



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 217 OF 2019

THE BOARD OF TRUSTEES PANDYA

MEMORIAL HOSPITAL.....APPELLANT

VERSUS

1. MLONGO TUNGWA

2. LEWA NGUTA LEWA...RESPONDENT

J U D G M E N T

1. This is an appeal against the finding on capacity of the Respondent to sue and liability adjudged against the appellant. The Respondents who were the plaintiffs in the lower court filed suit against the Defendant/Appellant seeking general under the Fatal Accident Act and the Law Reform Act, special damages, costs of the suit and interest thereon for the fatal injuries alleged to have been sustained by the deceased who was pleaded to have been an innocent bystander near the Defendant's wall when that wall collapsed.

2. By Judgment delivered on the 28/10/2019, the trial magistrate found that the plaintiffs/Respondents had proved their case on a balance of probabilities and Judgment was entered in favour of the Plaintiffs/Respondents as against the Defendant/Appellant as follows:

A. Mombasa CMCC NO. 1792 OF 2017

a. Loss of dependency	Kshs. 1,120,000/=
b. Loss of expectation of life.....	Kshs. -100,000/=
c. Pain and suffering	Kshs. 20,000/=
Net sum awarded.....	Kshs. 1140,000/=

B. Mombasa CMCC NO. 890 OF 2018

a. Loss of dependency	Kshs. 800,000/=
b. Loss of expectation of life.....	Kshs.-100,000/=
c. Pain and suffering	Kshs. 20,000/=
Net sum.....	Kshs. 20,000/=

3. The Appellant being aggrieved by the said determination filed this Appeal and preferred the following grounds: -

- i. The learned magistrate erred in law and in fact in finding that the respondents had the legal capacity to prosecute the case.**
- ii. The learned magistrate erred in law and in fact in Finding that the respondents had proved their case against the Appellant.**

- iii. **The learned magistrate erred in law and in fact in shifting the burden of proof from the Respondent to the Appellant.**
- iv. **The learned magistrate erred in law and misdirected himself on matters of evidence.**
- v. **The Learned magistrate erred in law and in fact in introducing extraneous matters and arriving on erroneous findings on matters, which were not pleaded.**
- vi. **The Learned magistrate erred in law and in fact in finding that the Appellant was liable for negligence.**
- vii. **The Learned magistrate erred in law and in fact and misdirected himself on the intents and purpose of the provisions of Order 1 rule 15 (1)(a), (b) and (c) of the Civil Procedure Rules, 2010.**
- viii. **The Learned magistrate erred in law and in fact in failing to consider the evidence of the Defendant.**
- ix. **The Learned magistrate erred in law and in fact in dismissing the Appellant's defense.**

4. By consent of the parties, the Appeal was canvassed by way of written submissions to be filed within set timelines. Pursuant to that consent by the parties, the Appellant filed submissions on 29/7/2020 and reply to the Respondents' submissions on 21/9/2020, while the Respondents filed submission together with a separate list of authorities on the 24/8/2014.

Submissions by the parties

5. **Mr. Omwega** Learned Counsel for the Appellant submitted that the Limited Grant of Letters of Administration Ad Litem was only issued for a limited purpose and specifically for the purpose of only filing the suit and without the power of distributing the estate until further representation were granted by this Court. Therefore, the said grant did not vest in the respondents the power to prosecute the case. He made reference to the case of **Lydia Ntembei & Fredrick Mugambi Dominic Kairanya vs. The Honourable Attorney General, Nairobi-HCC No. 818 of 1997**. Where the Court held that the limited grant the Plaintiff held ordinarily means until full grant is issued.

6. Counsel further submitted that from the evidence of PW1 and PW2, it is clear that both of them did not know who constructed the wall and why it collapsed, since both witnesses were not at the scene of the disaster. Consequently, to counsel, the allegations of negligence particularized in the Pleadings were not proved and the trial magistrate had no basis to erroneously fault the Appellant and find it liable for negligence. It was then added that it was erroneous for the trial magistrate to introduce the matter of the boundary between the two institutions, which was extraneous to the case before him.

