Attorney General (Suing on behalf of Permanent Secretary Ministry of Special Programmes) & another v Odeny (Suing as the legal representative of the estate of the late Andrew Agunda Odeny (Deceased)) (Civil Appeal E22 of 2021) [2022] KEHC 15707 (KLR) (29 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15707 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E22 OF 2021

JN KAMAU, J

NOVEMBER 29, 2022

BETWEEN

ATTORNEY GENERAL (SUING ON BEHALF OF PERMANENT SECRETARY MINISTRY OF SPECIAL PROGRAMMES) ..... 1ST APPELLANT

LEWIS KIPNG'ENO ..... 2ND APPELLANT

AND

CHRISTINE ATIENO ODENY ..... RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE ANDREW AGUNDA ODENY (DECEASED)

(Being an appeal from the Judgment and Decree of Hon S.O. Temu (SPM) delivered at Nyando in Senior Principal Magistrate's Court Case No 265 of 2011 on 18th February 2021)

JUDGMENT

Introduction

1. In his decision of February 18, 2021, the learned trial magistrate, Hon S. O. Temu (SPM) apportioned liability between the appellant and the respondent at 80% to 20% respectively and entered judgment in favour of the respondent against the appellant herein as follows:-

    a. Pain and suffering Kshs 10,000/=

    b. Loss of expectation of life Kshs 50,000/=

    General damages under fatal accidents Kshs 361,476/=

    1/3 x 3347 x 27 x 12

Plus costs and interest thereon at court rate from the date of judgment.

2. Being aggrieved by the said decision, the appellant herein filed a memorandum of appeal dated March 8, 2021 on March 16, 2021. He relied on four (4) grounds of appeal.

3. His written submissions were dated March 29, 2022 and filed on March 30, 2022 while those of the respondent were dated May 6, 2022 and filed on May 18, 2022.

4. The judgment herein is based on the said written submissions which the parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

7. Having looked at the grounds of appeal and the respective parties' written submissions, it appeared to this court that the issue that had been placed before it for determination was whether or not the respondent had the locus standi to institute suit against the appellant herein warranting interference by this court.

8. The court dealt with all the grounds of appeal together as they were related.

9. The appellant submitted that the learned trial magistrate noted in his judgment that the respondent had sought for the limited grant before filing the suit and that she had in fact admitted during trial that she did not have capacity to institute the case and that she instituted the case before obtaining the grant. He further argued that the claim was premised on the *Fatal Accidents Act* and the *Law Reform Act* in which it was a statutory requirement for the proceedings to be brought by the deceased's personal representative. It was thus his case that the case was therefore a nullity from its inception.

10. In this regard, he placed reliance on the case of *Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the estate of Fanuel Evans Amudavi, deceased)* [2016]eKLR where the court held that a person who is entitled to bring a cause of action in respect to the estate of a deceased person was personal representative or an executor or administrator and ought to obtain an appropriate grant so as to have the necessary locus standi.

11. He submitted that no evidence was led to prove the sentiments by the learned trial magistrate to the effect that the respondent rectified the omission by producing the limited grant dated April 24, 2012 although she had moved the court for the same on November 11, 2011 and that the same never came up in re-examination.

12. He further argued that the learned trial magistrate applied the wrong principles of law when he termed the said omission as a technicality and relied on the *Constitution* to cure the defect. He submitted that the *Constitution* did not do away with rules and procedure and that that was not a mere technicality but a mandatory statutory requirement that had to be complied with.

13. In this respect, he cited the case of *Nicholas Kiptoo Arap Salat v IEBC & 6 others* [2013] eKLR where the court held that article 159 of the *Constitution* and the oxygen principles were not meant to aid in overthrowing or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice.

14. He asserted that the amendment of the plaint did not cure the defect as was held in the case of *Patrick Kiseki Mutisya (suing as the personal representative to the estate of Nzomo Mutisya (deceased) v K.B Shaghani & Sons Limited & another* [2012] eKLR where it was held that the subsequent amendment of the plaint could not reverse the initial harm done to the suit when the plaintiff had no capacity to sue when he instituted the suit.

15. He also relied on the case of *Virginia Edith Wambui Otieno v Joash Ochieng Ougo [*1982-88] 1 KAR 1049 where it was held that the doctrine of relation back of an administrator's title on obtaining a grant of letters of administration to the date of the intestate's death could not be invoked so as to render the action incompetent. The court also held that an administrator to a deceased's estate had to take out letters of administration, failing which the action was incompetent at the date of its inception.

16. It was his submission that the appeal herein fell within the parameters of the case of *Mwanasokoni v Kenya Bus Service Limited* [eKLR citation not given] in which it was held that a fact could be challenged on appeal if it was not based on any evidence or if it was based on a misapprehension of evidence or if the judge was shown to have acted on the wrong principles in making the finding that he made. He thus urged this court to allow his appeal with costs.

17. On her part, the respondent submitted that she amended the date of the accident and filed a supplementary list of documents in which she also attached a limited grant of letters of administration *ad litem* dated February 24, 2012 in her amended plaint dated May 29, 2012. She pointed out that the issue of want of capacity on her part was not enjoined in the appellant's defence that was filed on September 27, 2012 and hence her capacity was therefore admitted as pleaded.

