REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 119 OF 2015

(Formerly Kisii High Court Civil Appeal No. 82 of 2008)

JULIAN ADOYO ONGUNGA

JARED ODHIAMBO ABANO .....APPELLANTS

VERSUS

FRANCIS KIBERENGE BONDEVA

(Suing as the Administrator of the Estate of

FANUEL EVANS AMUDAVI, Deceased) ....RESPONDENT

(Being an appeal from the judgment and decree by Hon. Ezra Awino, Principal Magistrate in Migori Principal Magistrate's Civil Case No. 553 of 2002 delivered on 18/03/2008).

JUDGMENT

Introduction:

1. The appeal subject of this judgment arose from the judgment and decree of Hon. Ezra Awino (Principal Magistrate, as he then was) in **Migori Principal Magistrate's Civil Case No. 553 of 2002** where the trial court found for the Respondent herein. For purposes of our discussion in this judgment the parties herein shall be referred as ***"the Appellants"*** and ***"the Respondent"*** respectively and the suit before the subordinate court shall be referred to as "***the suit***".

2. The Respondent sued the Appellants in the suit as a result of fatal injuries occasioned upon one **FANUEL EVANS AMUDAVI** (hereinafter referred to as **'the deceased')** following a road traffic accident on 15/07/2002 at Oyani Bridge along the Migori – Sirare Road. The deceased was a pedal cyclist who allegedly collided with motor vehicle registration number KAP 016T owned by the first Appellant and then driven by the second Appellant herein.

3. As a result of the said accident the Respondent instituted the suit claiming general damages under the Law Reform Act and the Fatal Accidents Act as well as special damages, costs and interests.

4. In a judgment that was rendered on 18/03/2008 the Appellants were found 90% liable for causing the

accident and damages were assessed at a total of Kshs. 275,220/= subject to the contribution.

5. As the Appellants were dissatisfied with the said judgment and decree, they preferred an appeal which is the subject of this judgment.

The Appeal:

6. By a Memorandum of Appeal dated 27/06/2008 and filed on 16/06/2008 with the leave of the Court, the Appellants preferred nine grounds of appeal against the entire judgment on liability and quantum which were tailored as follows:-

1. The Learned Trial Magistrate erred in fact and in law, in finding and holding that the Respondent had proved his case against the Appellants, on a balance of probability, when the Respondent had failed to tender any evidence, whatsoever in support of the pleadings, filed in court.

2. T***he Learned rial Magistrate in fact and in law in finding and holding, in favour of the Respondent, when the evidence tendered in court, was at variance with the plaint filed by the Respondent.***

3. The Learned Trial Magistrate erred in law and fact in entering Judgment in favour of the Respondent, even when the Respondent was devoid of the requisite Locus standi, to commence, originate and/or maintain the suit in the subordinate court. Consequently, the Judgment entered in favour of the Respondent was annulity.

4. The Learned Trial Magistrate erred in apportioning liability between the Respondent and the Appellants in the ratio of 10:90, without assigning any reason and/or basis for such apportionment and notwithstanding the evidence of the Police,to the contrary.

5. The Learned Magistrate misapprehended the law on negligence, when he held and found that the Appellants were liable to the Respondent even when the Respondent had failed to controvert and/or deny the particulars of negligence contained and/or alluded to in the Statement of Defence. Consequently, the holding by the Learned Magistrate, occasioned a miscarriage of justice.

6. The Learned Trial Magistrate erred in law in entering Judgment in favour of the Respondent for loss of dependency, when no such dependency was ever pleaded nor proved, as by law required.

7. The Learned Trial Magistrate erred in law and in fact in awarding special damages in the sum of Kshs. 35,220/= only, which was not specifically proved. Consequently, the award of special damages, was erroneusly and legally untenable.

8. The Learned Trial Magistrate erred in fact and in law in believing the Respondent's evidence, without subjecting same to thoroughgoing and/or exhaustive scrutiny. Consequently, the Learned Trial Magistrate failed to discern the apparent material discrepancies

9. That the Judgment and/or Decision of the learned Trial Magistrate is contrary to the weight of the evidence and submission on record.

7. The appeal was admitted on 24/10/2013 and directions taken on 06/10/2015 where parties agreed to dispose of the appeal by filing of written submissions with highlighting thereafter. Both parties complied by filing very comprehensive submissions and on an equal measure referred to several judicial decisions in respect to their rival positions. That state of affairs paved way to this judgment.