7. **Mr. Kenzi** Learned Counsel for the Respondents submitted that the Appellant in its defence never denied ownership of the wall. In fact, in the defence, it is stated that the wall was built within the codes of Building Regulations, and that the said wall collapsed due to the heavy rains and that the deceased had constructed illegal structures without knowledge of the Defendant. Therefore, the trial magistrate never shifted the burden of proof to the Appellant.

8. On the issue of the Legal capacity of the Respondents to prosecute the suit, Counsel submitted that the point of law was never pleaded and the same has only been raised via written submissions, and that the Appellant's position on limited grant Ad litem is a misinterpretation of Section 54 of the law of succession Act.

9. Counsel also submitted that the trial magistrate never shifted the burden of proof and that if the Appellant believed the wall belonged to Mbaraki Girls, they should have proceeded to enjoin Mbaraki Girls in the suit.

10. In rejoinder, **Mr. Owenga** submitted that the appellant had no reason to enjoin Mbaraki Girls High School as a third party because it had no claim for contribution or indemnity against the school within the meaning and intent of Order 1 rule 15 of the Civil Procedure Rules. Therefore, it was the Respondent's duty to sue and enjoin the relevant parties.

Analysis and Determination

11. This being a first appeal, the court proceeds by way of a retrial and is thus under a duty to **re-evaluate, reappraise, and reassess the evidence in totality and to make its own conclusions**. It must however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123**, **Peters vs Sunday Post Limited [1985] EA 424** as well as in **Abok James Odera T/A A.J. Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**.

12. Having read the record in satisfaction of the court's mandate, I do find the following two issues to isolate selves for determination by the court:

1. **Whether the Respondents had the capacity to prosecute the suit?**
2. **Whether the Respondents had proved their case on negligence on a balance of probabilities?**

Whether the Respondents had the capacity to prosecute the suit

13. The Respondents were issued with a limited grant of letters of administration *Ad Litem* for the purpose of only filling suit until further

representation were granted by the Court. It was on the basis of that letters of administration that the Respondents filed the civil suit seeking compensation for the deaths of the deceased. The Appellant relies upon a High Court decision namely **LYDIA NTEMBI KAIRANYA & ANOTHER – VS – THE HON A G [2009] eKLR**, or the proposition that the grant limited for filling suit did not empower the respondent to prosecute the same suit and therefore contended that that the Respondents had no capacity to prosecute that suit.

14. I have perused the authority cited by the Appellant and am in agreement with the said decision in its finding that a limited grant of Letters of Administration Ad Litem only authorized the Plaintiff to file suit but I do not agree that authority to file a suit excludes the authority to prosecute the same. To this court, court orders ought to be purposeful and nor merely flimsy or just pedantic. As the trial court posed, *‘what purpose would the authority to file suit serve if there was no authority to prosecute the said suit!’* In my very view and opinion, it would be defeatist and overly technical to grant authority to sue and be told you need to get yet another authority to prosecute the suit filed.

15. This, however, isn’t a new debate. In deed there are varied decisions by the High Court but also the Court of Appeal on the subject should have made the position clearer. This court was confronted with a similar position in **William Mbugua Ng’ang’a v Mohammed Salim & another [2020] eKLR** and the court said:-

“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*. *Morjaria* 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.”

16. 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. Black’s 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.”

I agree and appreciate to be fully bound by the reasoning followed by the appellate court in the two cases above... 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”. (emphasis added)

17. I still stand by that position of the law but should add that my perusal of the record of appeal revealed that the appellant, as defendant in the trial court, did not challenge the respondent’s legal standing or the propriety and adequacy of the grants used to bring the action in its defense filed. The first time the issue surfaced was on the written submissions filed. The matter was not even raised at the point of cross examination. It must be remembered that submissions are never pleadings yet the court is bound to determine a dispute only on the basis of the pleadings filed and evidence led. It does not matter that the plaintiff made a meek response to such submissions. It was a matter for the pleading, could be left for courts determination if parties brought it up in evidence, but could not be introduced by way of submission. Having not been pleaded and no evidence having not been led on it, it was prejudicial to the appellant’s claim, and the learned magistrate should not have made a decision upon it. However, I note the decision by the trial court on that issue was in the respondents favor and in tandem with the constitutional dictate that justice be administered without undue regard to technicalities. In the end I do find that that fault on the judgment lacks merit and not fit to disturb the judgment.

