Ichugo (Suing as the personal representative of the estate of Wairimu Mathiu) v Kihara (Civil Appeal 27 of 2020) [2023] KEHC 2979 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2979 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL 27 OF 2020

LN MUGAMBI, J

MARCH 31, 2023

BETWEEN

JAMES MBUGUA ICHUGO ..... APPELLANT

SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF WAIRIMU MATHIU

AND

DAVID MUGO KIHARA ..... RESPONDENT

(Being an appeal from the judgment and decree of Stella Atambo (PM) delivered on 6th January 2020 in Kiambu SPMCC No. 38 of 2016)

JUDGMENT

1. This appeal arises from a suit filed in the lower court on February 2, 2018 by the appellant where he alleged that on September 12, 2014 while the appellant's grandmother was travelling in motor vehicle registration No KBX 086Q along Kiambu/Githunguri road at Kiangima area, the said motor vehicle was negligently, recklessly and or carelessly driven that it lost control, veered off the road and rolled several times and as a result the appellant's grandmother sustained fatal injuries and died. He outlined the particulars of negligence on paragraph 5 of the plaint.

2. The respondent filed his defence dated February 18, 2016 in which he denied the allegations in the plaint. Without prejudice, the respondent averred by way of affirmative defence that if the alleged ownership of motor vehicle registration number KBX 086Q, is proved and also the accident, then it was his defence that the accident was wholly and or substantially caused by the negligence of the deceased. He listed the particulars of negligence in paragraph 8 of the defence.

3. On September 21, 2016, the parties entered into a consent on liability and agreed to proceed to assessment of quantum by way of written submissions.

4. In its judgment, the trial court dismissed the suit on the basis that the appellant lacked *locus standi* to bring the suit. The trial court opined as follows:

> "...Under the *Law Reform Act* section 2 (5) the award under the head for the benefit of the estate of the deceased and the plaintiff must obtain letters of administration before filing such claim...The letters of administration is not part of pleading. The grant was introduced by the plaintiff advocate through written submission...Having no evidence or facts placed before me in compliance with issues of plaintiff locus to institute proceedings on behalf of Wairimu Mathu (deceased) under section 2 of *Law Reform Act*, I hereby dismiss the suit with no order as to costs..."

5. Aggrieved by the judgment by the lower court, the appellant filed this appeal. in the memorandum of appeal, he listed six grounds as follows;

   a. The learned trial magistrate erred in law and in fact in dismissing the whole suit on the ground of *locus standi*.

   b. The learned trial magistrate erred in law and in fact when she dismissed the suit on the ground of lack of letters of administration yet the same was duly annexed to the submissions.

   c. The learned trial magistrate erred in law and in fact in dismissing the claim for pain and suffering.

   d. The learned trial magistrate erred in law and in fact in dismissing the claim for loss of expectation of life.

   e. The learned trial magistrate erred in law and fact in dismissing the claim for special damages.

   f. The learned trial magistrate erred in law and fact in dismissing the claim for loss of dependence.

6. The appellant prayed for this court to evaluate, assess the damages in all the above and accord the same with costs and the appeal be allowed with costs.

7. Directions were issued that the appeal be heard by way of written submissions.

Appellant Submissions

8. The appellant filed his submissions on July 10, 2022 and submitted that the parties agreed that the issue of damages be determined by way of written submissions. They recorded liability at 85%:15% in favour of the appellant and once that was done, the court's duty was not to interrogate on the pleadings but to proceed and assess the quantum of damages. He contended that agreeing on liability meant admitting the pleadings as evidence and the appellant was therefore properly suing as the deceased's administrator. He submitted that when the parties surrender their right of giving oral evidence, they have reduced their issues and implied that all documents filed or to be filed with submissions are evidence for the court to use in arriving at a fair justice.

9. The appellant urged this court to find that receipts of special damages were properly on record. Under the head or pain and suffering, the appellant submitted that Kshs 150,000/= would be reasonable and cited the decision in *Benedetta Wanjiru Kimani (suing as the personal administrator of the estate of Samuel Njenga Ngunji) v Changwen Cheboi & anor* Nakuru HCCC No 373 of 2008. Under the head of loss of expectation of life, they prayed for an award of Kshs 200,000/=. Under the head of loss of dependency, the appellant submitted that the deceased was aged 78 at the time of the fatal accident and prayed for Kshs 400,000/=.

Respondent's Submissions

10. The respondent filed his submissions on December 5, 2022 and outlined two issues for determination. On whether pleadings can be considered as evidence, they submitted the matter which had been set for retrial was to be subjected to a fresh hearing as if the previous trial had not occurred save for consent on liability as ordered by the High Court in Kiambu civil appeal No 200 of 2016. Therefore, it was required that any document to be relied upon by a party should be produced as an exhibit afresh and the witness statements be adopted. No such exercise was undertaken by either party during the fresh hearing. They submitted that pleadings are not evidence and thus the appellant's pleadings cannot be a basis for which an award is made. They placed reliance on the decision in civil application Nai 12 of 1978 *CMC Aviation Ltd V Kenya Airways Ltd (cruisair Ltd)* (1978) eKLR where Madan J (as he then was) expressed himself as follows;

> " The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.
>
> In the Australian case, *Re Williams Bros Ltd* (1928) 29 SRNSW 248, Harvey CJ said: "To give evidence in my opinion means to make statements on oath before a person duly authorised to administer an oath".