Discussion and Determinations:

8. The appeal to this court is a first appeal. It is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in ***Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278*** *and* ***Kiruga –versus- Kiruga & Another (1988) KLR 348.***

9. It was further held in the case of ***Hahn vs. Singh (1985)KLR 716*** that the appellate court will hardly interfere with the conclusions made by a trial court after weighing the credibility of the witnesses in cases where there is a conflict of primary facts between witnesses and where the credibility of the witness is crucial.

10. From the grounds of appeal as well as the submissions, there is an issue which was raised to the effect that the Respondent lacked the *locus standi* to commence, originate or maintain the suit and as such the proceedings and the judgment of the trial court remain a nullity. That is ground 3 in the Memorandum of Appeal. To me that is a cardinal ground which ought to be first dealt with since its outcome will determine the way forward in respect to the rest of the grounds.

11. The Appellants contended that since the Respondent had obtained a Limited Grant of Letters of Administration *Ad Colligenda Bona* instead of either a full grant or a Limited Grant of Letters of Administration *Ad Litem* then he lacked the legal capacity to institute and maintain the suit since the Limited Grant of Letters of Administration *Ad Colligenda Bona* did not provide for the institution of a suit. In echoing that submission Counsel for the Appellants relied on the Court of Appeal decision in **Morjarila vs. Abdallah (1984) KLR 490.**

12. Responding to the submission, the Respondent was of the contrary view. He first contended that the issue was not raised before the trial court in the first instance and secondly that the Limited Grant of Letters of Administration *Ad Colligenda Bona* made the Respondent a personal representative of the estate of the deceased and as such acquired the *locus standi* to institute and maintain a suit under the Law Reform Act aswell as under the Fatal Accidents Act. He relied on the persuasive decision of **PI v Zena Roses Ltd & Another (2015)eKLR** in buttressing that submission.

13. Under **Section 2** of the Law Reform Act and **Section 4** of the Fatal Accidents Act, 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. In that case such a person ought to first obtain an appropriate grant so as to have the necessary *locus standi*. (See the Court of Appeal cases of **Virginia Edith Wamboi vs. Joash Ochieng Ougo & Another (1982-88)1 KAR** and **Trouistik Union International & Another vs. Jane Mbeyu & Another, Civil Appeal No. 145 of 1990).** The grant may be a full grant or a limited grant.

14. 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. The basis of a limited grant is found in **Section 54** of the Law of Succession Act, Chapter 160 of the Laws of Kenya (hereinafter referred to as ***'the Act'***) which states that:

> ***'54. A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.'***

15. The law further provides for various forms of limited or special grants. They include, but not limited to, Limited Grant of Letters of Administration *Ad Litem.* Limited Grant of Letters of Administration *Ad Colligenda bona,* Limited Grant of Letters of Administration *Ad de bonis non,* Limited Grant of Letters of Administration *durante minore aestate*, Limited Grant of Letters of Administration durante absentia, Limited Grant of Letters of Administration *pendente lite*, Limited Grant of Letters of Administration purpose and due to their limited nature each such grant ought to be used for that specific purpose only.

Given that more than one limited grant or a combination of grants can be issued depending on the circumstances of a case, there is every reason to deal with a limited grant as it specifically provides. That will undoubtedly bring order and decorum in dealing with an estate of a deceased person noting that there may be need to obtain a full grant in future.

16. In this discussion, I will deal with two forms which are material to the matter before me. One form is the one commonly known as Limited Grant of Letters of Administration *Ad Litem* which is provided for under **Form 14** of the **Fifth Schedule** of the Act and 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'.***

17. From the foregone, 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. (See the case of **Greenway vs. Mc Kay (1911) 12 CLR 310**).

18. The other form is provided for under **Section 67** of the Act and **Rule 36** of the Probate and Administration Rules and is commonly known as the Limited Grant of Letters of Administration *Ad Colligenda Bona*. The said provisions state as follows:

> ***'67(1) No grant of representation, other than a limited grant for collection and preservation of assests, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.***
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> ***Rule 36 (1) Where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of grant of administration ad colligenda bona defuncti of the estate of the deceased.***
>
> ***(2) every such grant shall be in the Form 47 and be expressly limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate and until a further grant is made.***

19. On the other hand a Limited Grant of Letters of Administration *Ad Colligenda Bona* is usually used in an emergency for purposes of dealing with the property of a deceased person which is subject to waste or danger and where there is no sufficient time to obtain a full grant. (See the case of **Re Cohen (1975) VR 187**).

