REPUBLIC OF KENYA

IN THE HIGH CURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 84 OF 2017

WILLIAM MBUGUA NG'ANG'A (suing as father & administrator

of the estate of MARTIN NG'ANG'A MBUGUA).....APPELLANT

VERSUS

MOHAMMED SALIM.....1ST RESPONDENT

MBARAK SULEIMAN.....2ND RESPONDENT

J U D G M E N T

The Facts and historical background

1. This is an appeal from the judgement delivered on 21st March 2017 in Mombasa **CMCC No. 908 of 2004**. The record of appeal shows that the appellant filed CMCC No. 908 of 2004 after a road traffic accident which occurred along Mombasa-Malindi Road at Kengeleni traffic lights on or about the 3rd of November 2003. That accident occasioned the death of the deceased herein (the late Martin Ng'ang'a Mbugua). The late Mr. Mbugua was the son of the Appellant. In his capacity as the personal representative of the estate of the deceased, the appellant instituted CMCC 908 of 2004 seeking, among others, general damages under the Law Reform Act and the Fatal Accidents Act.

2. According to the amended plaint filed on 23rd January 2017, the deceased (the late Martin Ng'ang'a Mbugua) was a lawful passenger aboard the respondents' motor vehicle registration number KAP 743 V when the same was carelessly and negligently driven causing it to violently collide with motor vehicle registration number KAN 250A and occasioned to the deceased fatal injuries.

3. At trial, three witnesses testified in support of the appellant's case. The appellant testified as PW1, one Hamisi Omar Maanzu testified as PW2 and Corporal Mumo Mbugu testified as PW3. PW1 told the court that he did not witness the accident and that it was PW2 who informed him that his son had been involved in a road traffic accident and was at Coast General Hospital. He testified that his son was a matatu conductor and also a singer who would perform at Mamba Village during weekends. He told the Court that he did not have any evidence of his son's employment.

4. PW2 stated that the deceased was his friend. That on the day of the accident, himself and the deceased boarded the same matatu KAP 743V from Mamba Village to GPO Mombasa. He witnessed the accident and recounted the events to the trial court. He blamed the driver of KAP 743 V for the accident. He also stated that the deceased was an artist and also a conductor. PW3 testified that he was neither at the accident scene nor was he the investigating officer. He produced the police abstract and gave a brief as shown in the occurrence book.

5. After the plaintiff's case was marked as closed, the parties herein entered a consent judgment on liability for the accident in the ratio of 10%: 90% in favour of the appellant. As such, the trial court remained with the duty of determination and assessment of the quantum of damages to be awarded. After recording of the consent on liability, there ceased to be any need to call any witness by the respondents who then opted not to call any witnesses in support of their case and requested the Court to mark their case as closed. The parties then filed their written submissions in support of their respective cases. By its the judgement dated 21st March 2017, the trial magistrate began by faulting the appellant for filing an amended plaint after the close of pleadings and without leave of court. The court also noted that there was no evidence that the amended plaint was served on the new defendant. The Court proceeded to strike out the amended plaint on the dual grounds that firstly, leave was not sought before the amended plaint was filed, and secondly, there was no evidence that the new defendant was served with the amended plaint in accordance with the dictates of Order 1 Rule 10 of the Civil Procedure Rules.

6. The trial Court then noted that the plaintiff had obtained a limited grant of letters of administration *ad colligenda bona* and then went on to

find that such a type of grant does not give the plaintiff authority to file any suit. He then dismissed the suit on the basis that the plaintiff, now the appellant herein, did not have the *locus standi* to institute the suit. The trial court therefore found against the plaintiff on two key fronts. The first being that his amended plaint was not properly on record and the second being that he did not have the standing to institute the suit. The Court proceeded to find in favour of the respondents and the appellant's case was dismissed with costs and without assessing damages it would have awarded had the suit succeeded. The appellant is aggrieved by the judgement of 21st March 2017 hence the instant appeal which sets out some five grounds of appeal. All the ground of appeal faults the trial court for dismissing the suit when there was a consent judgment on liability; for dismissing the suit when the grant obtained specifically was for instituting a suit; dismissing the suit on account of lack of service when the defendant had in fact entered appearance and participated at trial and lastly for failing to consider the evidence availed.