11. On whether the appellant had locus in filing the suit, they submitted that the learned trial magistrate rightly declined to grant an award under this head on the ground that the appellant had not obtained proper letters of administration. They cited section 2(5) of the *Law Reform Act* which provides that the rights under the *Law Reform Act* are for the benefit of the estate of the deceased and thus anyone who purports to be seeking the said rights should be properly equipped with the letters of administration that give them power to deal on behalf of the estate of the deceased appropriately. It was their submission that this court ought to strike out and dismiss this appeal with orders as to cost to the respondent and uphold the lower court judgment as the appellant lacked locus standi. They cited the decision in *Rift Valley Railways Workers Union (k) v Kenya Railways Staff Retirement Benefits Scheme & another* (2017) eKLR, where Abuodha J held that:

> " On the issue of locus standi to agitate pension disputes, section 46 of the Act provides that any member of the scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of the scheme can request for a review by the CEO of RBA. A member is defined under the Act to include a person entitled to or receiving a benefits under a retirement benefits scheme. The claimant is a trade union and cannot possibly fit the definition of a member under the Act. Further under the *Employment Act*, a trade union is defined as an association of employees whose principal purpose is to regulate relations between employees and employers and includes an employer's organization.
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> 18. The persons the claimant purports to represent in this application are no longer employees of the interested party. They are retirees. The court is therefore of the view that the claimant does not have the *locus standi* to prosecute this claim on behalf of the beneficiaries of the 1st respondent's retirement scheme.

19. In conclusion the court declines jurisdiction to entertain this claim and the same is hereby struck out with costs."

12. They continued that if this court is inclined to determine that the appellant had locus to file and defend the trial suit on the basis that the said letters of administration were properly on record, they submitted that the appellant was not empowered to defend the suit. They stated that the filed limited grant of letters of administration ad litem was only limited for the purpose of filing the suit and not the prosecution of the same and the filing of subsequent suits including and not limited to the instant appeal. They cited the decision in civil case 618 of 1997 *Lydia Ntembi Kairanya &another v Attorney General* (2009) eKLR.

Analysis and Determination

13. Having read and considered the submissions together with the memorandum and record of appeal and the applicable law, I opine that these are the issues that come up for determination of this appeal;

    a. Whether the appellant had locus standi to file this suit;

    b. Whether the appeal is merited;

    c. Who should pay the costs of this appeal?

14. In *Selle & another v Associated Motor Boat Co Limited & others* (1968) EA 123 stated the duty of the court in a first appeal to be as follows:

> 'I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270).'

15. In *Margaret Njeri Mbugua v Kirk Mweya Nyaga* [2016] Eklr the Court of Appeal stated as follows of the role of the first appellate court:

> " .....The above is also true for the High Court sitting on a first appeal. The learned judge should have reconsidered the evidence, evaluate it herself and drawn her own conclusions. In doing so she should have therefore considered the application to strike out the defence, the affidavit and evidence in support as well as the reply by the respondent. She failed to do this and therefore failed to consider matters she should have considered."

16. The appellant has said that the trial court was wrong in finding that he had no *locus standi* to bring the suit on behalf of the deceased. In the case of *Law Society of Kenya v Commissioner of Lands & others*, Nakuru High Court civil case No 464 of 2000, the court held that; -

> " locus standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in court of law". Further in the case of *Alfred Njau and others v City Council of Nairobi* (1982) KAR 229, the court also held that; -
>
> "the term *locus standi* means a right to appear in court and conversely to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such proceedings".

17. Section 2(5) of the *Law Reform Act* states that the right conferred by this part of the benefit of the estates of deceased persons shall, in addition to and not on derogation of any rights conferred on dependants under the *Fatal Accidents Act* or the *Carriage by Air Act* 1932 of the United Kingdom."

18. A perusal of the pleadings in the lower court, shows that appellant indicated that he was filing this suit on behalf of his deceased grandmother who was involved in an accident while aboard KBX 086Q, in which she sustained fatal injuries and passed on. Under paragraph 1 of the plaint, the appellant (then plaintiff) described the capacity in which he was bringing the suit as follows:

> 'The plaintiff is an adult male of sound mind residing and working in Kiambu Town. He brings this suit as the administrator of the estate of Wairimu Mathu (deceased). He also brings this suit on his own behalf and on behalf of other dependants of the estate of the deceased. His address of service for purpose of this suit shall be care of M/S L.K KIrori & Co Advocates. The Bishop Magua House, Third Floor, PO Box 1283, Kiambu.'

19. It was therefore vital for the appellant to take out letters of administration for the estate of the late Wairimu Mathu before filing this suit. The appellant has submitted that he had taken out the letters of administration and annexed them to his submissions before the trial court.