20. The Appellants' argument is therefore based on the foregone distinction.Turning to the grant in this matter, the Respondent obtained and produced in evidence a Limited Grant of Letters of Administration *Ad Colligenda Bona as* the basis of his *locus stand* in the suit. I have carefully looked at the wording of the said grant which partly states as follows:-

> ***'.....but limited to the purpose only of collecting and getting in and receiving the estate and doing such things as may be necessary for the preservation of the same and until further representation be granted .....'***

21. Submitting on the purpose and intent of a Limited Grant of Letters of Administration *Ad Colligenda*

Bona, the Respondent had the following to say:-

> ***'...Even though a grant of letters of administration ad colligenda bona is 'generally' meant for collecting and getting in and receiving the estate and doing such things as may be necessary for the preservation of the estate of the deceased, it is not fatally defective for the respondent to have used it to file a suit. The suit was for compensation for damages and the award out of the suit, which if any would then form part of the estate of the deceased. This amounts to collecting the estate of the deceased.'***

22. Our courts have also dealt with the above issue. In the case of **Morjarila vs. Abdallah** (supra) the Court of Appeal expressed itself in the fifth and sixth holdings as follows:-

> ***'5. The purpose of a grant of letters of administration ad colligenda bona is to collect the property of the deceased person where it is of a perishable or precarious nature,and where regular probate and administration cannot be granted at once.***
>
> ***6. The appointment of a person as an administrator ad colligenda bona in respect of a deceased person cannot include the right to take the place of the deceased for the purpose of instituting an action or appeal, especially where there is specific provision for that purpose in paragraph 14 of the Fifth Schedule to the Law of Succession Act.'***

23. The above is the prevailing general position in law. However there are instances where such a Limited Grant of Letters of Administration *Ad Colligenda Bona* is tailored in a manner as to allow for the institutionof an action or where the record expressly provides for such. In such cases the focus will no doubt shift to the contents and wording of the grant or the record as opposed to the type of the grant. That scenario arose in the Court of Appeal case of **Peter Owade Ogwang v. Jared Obiero Ouya (2014)eKLR** where upon the demise of a party before the High Court the party which came in to represent the deceased party obtained a limited grant *ad colligenda bona*. The High Court found that the party had no *locus standi* and as such that party *inter alia* lost the matter. On appeal, the Court of Appeal on 19/09/2014 at Kisumu readily agreed with the High Court's position on the essence and purport of a limited grant *ad colligenda bona* but went further into the record and found that the party had further moved the High Court by way of a Chamber Summons which was allowed as prayed. The Summons moved the superior Court for the following order:

> ***'1. That the second plaintiff herein.....having died but since the cause of action survives him he be and is hereby substituted with the first Plaintiff, his legal representative who has obtained Letters of Administration the First Plaintiff allowed to prosecute the suit on his own behalf and on behalf of the second Plaintiff.'***

24. The Court of Appeal then went further and stated as follows:

> ***'The chamber summons was, on 16th November, 1998 allowed as prayed by Mbaluto, J. (as he then was). The record does not show that that order was ever set aside. It therefore remained a valid order of the court and could not be revisited by Musinga, J, who, at that time had concurrent jurisdiction with Mbaluto, J. In our view. notwithstanding that the appellant was armed with only a grant of letters of administration ad colligenda bona and therefore did not invoke paragraph 14 of the Fifth Schedule of the Law of Succession Act, the order of Mbaluto, J. allowing the appellant to represent the estate of his deceased father, the 2nd plaintiff, in effect converted the grant of letters of administration ad colligenda bona to a grant limited to the prosecution of the case before the High Court especially as the respondent never challenged it in that court.'***
>
> (emphasis added).