The parties' submissions on the appeal

7. Both sides filed written submissions in support of their respective cases. On 24th January 2019, the advocates for both parties attended Court and highlighted their submissions. Ms. Njau submitted for the Appellant while Mr. Baraka submitted for the respondents.

8. On whether the appellant had *locus* to institute the suit by way of limited grant *ad colligenda bona*, Ms. Njau cited to the Court the decision of the Court of Appeal decision in **Martha Ndiro Odero (suing as the administrator and Personal representative of the estate of Willy Patrick Ochieng Ndiro (Deceased) v Come Cons Africa Limited [2015] eKLR** In which it held that *"the object of the limited grant (ad colligenda bona) was collection of the assets of the estate of the deceased including the filing of suit to claim the deceased's properties."* Ms. Njau further submitted that once the consent on liability had been entered, the duty of the Court was limited to the assess damages. She urged the Court to set aside the judgement of the trial court and assess quantum of damages.

9. Contrary to expectation, Mr Baraka did not wholeheartedly or selfishly support the decision, but answered to his professional calling by faulting the trial court for failure to assess damages yet it was its duty to do so. Mr. Baraka proceeded to propose the damages to be awarded under the heads of pain and suffering, loss of expectation of life and loss of dependency. In fact, for calculation of loss of dependency he went the whole nine yards and proposed an income for the deceased together with the multiplier and the dependency ratio. To me, Mr. Baraka's submissions exemplify good advocacy and I must applaud him for that in these days when fidelity to the calling as an advocate among counsel is in short supply. Counsel however adopted the filed submissions in which the trial magistrate was supported for finding that a limited grant, ad *colligenda bona* gives no right to file or prosecute a suit.

Issues for determination

10. From the records of proceedings at trial and submissions of the parties, I find the issues isolating themselves for determination are as follows:-

i. Whether the limited grant of letters of administration *ad colligenda bona* empowered the appellant to institute the present suit?

ii. Whether the trial magistrate erred in fact and in law by striking out the appellant's amended plaints and dismissing the suit?

iii. Whether it was an error not to assess damages even when the suit was dismissed?

iv. What orders should be made as to costs?

Analysis and determination

Whether after obtaining the limited grant of letters of administration *ad colligenda bona*, the appellant was clothed with the requisite *locus* to institute the present suit?

11. I propose to start with this issue because it has the potential to summarily dispose of the appeal in that if the letters of administration *ad colligenda bona* did not give the appellant the power to institute the present proceedings, then he does not have locus and his appeal will be struck out without need for delving into the merits. However, if I find that the grant gives him the requisite locus, his appeal will be determined on the merits.

12. As a first appellate Court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions while bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand as they testified.

13. The duty of the court in a first appeal such as this one was stated in ***Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR*** as follows:

> **This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that: -**
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> **"On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

14. I must say from the word go that whether the grant produced in evidence at trial clothed the appellant with the requisite locus standi to bring the suit that this is a pure point of law. The grant *ad colligenda bona* is provided for under Section 67 of the Law of Succession Act and Rule 36 of the Probate and Administration rules. The Latin verb "*colligere*" means to collect, bring together or assemble. As such, this form of grant is usually issued to collect the property of a deceased person where it is of a perishable nature, and where regular probate or administration cannot be granted at once (See ***Morjaria v Abdalla*** **[1984] KLR 490**).

15. Can the holder of a grant *ad colligenda bona* institute a suit to claim damages on behalf of the estate of the deceased? I came across two Court of Appeal cases on the same question. The first is ***Morjaria v Abdalla*** **[1984] KLR 490** and the second is **Martha Ndiro Odero (suing as the administrator and Personal representative of the estate of Willy Patrick Ochieng Ndiro (Deceased) v Come Cons Africa Limited [2015] eKLR.**

16. Marjoria was an interesting case. The relevant facts are that a primary party to the suit died. A consent order was entered and the administrator of the deceased's estate was enjoined in the proceedings. Unfortunately, the administrator of the deceased also died when the matter was on appeal. The administrator's son applied to be enjoined in the appeal. It is important to note that two limited grants had been issued for each of the two deaths in the matter. The Court had this to say:

However, we do not think that the appointment of a person "ad colligenda bona" can possibly include the right to stand in the shoes of the deceased for the purposes of instituting an action, or, indeed, an appeal, especially where there is a specific provision, paragraph 14 of the fifth schedule, designed for this purpose…

Notwithstanding the foregoing, the grant of February 24 is specifically limited to "the purpose only" of representing the deceased in the present appeal. In our judgement therefore, it is those words which should be looked at for the purpose of determining this part of the application. In themselves, they constitute a valid grant pursuant to Rule 14, and we are prepared to regard them as such…We would therefore consider that which we may call the operative part of the grant of Aganyanya J on February 24 as a valid order enabling Bhavin and Lalita to represent Ranchod, who was a party in his own capacity, in this appeal."