20. I have perused the entire record of appeal and noted that the plaint was filed on February 2, 2016. The limited grant of letters of administration ad-litem is indicated as 'being limited only to the purpose of filing the suit' in respect of the estate of Wairimu Mathu and was issued on July 22, 2015 by Justice L. Achode.

21. From this fact, it can safely be deduced that in reality, the grant was in existence at the time the appellant instituted the suit and thus in describing himself as the representative of the estate of the deceased he was not misleading or fictitious.

22. The bone of contention is that he never filed the limited grant together with his list of documents in the suit before trial court. He instead belatedly attempted to introduce it through submissions on quantum since liability had already been agreed in the ratio of 85:15 in favour of the appellant

23. The question is, was the trial court justified dismissing the case for lack of *locus standi* in the circumstances?

24. As has been held in many judicial precedents', submissions are not evidence save when explicitly adopted as such. It is thus legally impermissible to seek to introduce evidential material through

submissions. As was held by Mwera, J (as he then was) in *Nancy Wambui Gatheru v Peter W Wanjere Ngugi* Nairobi HCCC No 36 of 1993 expressed himself as follows:

> " Indeed, and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it..."

25. There was a consent that was recorded on September 21, 2016 which the parties referred to in relation to liability. I have perused the trial court proceedings but I could not trace the said consent on liability. Further, I note that the matter was a subject of appeal in Kiambu civil appeal No 200 of 2016 where the court sent back the file to the Kiambu magistrate's court for retrial as it could not pinpoint when further consent on the admission of documents was recorded.

26. Even after an order for retrial was issued, the parties did not enter into a consent on admission of documents as exhibits.

27. The appellant, it seems holds the view that once consent on liability was entered, he had a free hand to not only rely on the documents filed together with the suit but also annex any that was previously left out at the time he filed the suit. That position is legally untenable. I concur with Justice Odunga in *Robert Ngande Kathathii v Francis Kivuva* (2020) eKLR where he held as follows:

> " ... submissions with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions..."

28. The fact of evidence not having been properly laid before the court did not only affect that limited grant that the appellant's counsel was trying to introduce.

29. The manner in which this particular 'trial' was conducted in the trial court left a great deal to be desired. Parties went straight to filling written submissions without either producing the exhibits by formal proof or recording a consent on admission of the documents as exhibits.

30. The court record indicates that on May 13, 2019; the matter was coming up for hearing when the appellants advocate informed the court as follows:

> 'Kirori: For hearing. This case emanates from an appeal. Issue pending is on quantum, liability was agreed on September 21, 2016. Will file submissions need 14 days.
>
> MS Motari: I confirm. Will file submissions in 21 days.
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> Hon S Atambo
>
> SPM
>
> May 13, 2019
>
> Court: Parties file written submissions for July 1, 2019
>
> Hon S. Atambo
>
> SPM
>
> May 13, 2019'

31. It is quite evident from the above that there was no hearing conducted or any consent entered to provide the court with evidence to determine the issue of quantum. It is apparent that the only consent that had been entered into was on liability only

32. The filing of written submissions in this suit was thus premature since the court was incapable of coming up with any judgment on quantum on the basis of submissions only unless of course those submissions were adopted as evidence which appears not to have been the case going by decision of the trial court to strike out the appellant's suit on account that he had annexed an additional document to his submissions outside those that had been filed with the pleadings.

33. From the court's ruling, it is patent even as it castigated the appellant counsel on the basis that he was submitting additional information through his written submissions and striking out the suit, it had itself sanctioned an irregular trial process by purporting to retire to write a judgment on issue it was required to take evidence on but which it had failed to do.

34. In skipping that critical stage taking evidence or ensuring that there was content or evidence, and accepting the parties submissions, the trial court committed a fundamental error in the conduct of the case since the list of documents that had been filed with the pleadings did not amount to evidence unless it was introduced in court as evidence either by consent of the parties or by way of formal proof.

35. The court decision amounted to allowing the parties advocates to submit on non-existent facts in respect to the issue of quantum as no evidence had been received by the court in that regard.

36. It means that the court called for closing submissions when it had not heard the case. How then could it possibly produce a judgment? The court condoned a short-circuiting of the trial process whose results are irregular proceedings.

37. The upshot of the foregoing is that this court finds that the entire proceedings were mistrial.

38. Once more, this file is returned to the lower court with directions to conduct a proper trial.

39. Since both parties had agreed on liability as can be discerned from the court record though I could not find the same, that position is maintained. Unless by consent, they agree to vacate it.

40. Each party will bear its own costs of this appeal.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 31st DAY OF MARCH 2023.

L.N MUGAMBI

JUDGE

In presence of:

CORAM (ON-LINE)

Before L.N. Mugambi, Judge

Appellant- absent

Respondent- absent

Advocate for Appellant- absent

Advocate for Respondent- absent

Court Assistant- Etyang

Court

This Judgement be transmitted digitally by the Deputy Registrar to the Advocates for the Parties on Record through their respective email addresses.

L.N. MUGAMBI

JUDGE