25. The Court of Appeal, differently constituted, in the case of **Morjarila vs. Abdallah** (supra) in similar circumstances held as follows:

'7. Notwithstanding that the grant of letters of administration ad colligenda bona was not a form of grant appropriate for this case and that it did not follow Form 47 in the First Schedule to the Law of Succession Act as provided by rule 36(2) of the Probate and Administration Rules, the grant was specifically limited to 'the purpose only' of representing the appellant in this appeal and those words in themselves constituted a valid grant under rule 14 enabling the appellant's son and his step-mother to represent the appellant in this appeal.' (emphasis added).

26. To further buttress the foregone position in law, the Court of Appeal, again differently constituted, at Nairobi in the case of **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** upheld that a party had the requisite *locus standi* to institute a suit in a matter where the grant of letters of administration ***ad colligenda bona*** was for '**the collection of the assets of the estate of the deceased including the filing of suit to claim the deceased's properties.**'

27. I believe I have said enough on the issue. Back to the matter at hand, I have already reproduced the wording of the limited grant of letters of administration ***ad colligenda bona*** above. I have also carefully gone through both the typed and the handwritten record before the trial court. Looking at the grant and the record it is clear that the limited grant of letters of administration ***ad colligenda bona*** issued to and produced in evidence by the Respondent herein does not benefit from the above exceptions. The same was issued for the specific purpose***'.....only of collecting and getting in and receiving the estate and doing such things as may be necessary for the preservation of the same and until further representation be granted .....'***

28. The argument by the Respondent that the word **'collecting'** in the limited grant of letters of administration ***ad colligenda bona*** gave power to the Respondent to institute a suit for compensation as the award would form part of the estate of the deceased, can with respect to the Learned Counsel, only be described as 'misplaced if not misconceived'. To me due to the limited nature of the grant of letters of administration ***ad colligenda bona,*** if a party in the process of collecting the estate is faced with the need to institute a suit arising from any cause of action, then that becomes the realm of another type of a grant unless the exceptions seen above come to play. The Respondent's argument is hence for rejection and hereby fails. On an equal footing, the argument that the issue of *locus standi* was not raised before the trial court in the first instance cannot stand. I take that position since the issue was raised in the Memorandum of Appeal and both parties responded to it in their respective submissions and made references to judicial decisions on the same. The failure to raise the matter before the trial court, although inappropriate, does not therefore amount to a bar against the same being raised on appeal especially when the same was raised timeously and with liberty to all parties to respond to it. Further the issue of *locus standi* is so 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. *Locus standi* relates mainly to the legal capacity of a party. 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.

29. In this matter therefore the Respondent lacked the requisite *locus standi* to institute and/or maintain the suit. The result is that all the proceedings before the trial court were instituted and maintained by a person who lacked the legal capacity to do so. They are indeed a nullity and as such lack the legal leg to stand on. In coming to this finding this Court is alive to the truism that the matter is quite an old one and involves the loss of a loved one in a family. Be that as it may, it is this Court's belief that all is not lost as the matter can be legally revisited.

30. That being the position, had this Court not found that the Respondent lacked the requisite *locus standi,* it would have revisited the issue of liability and assessment of damages as below.

31. On l**iability**, the evidence of how the accident occurred is quite clear. There is an eye-witness who testified as PW2 whose evidence placed the driver of the accident vehicle at fault and thereby proved the

particulars of negligence as appearing in the Plaint. That evidence was not shaken even in cross-examination. On the part of the Appellants, there was no evidence to controvert how the accident occurred. In such a situation the trial court was only left with the evidence of PW2 and the police officer, PW3. The court did its best and on a balance of probability found for the Respondent and apportioned liability at 10/90 against the Appellants jointly and severally.

32. On the contention that PW2 did not record a statement with the police, this Court is ably guided by the holding of the Court of Appeal sitting in Kisumu in the case of **Joel Muga Opija vs East African Sea Food Limited (2013)eKLR** where the only evidence on how the accident occurred was that of a member of the public which the Police did not list as a witness but he testified in during the trial. The Court on 24/10/2013 held as follows:

> ***'We do not think that the mere fact that this witness was not listed as a witness in the abstract lessened the weight of his evidence……In any case he was not challenged by any evidence from the Respondent on the contrary. We think that without any evidence challenging his evidence the fact would remain that the deceased was hit from behind and he fell on the left hand side. The driver must have been seeing him in front of him and there was no evidence that the deceased changed his manner of cycling or that he went zig sagging on the road. We see no reason to disturb the learned Magistrate's finding on negligence.'***

