



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 215 OF 2009

ANALIK WEKESA.....1ST APPELLANT

DIOCESE OF LODWAR (through its Registered Trustees)....2ND APPELLANT

VERSUS

HELLEN WAIRIMU MWANGISIMON NJOROGE MWANGI (Suing as the

Administrators of the Estate of

JAMES KANENE MWANGI (deceased)..... RESPONDENT

(Being an appeal from the judgment and decree of the Honourable Tanui Resident Magistrate, delivered on the 30th July 2009)

JUDGMENT

1. The Respondent hereof obtained leave of court upon application in the trial court to file the suit out of time following an accident that claimed the life of the deceased, James Kanene Mwangi on the 20th November 1996 involving the Appellants motor vehicle Registration KAB 077E.

The plaint was filed on the 12th July 2007 about eleven years after the accident and outside the statutory limit of three years on a claim based on the tort of negligence as provided in the **Limitations of Action Act, Chapter 22 Laws of Kenya**.

2. By an order of the Chief Magistrate dated the 13th June 2007, leave was granted to file the suit out of time. The suit proceeded to hearing with the appellant challenging the order for extension of time to file the suit. This was stated in the appellants defence dated 9th August 2007. Judgment was eventually entered in favour of the Respondent against the appellants.

In the judgment the trial Magistrate upon consideration of the parties submissions (which are not part of the Record of Appeal) and guided by the provisions of Section 4(2) of the said Act that

“an action founded on tort may not be brought after the end of three (3) years from the date on which the cause of action occurred.”

The Court made a finding that grant of leave to file the suit out of time issued in **Nakuru CMCC No. 501**

of 2007 (O.S) was on the ground that the Respondent had to wait the determination of the Succession Cause where objection proceedings had been filed.

3. This finding is the main ground of appeal preferred by the appellant besides that the Learned Magistrate erred in law and fact by assessing and awarding damages under the **Fatal Accidents Act** for lost years when there was no proof of any earnings by the deceased, and that the defendants stated where not dependants as envisaged under the Act.

4. In the Appellant's written submissions by counsel, it was submitted that the leave granted for filing of the suit out of time was not proper as the respondent failed to satisfy requirements stated in **Section 27 of the Limitations of Actions Act** thus caused prejudice to the appellant by the delay of twelve years, that there were no available witnesses and the insurance could not be certain of a claim after twelve years.

5. It is trite that a party may challenge grant of leave to file suit out of time. The appellant filed an application and sought an order to strike out the plaint but withdrew it.

In the case **Nairobi Civil Appeal No. 195 of 1995 – Mary Wambui Kabugu -vs- KBS Ltd JA Shah** (as he then was) had this to say:

“---- a defendant becomes aware of the order of extending time when served with the summons plaint and the order extending time. That there is no provision in the Act itself to enable the defendant to have the order set aside. In my humble view the only time is at the trial either on facts brought out at the trial or by way of arguments at the trial if circumstances and facts allow such arguments at the trial, that is to say if there is no dispute as to facts.”(underlining mine)

An order of extension of time is subject to challenge as stated above. The appellant submits that it raised its objections in its written submissions before the trial Magistrate.

6. I have not seen the appellants submissions before the trial court as they are not filed together with the Record of Appeal. I am therefore unable to discern what arguments if any were tendered. The court is not expected to go out of its way fetching the submissions as they would have been part of the Record of Appeal. In the same breath, I am not able to interrogate the trial court's findings that the Leave granted was proper or not without the benefit of the said submissions.

7. I have considered the cross examination of the Respondent by the Appellants Advocate on the issue during the hearing. It was only a confirmation that the suit was filed twelve years after the accident as the respondent had to wait for finalization of the Succession Cause. No other serious or any argument on cross examination was put to the Respondent.

I have considered the provisions of the **Limitations of Actions Act**, and the authorities cited by the appellant. **Section 27 (2)** provides:

“the requirements of this Sub-Section are fulfilled in relation to a cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which

(a) either was after the three year period of Limitation prescribed for that cause of action or was not earlier than one year before the end of that period.”

I have stated that the materials presented to me in the Record of Appeal do not afford me an opportunity to discern whether or not the respondent proved material facts to justify and warrant the grant of leave by the court.

8. The Respondents submission on this issue is that the trial Magistrate was guided by the legal position that without Letters of Administration, the legal Representative of the deceased's estate could not bring the suit to court.

It is stated that there was an objection to grant of the Letters of Administration *Ad-Litem* which took twelve years to be finalised. It is submitted that the Appellant challenged the order but the trial court found no merit in the challenge.

In the circumstances, I find the appellants grounds of appeal number 1, 2 and 3 without merit.

9. On assessment of damages under the Fatal Accidents Act for Loss of dependency, the Appellant was dissatisfied by the trial courts findings that the benefit under whose benefit the suit was filed were proper dependants as envisaged under the Act. This is ground Number 5 of the Appeal.

I have considered the plaint dated 12th July 2007. The claim is for damages under the Fatal Accidents Act as well as under the Law Reform Act.

Dependants listed thereof include the deceased minor daughter Hellen Wairimu Kanene, the deceased's mother Hellen Wairimu Mwangi and Seven brothers and two sisters.

Section 4(1) of the Fatal Accidents Act defines dependants as follows:

“every action brought by nature of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused and shall be brought by and in the name of the executor or administrator of the person deceased.” (underlining mine)

Brothers and sisters or uncles and aunties are not dependants for purposes of the Act.

10. The deceased left behind the minor daughter and his mother. **Section 8 of the Fatal Accidents Act** requires that the plaintiff give full particulars of the person or persons for whom and on whose behalf the action is brought.

The respondent had pleaded stated and gave particulars of the deceased's mother and child. In addition the mother of the deceased, Hellen Wairimu Mwangi, the first plaintiff was granted Letters of Administration of all the Estate of deceased James Kenene Mwangi vide **High Court Succession Cause No. 86 of 1996.**

Issue of whether or not the persons stated above were not dependents of the deceased was not urged before me in any manner. There is no dispute therefore that the dependants were proper dependents. That being the case, I am satisfied that the mother and child of the deceased were dependants and entitled to the benefits under the Fatal Accidents Act.

I have noted that the Appellant did not submit on this issue. I shall not go into details thereof.

Accordingly, that ground of appeal is also found without merit.

11. There is no appeal filed in respect of the trial Magistrate findings on both liability and *quantum* of damages as awarded.

That being the case, I find no justification and rationale in the appellants submissions on proof of ownership of motor vehicle Registration number KAB 077E. I shall not interrogate the issue as it is a none issue in the appeal.

12. For the above reasons, I find the appeal lacking in merit in its entirety. It is dismissed with costs to the Respondent.

Dated, signed and delivered in open court this 27th day of October 2016

JANET MULWA

JUDGE