17. More recently in 2015, a differently constituted Bench of the Court of Appeal adopted the above quoted reasoning. The Court in **Martha Ndiro Odero (suing as the administrator and Personal representative of the estate of Willy Patrick Ochieng Ndiro (Deceased) v Come Cons Africa Limited [2015] eKLR** held as follows:

"The limited grant in this case was issued pursuant to Rule 36(1) (supra). The object of the limited grant was collection of the assets of the estate of the deceased including the filing of suit to claim the deceased's properties. Blacks Law Dictionary defines a limited grant ad colligenda bona as -

"a special grant of letters of administration authorizing a person to collect and preserve a deceased's property."

It is clear that the limited grant, unlike a full grant, could be issued to a single individual intent on filing suit for the estate of a deceased person, as was the case here…

The issue of the value of the estate did not arise as the limited grant merely clothed the appellant with legal capacity to claim damages on behalf of the estate of the deceased as opposed to administering such estate."

18. I agree and appreciate to be fully bound by the reasoning followed by the appellate court in the two cases above. I can only add that in the ideal situation, the appellant should have obtained either a full grant of letters of administration or letters of administration *ad litem* prior to the filing of the suit. He did not do so. He, maybe on the advice of his counsel, opted for a grant *ad colligenda bona.* Given the binding position at law set out above, I conclude that his case was not dead on arrival simply because he instituted it on the strength of his grant *ad colligenda bona.* His grant *ad colligenda bona* dated 5th August 2003 was issued "***for purposes of instituting a suit to recover damages."*** In light of the Court of Appeal cases above, I find that the appellant's grant contained the ***'operative part'*** enabling him to institute the present proceedings.

19. I should add that my perusal of the record of appeal revealed that neither of the parties raised the present issue on the appellant's grant. The trial court of its own volition did so in its judgement. As the matter was prejudicial to the appellant's claim, the learned magistrate should have afforded the appellant an opportunity to be heard on it. The magistrate denied the appellant an opportunity to be heard on a matter which was critical to the appellant's claim. That, in my view should not have happened.

Whether the trial magistrate erred in fact and in law by striking out the appellant's amended plaints?

20. The appellant filed two amended plaints. One is dated 27th November 2006 and the other is dated 23rd January 2017. The trial magistrate struck them out in the following terms:-

"The same were filed long after the close of the pleadings and as such leave of the court was necessary. There is no evidence that such leave was sought and obtained. These two amended plaints seem to add the 1st Defendant MOHAMED SALIM as a

party to this suit…There is no evidence as to how the plaints referred to were amended and whether amended copies of the same were subsequently issued and served upon the new defendant. Since this was a mandatory requirement after the amendments which seem not to have been done, the two amended plaints are clearly improperly on record. They amount to an abuse of the process of the court. Accordingly, I strike them out as per Order 2 rule 15(1) (d) CPR 2010 and expunge them from the record."

21. It is indeed true that the plaint dated 23rd January 2017 was filed after the close of pleadings. In fact, it was filed after the close of the respondents' case when the parties were awaiting judgement. There is no evidence that the appellant sought leave of the court before filing this amended plaint of 23rd January 2017 or that summons was ever issued or served. The trial court was thus clearly right in striking out that amended plaint of 23rd January 2017.

22. However, the Court should not have struck out the amended plaint dated 27th November 2006 because on 28th November 2006, the appellant had sought and obtained leave to file it. This is clearly evident from the proceedings of 28th November 2006 when the court held, "**By consent time to file amended plaint be and is hereby extended for 30 days from today. Defendant to file an amended defence within 30 days from the date of service of amended plaint**."

