



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NUMBER 25 OF 2011

MIRIAM WANJA MUCHIRI (Suing as the mother and
legal representative of the estate

of **JANE NJERI MUCHIRI**.....**APPELLANT**

VERSUS

1. EMMAH WANGECHI MACHARIA..... **1ST RESPONDENT**

2. LYSIUS PHILLIP NDERI.....**2ND RESPONDENT**

*(Being an appeal from the Judgment of Honourable T.C. Wamae, the Senior Principal Magistrate
delivered on 15th February, 2011 in Naivasha SPMCC No. 969 of 2009)*

JUDGMENT

1. This appeal arose from the judgment of the trial court in Naivasha SPMCC No. 969 of 2009 delivered on the 15th February 2011. This is one of a series of twenty-seven(27) cases filed by road traffic accident victims that occurred on the 29th November 2008 along Naivasha-Kinangop road involving the respondents motor vehicle Registration Number KAY 223A. The twenty-seven victims sued the respondents for negligence and consequential loss and damages. They sued under both the Law Reform Act and the Fatal Accidents Act.

Among the cases filed was **Naivasha CMCC No. 99 of 2009 – Joseph Kanjigi Njoroge -vs- Emma Wangechi Wainaina and Pius Nderi Nyasa**. This was selected as the Test suit.

2. On the 2nd September, 2009, Mr. Gekonga Advocate acting for the plaintiff and Ms. Ndung'u Advocate acting for the defendant recorded a consent judgment, liability in the test suit stated above that the Defendants would shoulder 95% negligence while the plaintiff conceded to 5%. The said consent on liability was to apply to **CMCC Nos. 91/09, 116/09, 121/09, 145/09** and any Subsequent matter in the series, all such other matters were to be brought for purposes of mention after the test suit had been determined on liability.

3.The Test suit CMCC No. 99 of 2009 was determined after a full hearing on the 30th March 2011. The consent judgment on liability at 95% in favour of the plaintiff was adopted and general damages was assessed and awarded at Kshs.80,000/= with costs and interest.

While delivering his judgment, the trial Magistrate noted that the rest of the matters were to be listed for assessment of damages on the 13th April 2011. Among the matters to be listed for assessment of damages was **SPMCC NO. 969 of 2009**, whose judgment is the subject of this appeal.

4. I have perused the trial courts proceedings in **CMCC No. 969 of 2009**. The original and Amended plaint therein refers to the accident vehicle as KAY 223Y while the vehicle in the test suit was KAY 223A. The appellant did not amend the plaint to reflect the correct motor vehicle registration number. On the other hand, the Respondents in their submission before the trial court pointed to the anomaly and urged the court to dismiss the suit as the vehicle details were not as stated in the test suit, and therefore the consent judgment on liability could not bind the case.

5. In her judgment, the trial court rightly stated that there was judgment by consent of parties in **SPMCC No. 99 of 2009** as indicated earlier but that the subject accident vehicle numbers were different, in that in **SPMCC No. 99 of 2009**(the test suit) the vehicle referred to was KAY 223A while in the case it was referred to as KAY 22Y and therefore the plaintiff now the appellant was under a duty to prove ownership of the vehicle stated in her plaint, and therefore judgment on liability in the Test suit could not apply to the case.

Further, the trial Magistrate made a finding that the appellant was not the mother of the deceased and that the deceased did not leave behind any children as documents produced to prove birth of the two children turned out to be forgeries. On that basis, the trial court dismissed the appellants case with costs on the 15th February 2011.

6. The appellants grounds of appeal are as hereunder:

- 1. That the learned Trial magistrate erred in law and in fact by dwelling on extraneous matters when her mandate was only to determine quantum thus arriving at an erroneous decision and/or finding.**
- 2. That the learned magistrate in law and inf fact by dismissing the suit when there was a consent judgment apportioning liability in the ratio of 95% against the Defendant and 5% against the plaintiff.**
- 3. That the trial Magistrate erred in law and infact failing to verbatimly reproduce the terms of the consent thus arriving at an erroneous decision.**
- 4. That the trial Magistrate erred in law and in fact in not recording the proceedings in verbatim as adduced thus arriving at an erroneous decision.**
- 5. That the Learned Magistrate erred in law and infact in holding that the Appellant had disowned her signature when there was no evidence in support of that.**
- 6. That the Trial magistrate erred in law and infact in assessing damages which were too low in the circumstances.**
- 7. That the Learned trial magistrate misapprehended the evidence on record hence making her to reach at erroneous finding in dismissing the Appellant's suit.**

It is sought that the said judgment be set aside and the court proceeds of assess damages.