Whether the Respondent had proved its case on negligence on a balance of probabilities

18. In the judgment by the trial magistrate, the appellant was found not to have denied the ownership of the perimeter wall surrounding it. He found that the appellant only denied specifically the construction of the wall in Paragraph 4 (a) of the defense. That finding calls for the scrutiny of the defense filed and the claim in the plaint it was responding to.

19. At paragraph 3 of the plaint, the respondents alleged that the Appellant knowingly constructed the perimeter wall surrounding the Pandya Memorial Hospital Mombasa, without following the building regulations. In deed construction and ownership must not always go together. I

take notice that it is now the law that to be constructor, one need to be licensed by the regulator and therefore it is not always the case that proponents of construction works undertake the building by selves. So, while the construction was attributed to the defendant, ownership was never alleged against it in the plaint filed.

20. In resisting that claim, the defendant did plead at paragraphs 2 of the statement of defense, that it denied each and every allegation contained in paragraphs 1,2,3,4,5,6,7,8 and 9 of the plaint and put the respondents and put them to strict proof thereof. The Appellant's denial of ALL the allegations contained in the plaint included the respondents' allegations contained in paragraphs 3 and 4 of the plaint to the effect that the appellant knowingly constructed the a perimeter wall surrounding the Pandya Memorial Hospital Mombasa without following the laid down building regulations.

21. Paragraph 3 of the statement of defense reads –

“Save and except what is expressly admitted, the defendant denies each and every allegation contained in the plaint as though the same was set out verbatim and traversed in seriatim”

22. I understand the adverb Seriatim to mean taking one subject after another in regular order point by point while Verbatim means to cite or quote something in a manner which corresponds word for word. It refers to being identical words repeated exactly, written down or copied, word for word. With such an appreciation, it cannot be genuinely held and asserted that the construction of the wall, leave alone ownership, was never denied.

23. In paragraph 4 of the statement of defense, the appellant made specific denials which included a denial of the allegations contained in paragraph 3 of the plaint. In paragraph 4(a) of the statement of defense, the appellant '*specifically denied that it knowingly constructed perimeter wall without following the building regulations as alleged in paragraph 3 of the plaint*'.

24. To that statement of defense, the plaintiffs did not file any Reply to Defense. The failure to file a reply to the defense means that there was joinder of issues therewith and therefore a duty shouldered by the plaintiff to prove all the allegations contained in the plaint.

25. In prosecuting the case, both parties were bound by their pleadings without the liberty to depart therefrom. Equally in deciding the case, the trial magistrate was equally bound to only consider the matters pleaded and to limit himself to the issues arising from the pleadings. The question of ownership of the wall having not been led was not an issue for the court's determination at all. It was alien to the proceedings.

26. In PRESIDENTIAL PETITION NUMBER 1 OF 2017. RAILA AMOLO ODINGA & STEPHEN KALONZO MUSYOKA VERSUS = IEBC, CHAIRMAN - IEBC AND HIS EXCELLENCY UHURU MUGAI KENYATTA. In emphasizing on the rule that parties cannot tender evidence beyond their pleadings, the Highest Court in Kenya held:-

“ In the absence of pleadings, evidence if any, produced by both parties, cannot be considered. It is also a settled legal proposition that no party should be allowed to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they have an opportunity of placing the relevant evidence before the court for its consideration, the issues arise only when a material proposition of fact is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame issues not arising on the pleadings”.

27. While I find that the issue of ownership of the wall was never pleaded, I equally disagree with the trial magistrate that the ownership of the wall was not disputed. Having not been pleaded, no evidence was admissible on it and it was axiomatic that was not a matter for determination by the court. The Learned Trial Magistrate's finding on the ownership was thus extraneous and therefore unfounded. Having been alien to the dispute, making it an issue for determination which turned out as the fulcrum upon which the entire decision rotated was erroneous which error cannot be allowed to stand but must be upset and set aside.

