and their minor child. For that period, PW3 informed the court that they incurred hospital bill of about ksh 9,000,000/= and the Insurance Company settled part of it by paying ksh 2,000,000/= while the sum ksh 7,088,000/= was collected and paid following a fundraising (Harambee) organized by the family members. She produced as Plaintiff Exhibit 14 the fundraising card and the medical receipts as Plaintiff's Exhibit 12. Further, that she took out letters of grant of administration (Plaintiff's Exhibit 13) for which she paid ksh 2,900/=.
11. PW3 testified that the Deceased (Plaintiff) had been in good health before the accident and was aged 38 years at the time. She produced the deceased's death certificate as the Plaintiffs' Exhibit 8. She added that the deceased was the sole bread winner and was employed at SMEP Micro Finance Bank as the ICT Manager earning ksh 311,951/= as gross monthly salary. She produced as exhibit Pay slips for the months of November and December 2017 and the months of January and February 2018 in proof thereof. She stated that the estate of the deceased Plaintiff incurred burial expenses including purchasing a coffin for the sum of ksh 350,000/=.
12. On cross-examination, PW3 stated that she did not have the receipts for ksh 350,000/= spent on coffin and re-affirmed that the sum of ksh 7,088,000/= hospital bill was raised and cleared in a fund raising.
13. Though he filed a defence, the legal representative and Administration of the estate of Peter Mukhwana Sekesa (the deceased) did not adduce any evidence or call a witness in support of his case.

Submissions

14. Parties were then directed to file written submissions in support of their case. Counsel for the Plaintiff, Simiyu Opondo Kiranga & Company Advocates filed submissions on 2nd February 2022 while C.B GOR & GOR for the Defendant filed their submissions on 21st February, 2022.

Plaintiffs' Submissions

15. For the Plaintiff, it was submitted on liability that the deceased (Defendant) was solely to blame for the accident considering the testimonies of PW1 and PW2 that the accident was self-involving and had happened due to overspeeding by the deceased (Defendant) after he had missed his way to the train station. Further that since the Deceased (Plaintiff) was merely a passenger with no control over the motor vehicle, the deceased (Defendant) owed him a duty of care to ensure his safety.
16. On quantum of damages, under Fatal Accidents Act, it was submitted that the deceased Plaintiff was survived by one child and was married to PW3 and given that he was the bread winner for the family, the court was urged to adopt a dependency ratio of $\frac{2}{3}$. The Plaintiffs further proposed a multiplier of 20 years based on the submissions that the deceased 38 years old at the time of his death and he would have worked even beyond the age of 70 years. It was further submitted that the deceased Plaintiff was earning gross salary of ksh 311,951/= and after subtracting the statutory deductions, the net salary is ksh 229,508/= which the court was urged to adopt as multiplicand. Thus the calculation for the proposed damages under the Fatal Accidents Act by the Plaintiff is as follows; $\text{ksh } 229,508/ = \times 20 \text{ years} \times \frac{2}{3} \times 12 = \text{ksh } 36,721,280/ =$.
17. On damages awardable under the Law Reform Act, the court was urged to award ksh 350,000/= for pain and suffering considering that after the accident, the deceased was admitted in ICU for three



- (3) months before he died. To buttress the submissions, reliance was placed on the cases of *Margaret Wanjiru Wanjiri & Another v Isaac Thumbi Gitau & 2 Others* [2017] eKLR and *Beatrice Adhiambo Ngiela & Another v Mebul Kishorchand Shah & Another* [2019]eKLR.
18. On loss of expectation of life, the Plaintiffs proposed an award of ksh 150,000/= and reliance was placed on the *Beatrice Adhiambo Ngiela & Another v Mebul Kishorchand Shah & Another case* (*supra*) where the court had awarded the sum of ksh 150,000/= on loss of expectation of life.

Defendant's Submissions

19. In his submissions, the Defendant's counsel has pointed out three issues for determination as follows;
- Whether this Honourable Court has the jurisdiction to hear and determine the suit;
 - Whether the Plaintiffs had proved their case as against the Defendant on a balance of probabilities;
 - Whether the Plaintiffs are entitled to general damages plus costs and interest as prayed for in the Plaintiff.
20. On the first issue, it has been submitted that Section 2(3) of the *Law Reform Act* and Section 9(2) of the *Fatal Accidents Act* provide that actions taken in respect of the deceased's estate ought to be taken not later than six months after the Executors or Administrators took out representation. In the present case, it is submitted that the letters of administration were issued on 3rd March, 2020 whereas the suit was filed on 11th September, 2020 which is beyond the prescribed period of six (6) months, hence the suit is time barred and ought to be dismissed. The Defendant has relied on the cases of *Anaclet Kalia Musau v Attorney General & 2 Others* [2020] eKLR and *Roman Karl Hintz v Mwangombe Mwakima* [1984] eKLR, where the court dismissed the claims on similar grounds. The Defendant has submitted that jurisdiction touches on the core of a trial and the court hearing the same and can be raised at any stage of the hearing.
21. On liability, it was the Defendant's submissions that pursuant to Section 107 of the *Evidence Act*, the Plaintiffs had the burden of proving that the deceased suffered the fatal injuries as a result of an act or omission on part of the deceased (Defendant). However, based on the evidence adduced by the three (3) Plaintiffs' witnesses, the Defendant submitted that none of them could coherently establish the omission or negligent act of the deceased (Defendant) and it was not enough for the Plaintiff's counsel to assert that the evidence was uncontroverted. Instead, the Defendants' counsel submitted that the deceased (Plaintiff) was the author of his misfortune for failing to buckle the safety belts and without any detailed investigations on the accident, liability cannot shift against the Defendant. For those reasons, the Defendant has urged the court to reach the finding that the Plaintiffs had not discharged their evidentiary burden of proof and sought the court to dismiss the case on that basis.
22. On quantum, the Defendant submitted that for loss of dependency, the Plaintiffs had failed to prove their dependency and the allegations that the deceased settled the bills as they alleged. In any event, the Defendant urged the court to adopt a multiplier of 5 years, dependency ratio of $\frac{1}{3}$ and a Multiplicand of net salary of ksh 127,864/= to reach a total of ksh 2,557,280/=. It was submitted that the sum of ksh 36,721,280 proposed by the Plaintiffs is excessive and punitive to the Defendant and not applicable in the circumstances. In support of those submissions, the Defendant relied on the cases of *M'rarama M'Nthieri v Luke Kiumbe Murithi* [2015] eKLR, and *Kiarie Shoe Stores Ltd v Hellen Waruguru Waweru* [2013] eKLR.
23. For loss of expectation of life, the Defendant proposed the sum of ksh 50,000/= based on a similar award made by court in the case of *James Karanja v Joyce Njoki Maina & Another* [2020] eKLR. Lastly,