7. Parties filed written submissions.

When parties appeared before me on the 14th March, 2016 upon consultation, they both agreed that the correct Registration Number of the accident vehicle was KAY 223A and further agreed to have the said motor vehicle Registration Number KAY 223A adopted in all the proceedings both in the trial court and in the appeal. That being the case, the Appeal as far as it related to liability which had been recorded by

consent in the test suit, **SPMCC No. 99 of 2009** shall be allowed. This is in relation to **Grounds No. 1, 2 and 3.**

8. This is the first appellate court. It is mandated to re-evaluate and reconsider the evidence adduced before the trial court and come to its own findings and conclusions. It should however be very slow and cautious as it neither saw nor heard witnesses testify. See **Selle -vs- Associated Motor Boat Co. Ltd (1968) EA 123.**

The appellant in ground No. 5 of the appeal faults the trial Magistrate in holding that the appellant had disowned her signature in the verifying affidavit to the plaint when there was no evidence to support such finding. As mandated, I shall re-examine the appellants evidence as recorded.

9. **Appellants evidence:** before the trial Magistrate.

Miriam Wanja Muchiri testified as the Administrator of the deceased's estate that the deceased **Jane Njeri Muchiri** was her daughter and was 26 years when she met her death, was a business lady earning Kshs.5,000/= per month and had two children Gideon Muchiri ten years, and Miriam Wanja, one year old. The Birth certificate of Gideon Muchiri was produced as PEx 1 but the birth certificate for the younger child - Miriam Wanja was not produced but marked for identification. It was her testimony that the deceased was unmarried and she took care of the children. She produced Letters of Administration to confirm her *locus standi* in the case.

10. On cross-examination, the appellant stated that she signed all her documents by thumbprint. That while applying for the Letters of Administration she did not state that the deceased had left children nor was this pleaded in the original plaint dated 28th October 2009.

She stated that the signature on the supporting affidavit was not hers as she does not sign, but thumb print. She agreed and stated that the affidavit sworn on 12th August 2010 in support of an application was hers as she thumbprinted (it relates to possession of documents in support of the claim). She denied knowledge of the Advocate before whom she signed the affidavits in respect of succession cause but stated it was in her Advocates office whom she pointed was Mr. Gekong'a.

Questioned about the Birth Certificates of the children of the deceaseds, it was her testimony that Gedion Muchiri's birth certificate had been altered by the deceased to read the present names. She also stated that the names **Silvia Njeri Muchiri** (the second child) was unknown to her, but denied that the birth certificate was a forgery.

11. **DW1, George Mutua**, an officer at the Department of Civil Registration testified for the Respondent in respect of the Birth Certificates for the alleged deceased's children.

He produced a **Register of Births Vol. 123 of 1999.**

He confirmed an entry of the child Gedion Muchiri born on 29th January 1999 by **Silvia Njeri Muchiri** then 20 years old in 1999. He also produced a certificated copy of the birth certificate. He produced another Birth certificate in respect of the same child, that had an alteration on the name of the mother. It was his testimony that the second birth certificate (DE X3) – with the name of the child's mother (as deleted Njeri Muchiri) as falsified.

On cross examination by Mr. Gekong'a Advocate, this witness stated that the altered Birth certificate could not have been issued from their office as it could not be possible that the deceased, as mother of the child gave a wrong name – her name as the names of both mother and baby are given and entered in the notification card immediately after delivery. He however agreed that details in the birth certificate if erroneous can be corrected by the office upon application. Thereafter the appellant applied for admission of the birth certificate for the second child long after close of the case. In her ruling, the trial court disallowed the admission of the certificate.

12. I have seen the certificate of death of the deceased. She is named as **Jane Njeri Muchiri**, age twenty six years. In the trial court, the Birth certificate of her son as produced bore her names as “**rubbed Njeri Muchiri and registered on 4th August 1999.**” The second birth certificate in respect of Gideon Muchiri shows the name of the mother as **Silvia Njeri Muchiri** and date of registration as 4th August 1999.

The two Birth certificates bearing different names of the mother(deceased) of the children are indicated as having been registered on the same day the 4th August 1999. They bear different serial numbers.

Based upon the above evidence, the trial Magistrate made a finding that the appellant failed to prove that the alleged children were children of the deceased, and concluded that the Birth certificates for the child Gedion Muchiri were a forgery.

13. Evaluation of Evidence

I have carefully considered the evidence tendered by both the appellant and the respondent's witness before the trial court. The appellant presents herself as an untruthful witness. She did not prove in any way or manner that she was the deceased's mother. The grant of letters of Administration intestate issued in **Succession cause No.166 of 2009** at the Principal Magistrate's court at Naivasha describe her as the personal representative of the Estate of Jane Njeri Muchiri. Such grant may be obtained by any person, who has an interest in the deceased's estate, and in this case, not necessarily the deceased's mother. It is not clear why, while applying for such grant she failed to state that the deceased was survived by the two children. In her own admission, she testified that in the original plaint dated 28th October 2009, She failed to indicate that the deceased had children, and no reason was given for the omission.