23. Further, I have noted that after the appellant filed his amended plaint, the respondents did not file their amended defence. As late as 7th March 2017, the Court lamented that there was no defence on record. This is despite the fact that the matter had been heard and was only awaiting judgement. From the foregoing I must reach the inevitable conclusion that the plaint dated 27th November 2006 was properly on record and should not have been struck out. The totality of the facts of this matter lead me to conclude that the 1st respondent was properly enjoined in the proceedings and so will be bound by the judgement and any orders flowing here from.

The question on Quantum

24. From the foregoing analysis, it is clear that the appellant has carried the day. I have found that his grant *ad colligenda bona* gave him powers to institute this matter and that his plaint dated 27th November 2006 should not have been struck out. Because he had *locus* and his amended plaint was properly on record, the trial court should have heard his matter on the merits. In fact, since the parties had already entered a consent agreement on liability, the trial court had only one job - to assess damages. It did not do so and instead opted to determine the dispute on a matter not raised before him on matters that were not before it.

25. It must however be noted that even if the suit was dismissed on the merits, a court of first instance has the unwavering obligation to assess damages. **In LEI MASAKU V KALPAMA BUILDERS LTD CIVIL APPEAL NO. 40 OF 2007[2014] EKLR Mabeya J**. held that:

"There is the issue of failure to assess damages. It has been held time and again by the Court of Appeal that the court of first instance must assess damages even if it finds that liability has not been established. To have casually dismissed the suit and fail to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the Appellate Court needs to know the view taken by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum".

26. In failing to assess damages, the trial court committed an error of law thus call upon this court for rectification as of right. The rectification calls upon this court to now assess the damages

Damages Under the Law Reform Act

i. Pain and Suffering

The deceased died a few hours after the accident. The accident occurred at around 5 A.M on 3rd November 2002 and he passed away at around 8 A.M of the same day. Under this head I will award Kshs. 30,000 for pain and suffering.

ii. Loss of expectation of life

The deceased passed away at the age of 26 years. Surely, he had his whole life ahead of him. There are cases where people who died at 40 years or more were awarded Kshs. 150,000 onwards. See for example ***Violet Jeptum Rahedi v Albert Kubai Mbogori*** **[2013] eKLR.** Under this head, Kshs. 200,000 is appropriate.

Damages Under the Fatal Accidents Act

i. Loss of dependency

It was the appellant's evidence that his son was an artist and a matatu tout. The appellant's second witness, Hamisi, corroborated this evidence. It was further submitted that the deceased earned roughly Kshs. 15,000- 20,000 from his two occupations but no evidence was produced in support of the same. In the absence of evidence of earnings, this Court has the discretion to make a global award of damages. See for example ***Mary Khayesi Awalo & Another v Mwilu Malungu & Another ELD HCCC No. 19 of 1997 [1999] eKLR*** *and* ***Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula***

Maina (deceased) [2016] eKLR . Under this head, it is my considered view that a global award of Kshs. 1,500,000.00 is fair and appropriate. This award takes into account the age of the deceased at the time of his death and the fact that he was not married and did not have any children.

ii. Special damages

The appellant testified that his son was buried in Kiambu and produced a bundle of receipts totalling Kshs. 261,450. I have perused the receipts and they include, among others, payments to Coast General Hospital and payments incurred in the ordinary course of making funeral arrangements. I am satisfied that the appellant has specifically proved his claim for specific damages and so I will award him the Kshs. 261,450/- specifically claimed.

Conclusion and final orders

27. I have found that that the dismissal of the suit at trial was erroneous and therefore I do set aside the order of dismissal and in its place I substitute an order entering judgment on liability as agreed between the parties and do assess damages as follows:

A; Under the Law Reform Act

a. Pain and suffering……. Kshs. 30,000.00

b. Loss of expectation of life…….. Kshs. 200,000.00

B: Under the Fatal Accidents Act

c. Loss of dependence…… Kshs. 1,500, 000.00

d. Add special damages……..…. Kshs. 261,450.00

e. Gross Total…… Kshs. 1,991,450.00

f. Less 10% liability..... ... Kshs. 199,145.00

g. Total Payable…… ……. Kshs. 1,792,305.00

28. Since he has carried the day, the appellant gets the costs of the suit as well as those of this appeal together with interests from the date of the judgment of the trial court judgement. This judgment is joint and several against the respondents

29. It is so ordered.

Dated, **signed** and **delivered** at **Mombasa** this **29th** day of **May, 2020.**

P.J.O. OTIENO

JUDGE