



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 92 OF 2018

MARY WAMUYU THUKU & CHARLES GICIRI.....APPELLANTS

VERSUS

SARAH WANJIKU.....1ST RESPONDENT

JOSHUA NYAGA.....2ND RESPONDENT

ELIJAH MWANGI.....3RD RESPONDENT

(Being an appeal from the ruling delivered by Honourable Kalo Chief Magistrate

on 12th June 2018 in Nakuru Cmcc No. 662 of 2017)

JUDGEMENT

1. This appeal arises from suit filed by the appellants/plaintiffs as legal representatives of the late **Joakim Thuku Ngugi** through a plaint dated 4th July 2017 against the defendants/respondents seeking general and special damages under the **Fatal Accident Act** and the **Law Reform Act** following death Joakim **Thuku Ngugi** who died as a result of road traffic accident that occurred on 4th July 2014 at Eldama Ravine road.

2. After the 1st appellant and a police officer testified before the court the appellants filed an application dated 13th April 2018 seeking to file a supplementary list of witnesses and the statements of **Peninah Wanjiku Ndumbo** and **Isaac Heka Mungai** and a supplementary list of documents.

3. The application was opposed by the defendants. The court in its ruling dated 12th June 2018 dismissed the appellants' application with costs.

4. Being aggrieved by the said ruling of Honourable Chief Magistrate in Nakuru CMCC No. 662 of 2017 the appellant filed the current appeal on the following grounds:

i. That the learned trial magistrate erred in fact and law in holding that the appellants ought to have filed the application for leave to file supplementary list of witnesses and their statements at the pre-trial stage yet the Plaintiffs had not closed their case and no prejudice could be occasioned to the Respondents.

ii. That the learned magistrate erred in law and misdirected himself in predetermining the matter before it is heard and concluded.

iii. The learned magistrate erred in law and fact in relying wholly on procedural technicalities as opposed to taking into account substantive justice to the Plaintiffs who are the legal administrators of the estate of the deceased as per article 159 (d) of the constitution of Kenya.

5. The appeal was canvassed by way of written submissions. The Respondents did not file their submissions.

APPELLANTS' SUBMISSIONS

6. Through submissions filed on 15th December 2021, counsel for the appellant submitted that the suit was filed by the appellants as legal

representative of the estate of the deceased seeking compensation for general and special damages under the **Fatal Accidents Act** and the **Law Reform Act** following death of **Joakim Thuku Ngugi** who was knocked by motor vehicle registration number KXX 510 belonging to the 1st and 2nd respondent which occurred on 4th July 2014 along Eldama Ravine Road.

7. The appellant submitted that the application was dismissed on ground that it was made after suit had been certified ready for hearing and PW1 and PW2 had testified.
8. The appellant submitted that the appellants are entitled to a fair hearing as a constitutional right as per **article 50(1) of the constitution** and in exercising judicial authority, the courts are to be guided by **Article 159 (2)** and administer justice without undue regard to procedural technicalities; that the dismissal of the application by the magistrate failed to take into account the said two principles.
9. Counsel for the appellant further submitted that at the time of filing the application seeking to file a supplementary list of witnesses, the appellants had not closed their case and it is only the appellant and the police officer who had testified and the respondent would not be prejudiced in any manner nor compromise the tenets of a fair trial.
10. The appellant's counsel further submitted that the rules of procedure are handmaidens to justice and substantive justice should not be sacrificed at the altar of procedural rules like discovery procedure and further if the appellant had closed their case, the court was supposed to weigh the scales of justice and exercise discretion to allow reopening of the case.
11. In conclusion, the appellant urged this court to exercise its appellate jurisdiction and set aside the ruling of the trial court of 12th June 2018 and allow the appellant application dated 13th April 2018 and upon allowing the application, direct the matter to proceed to a full trial before the trial court from where it had reached.

ANALYSIS AND DETERMINATION

12. I have perused the proceedings before the trial court and the submissions filed by the appellant and find that the issue for determination is whether the trial court erred in declining to grant leave to the appellants to file a supplementary list of documents and witnesses statement of **Peninah Wanjiku Ndumbo** and **Isaac Heka Mungai**.
13. Record show that the application was dismissed on the ground that the application was made after the matter had been certified ready for hearing and PW1 and PW2 had already testified.
14. Under **Order 3, Order 7, and Order 11 of the Civil Procedure Rules of 2010**, parties are required to furnish their evidence in advance before the commencement of the trial. **Order 3 rule 2** provide as follows: -

“All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by—

 - (a) the affidavit referred to under Order 4 rule1 (2);**
 - (b) a list of witnesses to be called at the trial;**
 - (c) written statements signed by the witnesses excluding expert witnesses; and**
 - (d) copies of documents to be relied on at the trial including a demand letter before action: Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order.”**
15. However, under **Order 11 Rule 7** with the leave of the court, documents can be furnished later, but at least 15 days before the pre-trial conference as envisaged.
16. The suit had passed through the pre-trial stage and the parties had confirmed having complied with order 11 on 30th October 2017 the suit was fixed for hearing on 5th December 2017.
17. On 5th December 2017, the 1st appellant testified while Pw2 testified on 29th January 2018. After evidence of PW2, counsel for appellants indicated to court that they wished to call an eye witness and sought leave to file a supplementary list of witnesses and witness statements.
18. The essence of filing the witnesses' statement and the list documents together with the pleadings is to avoid the issue of an ambush during the trial by enabling the other party know evidence to be adduced.
19. However, as envisaged in **article 50(1) of the constitution of Kenya** every person is entitled to a fair trial. The courts in ensuring that parties have a fair hearing and in the process of doing justice should not be overtaken by procedural technicalities as enshrined under **Article 159 (2) of the constitution**.
20. The court in exercising its discretion should be guided by the circumstances of each case including the availability of witnesses, and the stage at which the case has reached for the additional evidence to be introduced.

21. The appellants/plaintiffs herein sought to introduce two witnesses **Peninah Wanjiku Ndumbo** and **Isaac Heka Mungai** after the 1st plaintiff and one other witness had testified. I have looked at the witness statement filed and I note that Isaac was the eyewitness and his statement gives a chronology of the events of the accident having been present at the scene and taken the deceased to hospital on the fateful day of the accident.

22. The defendant has option of recalling witnesses who had testified for cross examination if it will be necessitated by additional evidence. That way both parties will not be prejudice as locking out crucial witness will occasion injustice as that will deny the court access to crucial evidence which will assist in arriving at a fair and just determination of issues between the parties herein.

23. From the foregoing, I find that learned magistrate erred in dismissing the appellants' application. I therefore proceed to set aside the trial court ruling dismissing the application dated 13th April 2018.

24. FINAL ORDERS

- 1) **Ruling delivered on 12th June 2018 dismissing plaintiff's/appellant's application dated 13th April 2018 is hereby set aside.**
- 2) **That the appellant be allowed to file a supplementary list of witnesses and the witness statements of Peninah Wanjiku and Isaac Heka within 14 days**
- 3) **The respondent/defendant is at liberty to recall witnesses who had testified**
- 4) **Costs to the appellants**

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY OF MARCH, 2022

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

FRANCIS LEPIKAS - COURT ASSISTANT

NO APPEARANCE BY PARTIES