I have also seen the verifying affidavit allegedly sworn by the appellant on the 9th October 2009, and attached to the plaint.

The appellant in her evidence disowned the said verifying affidavit, and stated categorically that she is not he one who signed it as she could not sign. That in effect left the plaint without a verifying affidavit. The Amended plaint Amended on 4th June 2010 did not have a Verifying Affidavit.

14. **Appellants Submissions** on the contentious issues above are that the appellant swore all the affidavits. No submissions were tendered in respect of the alleged alterations in the Birth certificates of the children, the different names of the mother of the children as indicated in the register of Births nor the alleged forgeries in respect of the birth Certificates. He however submitted extensively on the *quantum* of damages. I will come to the matter of *quantum* of damages later.

15. **The Respondents submissions** are on the twin issues of:

- (1) ***Verifying affidavit to the plaint.***
- (2) ***Falsified Birth certificates***

It is submitted that non compliance with provisions of **Order 4 Rule 2** that every plaint shall be accompanied by a verifying affidavit is fatal. It is urged that the case was a non-starter, and this appeal ought to be dismissed as well.

16. Findings and determination

It is trite that a plaint that is not supported by a verifying affidavit, to verify the averment in the plaint can not stand on its own. The appellant having disowned the said affidavit by candidly stating that she did not sign documents but thumb prints, it goes without a doubt that the original plaint dated 28th September 2009 was filed without a valid verifying affidavit, the one attached thereto having been disowned by the deponent. It is instructive that when the plaintiff filed an amended plaint, amended on the 4th June 2010, he found it unnecessary to verify the contents with another affidavit that would have cured the defect.

Order 4 rule 1(2) gives no option to a litigant when filing a plaint.

Rule 1(2) states:

“The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.”

The court in **Mercy Kanjiri Makathimo -vs- Francis Mburugu Mkathimo(2007) e KLR** struck out a plaint that was not accompanied by verifying affidavit. The appellant did not seek leave to file a proper verifying affidavit at the commencement of the primary suit, which in my view would have been the right thing to do to correct a procedural defect. I agree with the trial Magistrate that the appellant did not have a valid suit before the court as the plaint was not supported by any valid verifying affidavit. That being the case, the appeal as well as the primary suit are candidates for striking out as having been incompetent.

17. In the case **Kitur & Another -vs- Standard Chartered Bank & 2 Others (2002) No. 2 e KLR** the Judge faced with an issue of failure to attach a valid verifying affidavit to the plaint, had this to say:

“---A false affidavit is a non affidavit and thus even on a a matter of technicalities I do strike out the verifying affidavit and the plaint is therefore untenable.”

As stated earlier, the plaintiff did not take the opportunity to rectify the defect even when an Amended Plaint was filed, this time without a Verifying Affidavit which though not a legal requirement, if a proper affidavit was attached would have cured the defect.

It is therefore evident that the appellant was in breach of the provisions of **Order 4 Rule 2 of Civil Procedure Rules** which are mandatory in nature. The defective Verifying Affidavit must be struck out, leaving the amended plaint, (and of course the original plaint) without legs to stand on. I proceed to strike out the amended plaint.

The effect of striking out the Amended plaint in the trial court is that there was no suit upon which the trial court would have proceeded with to deliver the judgment the subject of the appeal.

Nevertheless, I shall proceed to address myself to the second issue of falsified Birth Certificates and proof of dependency under the Fatal Accidents Act.

18. The trial Magistrate rendered herself that the appellant failed to prove that she was the mother of the deceased and that the two minor children were children of the deceased. As stated **above**, I find the evidence of the appellant suspect. It is not logical or common that a true mother would not know her daughter's names. She denied knowledge of the names of her alleged daughter as entered in the Birth certificate of the grandson **Gedion Muchiri** as **Silvia Njeri Muchiri**. She could not explain and indeed did not attempt the deletion of her daughter's name in the Birth certificate. The two birth certificates were issued on the same day but bore different names and different serial numbers. There is no doubt that a parent can change names of a child and or correct any erroneous information in the entries at the Civil Registration Register. There is a procedure to do so. It is not as easy as deleting a name by rubbing the same and substituting it with another. The procedure to do so is provided. It is is evident that some falsification and alteration of official documents was done in this matter.

19. As stated by the trial court, I too find that the appellant made a deliberate attempt to circumvent justice by presenting to court false and altered documents. I therefore find that the **claim on** loss on dependency fails as no dependents were proved.

For the above reasons the court finds no merit in the Appeal as filed, it is dismissed with costs to the Respondents.

Dated, signed and delivered in open court this 22nd day of September 2016

JANET MULWA

JUDGE