28. That the burden of proof was on the Respondents to prove their case is not in doubt. The Appellant's complaint is that the Respondents did not prove their case against it on a balance of probability, and that the trial Court erred when it introduced extraneous matters and shifted the burden of proof from the Respondents to the Appellant. * Theand answered is whether there was proof that the defendant constructed the wall and whether on a balance of probabilities that indeed the Appellant's negligence resulted to the fatal injuries sustained by the deceased persons. The question then is what amounts to proof on a balance of probabilities. **Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526** stated: -

“In ordinary civil cases, a case may be determined in favor of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

29. Similarly, In Evans Nyakwana -vs- Cleophas Bwana Ongaro (2015) eKLR it was held that:-

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”

30. It follows that the initial burden of proof was upon the plaintiffs - the Respondents in this Appeal, but the same would shift to the Defendant- the Appellant in this Appeal, once the evidence led points to the plaintiff's explanation being the probable position. That never was and therefore the burden never shifted and the plaintiff's remained unproved.

31. In this appeal, it is the Appellant's contention that both **PW1 Lewa Nguta and PW2 Mlongo Tungwa** on cross-examination confirmed '**not knowing who authorized the construction of the wall and exactly why the wall collapsed save for the heavy down pour**'. Such evidence goes a long way in demonstrating that the case was never proved even if the decision had been based on the pleaded act of constructing the wall.

32. The plaintiff/respondents having testified that they did not know who authorized the construction of the wall and what caused it to collapse. The defendant's witness testified that he did not know who constructed the wall and further that there were no records on its construction in their records. Against that evidence, the trial court found that the wall belonged to the appellant because '*it did not explain whether the wall was constructed prior to its allotment of the land or consequently*'. Because the burden of prove had remained on the respondent to establish his case, it was erroneous and in fact an act in shifting the onus to a party with no obligation in that regard. That is the other reason the appeal must succeed.

33. The other reason the court found against the appellant was that it did not take out third party proceedings which was to the court an implicit admission of its ownership of the wall. Third party proceedings are provided for by the Rules under **Order 1 Rule 15 of the Civil Procedure Rules, 2010**. In that stipulation, defendant can only join a third party, where it is its case:

i) That it is entitled to a relief or remedy against the third party relating to or substantially relating to or connected with the subject matter of the suit and or substantially the same as some relief claimed by the plaintiff against the defendant.

ii) There is a question or issue relating to or connected with the said subject matter which is substantially the same question or issue arising between the plaintiff and the defendant and/or can properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and the third party or between any of the parties.

34. On the basis of the pleadings on record, I do agree with the appellant that the issue which was to be determined between the respondents and the appellant was whether the appellant constructed the collapsed wall contrary to the building specifications and exposed members of the public to danger as pleaded in the plaint. I further find that that there was no question or issue relating to or connected with the said subject matter which could have been properly determined - not only as between the respondents and the appellant but as between the respondents and the appellant and Mbaraki Girls Secondary School or between any of the parties. To that extent I find that the Learned Magistrate erred and misdirected himself on the intents and purposes of the provisions of order 1 rule 15(1), (a), (b) and (c) of the Civil Procedure Rules, 2010 because there was no need or reasons for the appellant to enjoin Mbaraki Girls Secondary School as a third party.

35. In light of what I have stated above, this Court cannot uphold the finding of the trial magistrate on the issue of liability and finds that there was no evidence furnished by the respondent to prove that the collapsed wall was not built in accordance to the required standards and in adherence to the building codes. That allegation having been made by the respondent, it was his onus to avail evidence in proof thereof and without such proof it was an error to find for him. I accordingly therefore, set aside the finding on liability and in its place substitute a finding that the liability was never proved.

36 I therefore accede to the appeal and allow it with costs.

Dated, signed and delivered at Mombasa this 26th day of October, 2020

P.J.O. OTIENO

JUDGE