on pain and suffering, the Defendant urged the court to award the sum of ksh 20,000/= and referred the court to consider the case of *James Karanja v Joyce Njoki Maina & Another* [2020]eKLR, where the court awarded the sum of ksh 20,000/= on pain and suffering.

Analysis and Determination

24. Having considered the pleadings and evidence on record, the following issues crystalize for determination.
- a. Whether the suit is time barred;
 - b. Whether the Defendant is liable for the accident; and if so,
 - c. What quantum of damages is appropriate in the circumstance?

a. Whether the Suit is Time Barred

25. The fundamental right of access to courts is essential for constitutional democracy under the rule of law. In order to enforce one's rights under the Constitution, legislation and the common law, everyone must be able to have a dispute that can be resolved by the application of law, decided by a court. The right of access to courts is thus protected in the Constitution. In the interests of social certainty and the quality of adjudication, it is important though that legal dispute be finalised timeously. The realities of time and human fallibility require that disputes be brought before a court as soon as reasonably possible. Claims thus lapse, or prescribe, after a certain period of time. If a claim is not instituted within a fixed time, a litigant may be barred from having a dispute decided by a court. This has been recognised in our legal system and others for centuries.

26. In the present case, it has been submitted that the Plaintiffs obtained Letters of Administration on 3rd March, 2020 but filed the present suit on 11th September, 2020 outside the prescribed timeline of six (6) months provided for under Section 2(3) of the *Law Reform Act* and Section 9(2)(b) of the *Fatal Accidents Act*. Section 2 Sub-section 3 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.”

27. The above position is mirrored in Section 9 (2) (b) of the *Fatal Accidents Act*.

The central question therefore is, when did the limitation clock start ticking in this particular case? In my view and pursuant to Section 2(3) and Section 9(2) (b) of the *Law Reform Act* and *Fatal Accidents Act* respectively, the limitation clock begins as soon as the Letters of Administration are issued to the Deceased's legal representatives. The on limitation is one that warrants investigation of facts and in this case, Letters of Administration were herein issued on 3rd March, 2020 to the Plaintiffs and the limitation clock started counting on the 4th March, 2020. It then follows that the period of six (6) months prescribed under Section 2(3) and Section 9(2) (b) of the *Law Reform Act* and *Fatal Accidents Act* respectively, ended on 5th September, 2020 and the Plaintiffs were therefore five (5) days late in filing the suit.



28. Although this court is alive to the fact that the issue of limitation has not been pleaded in the statement of defence, it serves repetition to add that notwithstanding the rule that a party must plead limitation and indeed any defence that would defeat a claim since it underpins a right to fair trial that a party must have notice of the case against it to avoid being taken by surprise, time limitation is a jurisdictional question and the court cannot entertain a matter barred by statutes. To demonstrate this, the court relies on the decision of the Supreme Court in the case of *Nasra Ibrahim Ibren v Independent Electoral And Boundaries Commission & Others*, Supreme Court Petition no 19 of 2018, where that court stressed the fact that jurisdiction is everything and that a Court may even raise a jurisdictional issue *suo moto*.
29. The effect then is that this suit having been filed after the expiration of the limitation period and as is apparent from the plaint that no explanation for the five (5) days delay or any ground of exception has been shown in the Plaint, the Plaint however meritorious it is, must be rejected. However, that does not extinguish the present suit or action itself but operates as a bar to the claim or remedy sought for. Better stated, when a suit is time barred as the one at hand or where the statute prohibits a party from litigating a particular claim, the court cannot grant the remedy or relief sought. To do otherwise would be tantamount to wading out of the jurisdiction of the court and amounting to a travesty of justice.

Conclusion and Disposition

30. In summary, to assuage and dispel any doubts the parties may have, I have found that the present suit was time barred by five days as at the date it was filed and no matter the number of days, once a claim is time barred, leave of court has to be sought before filing the suit. It is for those reasons that this court proceeds to strike out the Plaintiffs' suit while granting liberty of the Plaintiffs to properly move the court.
31. Having found the court is without jurisdiction, I see no basis of delving on the other issues as pointed out for determination. There shall be no orders as to costs.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Muriuki counsel holding brief for Mr. Kiranga for Plaintiff

Mr. Adede holding brief for Mr. Gor counsel for Defendant

Court Assistant - Simon