33. As to whether the failure of a party to file a Reply to defence in a suit based on negligence amounts to an admission, I must say that that issue has been subject of litigation for quite some time and it is now well settled. The same cannot be well put as such than by ***Ransley, J.*** in **Jubilee Insurance Company Limited vs. Njuguna (2004)eKLR** when he stated that:

> ***'...The position therefore is that the fact of the Plaintiff's negligence as particularized is deemed to have been denied as there is a joinder of that issue under rule 10(1) and as there is a joinder of issue under rule 10(4) the joinder operates as a denial of every material allegation of fact made in the pleadings..***
>
> ***.....Of course where there is a counter-claim a Reply is necessary under O.VII rule 10. This however does not apply in this case...'*** (emphasis added).

34. The learned trial magistrate cannot therefore be said to have erred on the issue of the liability.

35. On the issue of **quantum of damages**, an appellate Court when dealing with an appeal on the assessment of damages must always be reminded of the principles for consideration as enumerated by the Court of Appeal in the case of **Kemfro Africa Limited t/a Meru Express Services, Gathogo Kanini vs. A.M.M Lubia & Another (1982-88) 1 KAR 777.** The court expressed itself clearly thus:-

> "***the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."***

36. Concerning damages arising out of fatal claims under the Law Reform Act and the Fatal Accidents Act, it is settled that a Court can award damages tothe deceased's estate under the Law Reform Act on account of the pain and suffering before death as well as on the loss of expectation of life or otherwise referred to as "*the lost years*." Likewise a Court can award damages under the Fatal Accidents Act to the dependants for the loss of dependency. However, when dealing with a claim under both said Acts, a Court is to be carefully to discount the amount awarded on the loss of expectation of life/lost years from the final award. This was clearly laid down by the Court of Appeal in the case of **Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini =vs= A. M. Lubia & Olive Lubia (1982-88), KAR 727.**

37. I have perused the judgment of the trial court and noted that it awarded damages under both the Law Reform Act and the Fatal Accidents Act. I must say that I have no problem at all with the reasonability of the said awards. I would have proceeded to dismiss the contention on the awards had the trial Court adhered to the requirement of deducting the damages on loss of expectation of life from the final award. However, that was not the case. I would therefore have found that the trial court erred in the assessment of damages in not taking into account a relevant factor; that is not off-setting the award on loss of expectation of life from the final award. Consequently the appeal would have partly succeeded only to theextent of discounting the sum of Kshs. 80,000/= (being the award on Loss of expectation of life) from the final award thereby making a figure of Kshs. 195,220/= subject to contribution.

38. Before disposing this aspect, there was an argument by the Appellants to the effect that there was no evidence of dependency adduced to even warrant the award on loss of dependency since the deceased was only a child. I will refer to what Courts have said about the issue over time. In the case of **Kenya Breweries Ltd vs Saro (1991) eKLR**, the Court of Appeal sitting in Mombasa in 1991 observed as follows: -

> ***"In the Kenyan Society at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact."***

39. In dismissing a trial Judge's finding as outrageous and pernicious to expect children to maintain their parents and as having been arrived on application of wrong principle, Kneller, JA in the Court of Appeal case of **Hassan -vs- Nathan Mwangi Kamau Transporters & 5 Others (1986) KLR 457** expressed himself thus:

> ***"The fact of the matter is, however, that today parents and children in most Kenya families do expect their children when adults to help their parents if they need it and, in any view, that should be encouraged and not fulminated against as a system of gerontocracy at its worst."***

I will rest that issue there.

Disposition:

40. From the above analysis and having found that the Respondent lacked the *locus standi* in the suit, what this Court can only do is to make the following orders:-

> ***a) The appeal be and is hereby allowed;***
>
> ***b) The judgment and decree of the trial court in Migori Principal Magistrate's Court Civil Case***
>
> ***No. 553 of 2002 be and is hereby set aside and is substituted with an order striking out the said Migori Principal Magistrate's Court Civil Case No. 553 of 2002.***
>
> ***c) Since the issue of locus standi was not raised before the trial court, each party to the appeal shall bear its own costs both in the appeal as well as in the suit.***

Orders accordingly.

DATED, SIGNED and DELIVERED at MIGORI this 20th day of July 2016.

A. C. MRIMA

JUDGE