REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.121 OF 2015

RAHAB NJUGUNA……..……..APPELLANT

-VERSUS-

PETER K. KARI……..……..……..1ST RESPONDENT

ROWLAND MUCHANGI NJERI……2ND RESPONDENT

ELSAVAN MWANGI……..……..….3RD RESPONDENT

HARRISON MAINA MBURU..……4TH RESPONDENT

JUDGMENT

INTRODUCTION

1. The plaintiff herein filed a suit in the trial court seeking general and special damages on behalf of the estate of **Duncan Matheri** who died on 16th day of August 2004 while travelling in motor vehicle registration number KAN 979S owned by the 1st and 3rd defendants and driven by the 2nd defendant. After hearing, the trial magistrate found that the suit had abated by operation of law.

2. The appellant being aggrieved by the decision of the learned magistrate filed this appeal on the following grounds:-

1. That the trial Magistrate erred in law and in fact in dismissing the suit on a technicality which was never raised at all during the hearing.

2. That the trial Magistrate erred in law and in fact by failing to consider that in nature that injuries were serious and the death of the plaintiff shall not cause the suit to abate if the cause of action survives or continue and that there was no order at any point for abatement.

3. That by dismissing the lower court suit on the ground of abatement and non-substitution within one year was manifestly too harsh as the plaintiff took letters of administration to pursue this claim on behalf of the deceased and parties agreed to that.

4. That the learned trial magistrate erred in law and fact that there was no valid suit in her finding on not taking into consideration the limited grant ad litem under Section 54 and the 5th schedule thereby arriving at an erroneous finding.

5. That the learned trial magistrate erred in law finding on liability, more particularly on contributory negligence without considering that the plaintiff was travelling as a fare paying passenger.

6. That the learned trial magistrate gave judgment against the law and weight of evidence. In court assessing the amount she could have awarded.

SUBMISSIONS BY THE APPELLANT

3. Appellant submitted that the plaintiff's husband filed suit seeking compensation for injuries arising from road traffic accident but unfortunately, he died before the suit was heard and determined; plaintiff submitted that the she obtained grant of letters of administration *ad litem* which was granted on 2nd February 2007; thereafter she filed application dated 26th march 2007 to be to be joined as a party on behalf of her late husband. She further sought amendment of the plaint and the application was allowed by consent on 30th July 2007; and amended plaint substituting plaintiff as legal representative was filed on 6th August 2007.

4. In the trial court's judgment, the trial magistrate indicated that, the plaintiff in addition to the application for substitution ought to have prayed for revival of the suit under Order 24 Rule 7 of the Civil Procedure Rules. He stated that the application for substitution was made 2 years after plaintiff's death when the suit had abated and although it was made by consent, it did not revive the suit, as there was no suit on record for substitution.

5. Appellant submitted that the parties proceeded in the understanding that the suit was alive and the court's decision was therefore baffling; in that, the plaintiff would not have been joined to the suit if the suit were nonexistent.

6. The appellant urged court to invoke the doctrine of estoppel. Appellant quoted Section 120 of the Evidence Act which provide as follows:-

> **"When one person has by his declaration act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such believe neither her nor his representative shall be allowed in any suit or proceedings between himself and such person or his representative to deny the truth of that thing."**

7. Appellant further submitted that, apart from parties to the suit, the court made orders for adjournments and to proceed making her believe that the suit had been revived.

8. Appellant further submitted that the court erred in failing to assess damages despite the finding. Appellant concluded that it would be improper to allow procedural technicalities to override substantive justice.

RESPONDENTS SUBMISSIONS

9. 3rd and 4th respondents filed submissions dated 11th march 2019. The respondent confirmed that the suit was dismissed for having automatically abated by operation of law; that the suit was marred with procedural technicalities which went to the root of the matter thus rendering it null as the application was made 2 years after the plaintiff's death.

10. On whether the suit had abated by operation of law, Respondent submitted that the Appellant disregarded the civil procedure rules and went ahead to make amended plaint without making any application from the court for revival of the suit. Respondent cited the case of **Leonard Mutua Mutevu Vs Benson Katella Ole Kentia& Another [2011]** where the court held that it is necessary to revive suit and that applicant should be reminded crucial provisions of the law and **Nicholas Kiptoo Arap Korir Vs IEBC** where the court held that invocation of oxygen principle is not magic word that will automatically compel the court to suspend procedural rules.

