



**Koki & another v Osenya & another (Both Suing as the Legal Administrators
of the Estate Of Julius Odhiambo Ochola-Deceased) (Civil Appeal
E573 of 2019) [2023] KEHC 24092 (KLR) (Civ) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24092 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E573 OF 2019
CW MEOLI, J
OCTOBER 26, 2023**

BETWEEN

CHRISTOPHER OBWABO KOKI 1ST APPELLANT

LONGRUN TOURS & TRAVEL LTD 2ND APPELLANT

AND

VINCENT OTIENO OSENYA 1ST RESPONDENT

BEATRICE AWOUR OCHOLA 2ND RESPONDENT

**BOTH SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF
JULIUS ODHIAMBO OCHOLA-DECEASED**

*(Being an appeal from the judgment of I. Orange, SRM, delivered on
10th September, 2019 in Nairobi Milimani CMCC No. 4182 of 2017)*

JUDGMENT

1. This appeal emanates from the judgment delivered on 10th September 2019 in Nairobi Milimani CMCC No 4182 of 2017. The suit had been commenced by way of the plaint dated 6th June, 2017. The plaintiffs therein were Vincent Otieno Osenya and Beatrice Awour Ochola (hereafter the 1st and 2nd Respondents respectively) and they named Christopher Obwabo Koki and Longrun Tours & Travel Ltd, as the defendants in the lower court (hereafter the 1st and 2nd Appellants).
2. The claim was brought to recover damages under the *Law Reform Act* and the *Fatal Accidents Act* in respect of the death of Julius Odhiambo Ochola (hereafter the deceased) due to fatal injuries sustained in a road traffic accident which occurred on or about the 20th of October, 2013. It was alleged that



the 1st Appellant was at all material times the driver of the motor vehicle registration No KBT 274A (hereafter the subject motor vehicle) while the 2nd Appellant was at all material times the registered owner of the subject motor vehicle.

3. It was further alleged that on the fateful day, the deceased was lawfully riding a bicycle along Moi-South Lake Road near Simba Lodge when the 1st Appellant so negligently and carelessly controlled and/or managed subject motor vehicle that, it veered off the road and knocked down the deceased, occasioning him fatal injuries. The Respondents pleaded in the plaint that prior to his death, the deceased who was aged 35 years at the material time, enjoyed good health and was self-employed, with a monthly income of Kshs 15,000/-. Five people including his wife, mother and daughter were named as dependents of the deceased.
4. The 1st and 2nd Appellants entered appearance and filed their joint statement of defence on 18th June 2018 denying the key averments in the plaint. Alternatively, the Appellants pleaded contributory negligence against the deceased and setting out the particulars thereof in the statement of defence. In rejoinder, the Respondents filed a reply to defence on 2nd July, 2018 echoing the averments made in the plaint.
5. The suit proceeded to full hearing, with the Respondents both testifying, while the Appellants closed their case without calling any witnesses. In its judgment, the trial court found in favour of the Respondents. The court held the Appellants jointly and severally liable for the accident. Judgment was thus entered against the Appellants in the total sum of Kshs 1,551,600/- made up as follows:
 - a. General damages for pain and suffering Kshs 50,000/-;
 - b. Loss of expectation of life Kshs 100,000/-;
 - c. Loss of dependency Kshs 1,281,600/-
 - d. Special Damages: Kshs 120,000/-.
6. Aggrieved by the outcome, the Appellants preferred this appeal vide the memorandum of appeal dated 4th October, 2019 which is premised on the following grounds:
 1. That the Learned trial magistrate erred in law and in fact by failing to find that the leave obtained by the Plaintiffs to file the case out of time was irregularly obtained.
 2. That the Learned trial magistrate erred in law and in fact in failing to find that leave to file suit out of time is usually ex parte and therefore can only be challenged in subsequent proceedings.
 3. The Learned trial magistrate misdirected himself and erred both in law and in fact by allowing the Plaintiff's suit to stand.
 4. The Learned trial magistrate misdirected himself and erred both in law and in fact by failing to dismiss the Plaintiff's suit against the Defendant.
 5. The Learned trial magistrate misdirected himself and erred both in law and in fact in failing to find that the Plaintiff's suit against the Defendant could not stand as it was filed out of time.
 6. That the Learned trial magistrate erred in law and in fact in failing to address himself on the gist of the law whether the reasons advanced by the Plaintiffs while seeking leave to bring the suit out of time.