18. She invoked section 100 of the *Civil Procedure Act*, order 8 rule 5(1) of the *Civil Procedure Rules* and article 159(2)(d) of the *Constitution* of Kenya, 2010 and admitted that while it was true that the suit was commenced without the requisite grant ad litem, that anomaly was promptly cured. In this regard, she relied on the case of *Elijah Chepkwony Chirchir v Joel Kipng'eno Rop* Kericho ELCC No 2 of 2018 (eKLR citation not given) where the court held that blunders will continue to be made from time to time and that it did not follow that because a mistake had been made, a party should suffer the penalty of not having his case heard on the merits.

19. She contended that an amended plaint was akin to a fresh plaint and it would be fool hardy to contend that she was entitled to file a new suit but not amend the plaint on record. She pointed out that the amended plaint cured that defect of lack of capacity and the same issue having not been raised at the trial court could not be raised on appellate stage. In this respect, she referred this court to the case of *William Opondo Omalla vs Gabriel Ochieng' Oriwa & another* Siaya ELC No 36 of 2021 (eKLR citation not given) where it was held that the overriding objective of the court is to do substantive justice in cases presented before it without having undue regard to procedural technicalities.

20. It was her case that there was no prejudice whatsoever that had been occasioned on the appellant by the amended plaint and hence the appellant's appeal was misconceived as it was one of straws and totally lacking in substance. She asserted that in any event, in an action brought under both the *Law Reform Act* cap 22 and the *Fatal Accidents Act* cap 26 (sic), under section 7 of the *Fatal Accidents Act*, an action was maintainable even without letters of administration being issued.

21. In that regard, she cited the case of *CA & others v Jael Mureithi & 3 others* (eKLR citation not given) where it was held that an action could be maintained even without letters of administration being issued and this could be done if the action was brought by a person for whose benefit the action could have been brought by an administrator or executor of the deceased if letters of administration were issued.

22. She further submitted that she was the deceased's mother and that she had pleaded in her plaint that she filed the suit on her behalf and on behalf of the deceased's dependants. She urged the court to dismiss the appeal with costs.

23. Under section 2 of the *Law Reform Act* cap 26 (laws of Kenya) and section 4 of the *Fatal Accidents Act* cap 32 (Laws of Kenya), the person who is entitled to bring a cause of action in respect to the estate of a deceased person is a personal representative or an executor or administrator respectively. A person therefore ought to obtain an appropriate grant so as to have the necessary locus standi. The grant may be a full grant or a limited grant.

24. Whereas a full grant of representation takes care of the entire administration of the estate of a deceased person, a limited grant, as the name suggests, is limited to a specific purpose in relation to the estate of a deceased person. Limited grant of letters of administration ad litem which is provided for under form 14 of the fifth schedule of the act deals with suits. The said provision states as follows:-

> "When it is necessary that the representation of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution."

25. From the foregoing, it is clear that a limited grant of letters of administration ad litem is usually used when the estate of a deceased person is required to be represented in court proceedings if the grant of letters of administration intestate has not been obtained.

26. Notably, the respondent first filed her suit before the lower court on November 18, 2021. The limited grant of letters of administration *ad litem* was issued on February 24, 2012. It was quite apparent that the respondent instituted the suit without having obtained the necessary grant beforehand. No doubt this rendered the suit a nullity.

27. This court had due regard to the case of *Macfoy v United Africa Ltd* [1961]3 ALL ER 1169 where the court held that:-

> "... if an act is void then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

28. That was precisely the position obtaining in this case. Locus standi relates mainly to the legal capacity of a party to sue. It is cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists.

29. The impact of a party in a suit without *locus standi* can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.

30. Indeed, it is settled law that a person cannot sue on behalf of the estate of the deceased unless he has first obtained a grant of letters of administration either limited or full. The respondent had no capacity to sue ab initio. She lacked the locus standi to institute the suit in the lower court. The suit that was filed in the lower court was thus a nullity from inception. The subsequent amendment of the plaint could not reverse the harm that was done when she first filed suit without first having obtained a grant of letters of administration, whether the same was grant of letters of administration intestate or limited grant of letters of administration ad litem.

31. The omission to obtain the letters of administration as aforesaid was not a technicality that was envisaged in article 159(2)(d) of the *Constitution* of Kenya, 2010. The learned trial magistrate misapplied the law when he relied on article 159 of the *Constitution* of Kenya and hence arrived at a wrong conclusion warranting interference by this court.

32. In coming to this finding this court was alive to the truism that the matter is an old one and involved the loss of a loved one in a family. Having said so, it was unfortunate that this court's hands were tied and could not assist the respondent. Indeed, justice must not only be done but it must be seen to be done to an aggrieved party who had proven his case notwithstanding his status or position in the society and/or government.

Disposition

33. The upshot of this court's decision was that the appellant's appeal that was lodged on March 16, 2021 was merited and the same be and is hereby allowed. The effect of this is that the judgment and decree of Hon S.O Temu (SPM) delivered at Nyando in Senior Principal Magistrate's Court SPMCC No 265 of 2011 on February 18, 2021 be and is hereby set aside and/or vacated and replaced with the order that the respondent's suit against the appellant be and is hereby struck out for being incompetent and a nullity.

34. As it would not be fair to award costs to the government against its own citizen and bearing in mind that the respondent lost a loved one and the appeal herein, it is hereby directed that each party will bear its own costs of this appeal.

35. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 29TH DAY OF NOVEMBER, 2022.

J. KAMAU

JUDGE