11. As to whether plaintiff proved his case, the respondent submitted that the plaint was vague and ambiguous, as it did not disclose any reasonable cause of action. He added that the plaint was changed to suit prayers sought upon bringing legal representative on board and that evidence adduced was not consistent with claims in amended plaint. Respondent further submitted that under Order 20 Rule 4 of the Civil Procedure Rules provide for pronouncement of judgment on issues which arise from pleadings; that there is no medical report to show that the plaintiff died from the injuries of the accident. That issues raised in lower court on cause of death were off record as the same were not captured in the plaint. Respondent prayed for dismissal of appeal.

ANALYSIS AND DETERMINATION

12. I have considered augments by both parties herein. This being the first appellate court I am required to evaluate evidence adduced before the trial court and arrive at an independent determination.

13. There is no doubt that there was delay in filing application for substitution. Substitution was done after one year provided by law. The question is, whether the trial magistrate erred in finding that there was no suit for plaintiff to be substituted to continue with. I do agree that a suit abate if the deceased plaintiff is not substituted within one year from death of death; but the question that remain to be answered is can subsequent processes revive the suit. Substitution was by consent. By agreeing to substitution, the respondent impliedly conceded to revival of the suit. The court also proceeded with the hearing based on amended plaint. This clearly amount to revival of amount. How can proceedings go on in a non-existent suit? The parties and court proceeded in the understanding that the suit had been revived; parties are therefore estopped from alleging otherwise.

14. On prove of claim by the appellant, I have perusal the record and note that the plaintiff testified that her late husband had been involved in an accident on 16th August 2004 and sustained injury on the toe and head. She showed court police abstract, which confirmed an accident involving motor vehicle registration number KAS 428G and KAB 979S occurred. She also showed court treatment documents. The treatment records and police abstract were produced in court by consent of both parties on 3rd December 2015.The respondent never adduced evidence in the lower court.

15. On perusal of the amended plaint I note that the deceased was travelling as a fare paying passenger in motor vehicle registration number KAS 428G. In the Police abstract there is however no mention of injury to the toe. In cross-examination, she further said the deceased died of malaria. There is therefore no connection of the cause of death to injuries sustained in the accident even though she talked of the deceased having continued with medication until his death.

16. P3 produced by consent indicate cut would on the nose and blunt injury to the head. Initial treatment card produced indicate cut nose.

17. On perusal of hand written proceedings, I note that the trial magistrate indicated cut nose not toe. It is evident therefore that there is consistency in injuries indicated in the amended plain, original plaint, police abstract and treatment record. It is not therefore true that the evidence adduced did not prove injuries pleaded in the plaint.

18. From the foregoing, I find that the trial magistrate erred in dismissing the suit on technicality, which both parties and the court appeared to concede to. In my view, substantive justice should not be defeated by technicalities as that will be contravening Article 159 of the Constitution of Kenya.

19. In respect to liability, the deceased was a passenger in the vehicle. He never contributed to the accident. Plaintiff set out particulars of negligence set on part of 2nd and 4th defendants in the plaint; drivers of the two vehicles respectively. None of the defendants adduced evidence to discharge liability. From the foregoing I do apportion 50% liability for the 1 and 2nd respondent/defendant and 50% liability to the 3rd and 4th respondent/defendant

20. In so far quantum is concerned I have considered injuries sustained by plaintiff, which is deep cut to the nose and blunt injury to the head. I have considered submissions on quantum in the lower court and compared the injuries herein with injuries in the cited authorities and find that an award of kshs.150,000 will be sufficient to compensate the plaintiff

21. **FINAL ORDERS**

1. Appeal is allowed.

2. Liability apportioned at 50:50 as between 1st and 2nd defendants/respondents on one part and 3rd and 4th defendants on the other party.

3. Quantum assessed at Kshs.150,000 general damages and special damages proved Kshs.100 making total of Kshs.150,100.

4. I therefore enter judgment for plaintiff against 1 &2nd defendant jointly and severally for Kshs.75,050 and against 3rd and 4th defendant jointly and severally for Kshs.75,050

5. Each party to bear own costs of Appeal

6. Costs of the trial court to the appellant

Ruling Dated, signed and delivered at Nakuru this 30th day of May, 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jared Court Assistant

Ms. Ayuma holding brief for Mr. Mboga Counsel for Appellant

N/A Counsel for Respondent