7. The Learned trial magistrate erred in law and in fact by failing to find that the Plaintiffs had obtained leave to file their suit out of time irregularly and that the reasons adduced did not meet the threshold or fall within the provisions of Cap 22 of the *Limitation of Actions Act*.
 8. The Learned trial magistrate misdirected himself and erred both in law and in fact by holding the Appellants 100% liable for the accident the subject of this suit.
 9. The Learned trial magistrate misdirected himself and erred both in law and in fact by holding the Defendant 100% liable for the accident whereas evidence on record called for a higher degree of contribution from the deceased and thus arrived at an erroneous finding on liability.
 10. The Learned trial magistrate erred in law and in fact by awarding damages for loss of dependency that are so manifestly excessive thus rendering the whole assessment erroneous.
 11. The Learned trial magistrate misdirected herself and erred in law and in fact by awarding a very high multiplier and hence arrived at an erroneous award.
 12. The Learned trial magistrate erred in law and in fact by failing to discount the award under the *Law Reform Act* from the award under the *Fatal Accidents Act* thus rendering the whole assessment of damages erroneous.” (*sic*)
7. The appeal was canvassed by way of written submissions. Counsel condensed the Appellants’ grounds of appeal into three (3) salient issues, namely, the trial court’s respective findings on the validity of the suit; liability and quantum (loss of dependency specifically). Addressing the first issue, counsel cited the decisions in *Hezbon Opande (suing as administrator of the estate of the late Florence Pande Nyaidho) v James A. Obura* [2018] eKLR and *Bernard Mutenga Mbithi v Municipal Council of Mombasa and another* Civil Appeal No 3 of 1992, (unreported) to contend that the trial court erred in failing to find that the leave granted to the Respondents to file their suit out of time was improper. Counsel contended that in the absence of proper reasons to warrant an extension of time for the Respondents, the trial court ought to have dismissed the suit.
 8. On liability, counsel borrowing from the decisions in *Enock Sindi Obegi v Benard Sumo* [2020] eKLR and *Hussein Omar Farah v Lento Agencies* [2006] eKLR argued that the Respondents did not discharge the burden of proof in ascertaining the circumstances surrounding the accident and hence the trial court erred in finding the Appellants wholly liable in the circumstances.
 9. Concerning quantum of damages, counsel urged the court to substitute the award in the sum of Kshs 50,000/- made under the head of pain and suffering, with a more reasonable award of Kshs 10,000/-. Here citing the decision in *James Gakinya Karienyé & another (suing as the legal Representative of the estate of David Kelvin Gakinya (deceased) v Perminus Kariuki Gitbinji* [2015] eKLR. Counsel further proposed that the award made under the head of loss of expectation of life be substituted with an award in the sum of Kshs 50,000/-.
 10. Concerning the award given for loss of dependency, the Appellants’ counsel contended that the multiplier adopted by the trial court fell on the higher side and hence proposed that a multiplier of 13 years be applied instead. He relied on the case of *Michimikuru Tea Factory v Charles Lautani Imunya* [2013] eKLR where a similar multiplier was used at the instance of a person who died aged 22 years. Counsel equally asserted that special damages not having been proved ought not to have been awarded. Lastly, counsel submitted that the trial court’s final award amounted to a duplication and that the relevant awards ought to have been adjusted in line with the decision offered in *Rose Adisa Odari v Wilberforce Egesa Magoba* [2009] eKLR. In conclusion therefore, it was contended that the trial court’s judgment ought to be disturbed in the manner set out hereinabove.



11. The Respondents defended the trial court’s findings in totality. Concerning the issue of extension of time to file suit, their counsel contended that the law makes provision for the enlargement of time where such time has lapsed and that in the present instance, the Respondents sought and were granted leave to institute the suit out of time in keeping with the principles set out in the case of *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR. That subsequently, the suit proceeded to full hearing with the participation of the Appellants, following which judgment was rendered. The court was thus urged to disallow grounds 1-7 of the memorandum of appeal.
12. On liability, counsel for the Respondents contended that the evidence tendered by the Respondents was consistent and uncontroverted by the Appellants and hence there is no justification for disturbing the lower court’s finding on liability.
13. Concerning quantum, counsel urged the court to uphold the awards made under the respective heads of pain and suffering, and loss of expectation of life, terming them as reasonable in the circumstances. Regarding the award for lost dependency, counsel contended that the multiplier of 25 years applied by the trial court is reasonable, citing *Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita* [2011] eKLR and *Ruth Wangechi Gichubi v Nairobi City County* (2013) eKLR. Where both courts applied a multiplier of 30 years at the instance of deceased persons aged 21 years and 22 years respectively.
14. Counsel drew the court’s attention to the decision in *Hellen Waruguru Waweru (Suing as the Legal Representative of Peter Waweru Menja (Deceased v Kiarie Shoe Stores Limited* [2015] eKLR to argue that there is no mandatory requirement under the *Fatal Accidents Act* for the deduction of awards made under other statutes in respect of a deceased person from and all that is required is for the trial court to take into account those other awards due to dependents under other statutes. Consequently, it was asserted that the appeal lacked merit, and ought to be dismissed with costs.
15. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123 in the following terms:

“ An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

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 demeanor of a witness is inconsistent with the evidence in the case generally.”
16. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & another v Duncan Mwangi Wambugu* [1982 – 1988] IKAR 278.



17. Upon review of the memorandum of appeal and submissions by the respective parties before this court, it is the court's view the appeal turns on one key issue, namely, whether the trial court erred in finding that leave to file the suit out of time was properly sought and granted.
18. The record shows that prior to instituting the suit, the Respondents filed an ex parte application dated 25th July, 2017 seeking leave/ enlargement of time to enable them file the suit out of time. The application which was brought inter alia under the provisions of Order 37, Rule 6 of the Civil Procedure Rules (CPR) was supported by the affidavit of the 2nd Respondent who explained that following the occurrence of the accident on 20th October, 2013 there was a delay in bringing the suit, that the delay was occasioned by an ensuing dispute between the 1st Respondent who was the wife to the deceased, and the deceased's family, hence hindering the filing of the succession cause to enable them obtain the requisite letters of administration in good time.
19. The 2nd Respondent further explained that the matter was resolved in December, 2016 upon which the succession cause was filed and letters of administration ad litem were obtained on 13th December, 2016. Upon hearing the ex parte application, the trial court allowed it vide the order made on 7th February, 2018.
20. The matter eventually proceeded to trial after a defence was filed by the Appellants. The record of the trial shows that during the cross-examination of the Respondents and at submissions stage, the Appellants canvassed the issue that the suit was incompetent for being statute barred (the limitation period having lapsed in 2016) and that leave ought not to have been granted in the circumstances of the case. In the end, the trial court delivered judgment in favour of the Respondents and against the Appellants.
21. Order 37, Rule 6 (*supra*) expresses that:
 1. "An application under section 27 of the Limitation of Actions Act made before filing a suit shall be made ex parte by originating summons supported by affidavit.
 2. Any such application made after the filing of a suit shall be made *ex parte* in that suit."
22. An application seeking leave to institute a suit out of time is ordinarily made ex parte. That notwithstanding a challenge to the order granting leave to the Respondents could be raised at the point of trial, as was the case herein, by way of cross-examination. This position has been reiterated by superior courts in various instances, pursuant to relevant decisions of the Court of Appeal including Yunes K. Oruta and another v Samuel Mose Nyamato Civil Appeal No 96 of 1984 (unreported) where *dicta* in the English case of Cozens v North Devon Hospital Management Committee and Anor [1966] 2 ALL ER 799 was followed. See also Raphael Gachoki Njanguru v Alesio Ndanju Karagu [2014] eKLR; John Gachanja Mundia v Francis Muriira & another [2017] eKLR. The Court of Appeal in Mary Wambui Kabugu v Kenya Bus Service Limited [1997] eKLR held that:

"...the question whether or not the plaintiff was entitled to the extension can only be challenged in the proceedings. This is one of the exceptions to the general rule that a party against whom an ex parte order has been made can only apply to the court which made the order to set it aside."
23. The law clearly stipulates the circumstances in which a court can extend the time required for a party to bring a suit out of time. Section 27(1) and (2) of the Limitation of Actions Act, provides as follows:
 - (1) Section 4 (2) does not afford a defence to an action founded on tort where—



- (a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
 - (b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
 - (c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
 - (d) the requirements of subsection (2) are fulfilled in relation to the cause of action.
- (2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—
- (a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and
 - (b) in either case, was a date not earlier than one year before the date on which the action was brought.
24. The above provision has been the subject of interpretation in different superior courts. In the case of *Mary Osundwa v Nzoia Sugar Company Limited* Civil Appeal No 244 of 2000 [2002] eKLR the Court of Appeal upon setting out the provisions of Section 27 (1) of the *Limitation of Actions Act* stated that:
- “The section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort. Accordingly, Osiemo J. had no jurisdiction to extend time as he purported to do on 28th May, 1991. That the order was by consent was neither here nor there; the parties could not confer jurisdiction on the Judge by their consent”.
25. It is not in dispute that the Respondents’ case was founded on the tort of negligence wherein damages were sought on behalf of the estate of the deceased in respect to a personal injury claim resulting from a fatal accident which occurred over 3 years prior to the institution of the claim. Hence the Respondents’ suit fell within the ambit of Section 27 (*supra*). Under the Section for an application seeking leave to file a suit out of time to succeed, an applicant ought to demonstrate that the material facts relating to the dispute were outside of his or her knowledge in the material times prescribed in section 27 (2) (a) and/or (b).
26. No such ground was raised in the Respondent’s *ex parte* motion to institute suit or during cross-examination, the Respondents asserting that a dispute between the deceased’s widow and his family caused the delay in filing the suit within the statutory timelines. This assertion does not satisfy the requirements set out under Section 27. Consequently, the court is of the considered view that the trial court had no proper basis upon which to grant leave at the outset, or to sustain the suit in the final stage. This court concurs with the sentiments of the Appellants that the trial court in so acting erred and misdirected itself, thereby arriving at a wrong finding on the issue.



27. In the case of *Mary Wambui Kabugu* (*supra*) the Court of Appeal expressed the following:

“Kwach, J.A went on to say, in the *Mbithi* case, that *Cozen's* case was cited with approval in the case of Yunes Oruta & another v Samel Nyamoto (Civil Appeal No 96 of 1984 - unreported).

I see the correct reasoning in the *Oruta* and *Mbithi* cases. The judge who heard the application for extension of time must first hear it (in case of application filed before filing of suit) ex-parte. He has no discretion in the matter. He is bound by the requirements of the Act. If the evidence shows prima facie that the requirements of the Act are satisfied, leave should be given. It is in the action only that the defendant can challenge the facts in due course. This is, because, in my view, the requirements of section 27 of the Act are explicit and the judge cannot go beyond the scope of those requirements. He cannot for instance grant leave out of sympathy, or because the applicant did not know the law etc.”

28. In view of all the foregoing circumstances, the court finds that the suit, having been founded on leave, which was improperly granted, was incompetent ab initio and ought to have been dismissed on that basis. This determination is adequate to dispose of the entire appeal and no useful purpose will be served by delving into the issues touching on liability and quantum.

29. The upshot therefore is that the appeal has succeeded. Consequently, the judgment rendered by the trial court on 10th September, 2019 in Nairobi Milimani CMCC No 4182 of 2017 is hereby set aside and is substituted with an order dismissing the Respondents' suit. In view of the circumstances giving rise to the claim, the Court will order that the parties shall bear their own costs in the lower Court and on this appeal.

DELIVERED AND SIGNED AT NAIROBI ON THIS 26TH DAY OF OCTOBER 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellants: N/A

For the Respondents: Mr. Kamau

C/A: Carol

