



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 27 OF 2014

BETWEEN

ALICE ODONGO OBUR & CHARLES OUMA

suing as the administrators of

PAMELA ANYANGO ODHIAMBO (DECEASED) APPELLANT

AND

PAMELA ADHIAMBO MILAMA RESPONDENT

(Being an appeal from the Ruling and Order of Hon.L. Gitari, CM at the Chief Magistrates Court at Kisumu in Civil Case No. 441 of 2012 dated 5th March 2014)

JUDGMENT

1. This is an appeal from a decision of the subordinate court striking out the appellant's statement of defence on the ground that the matter had been settled by an agreement between the parties.
2. The facts leading up to this appeal are that the appellants as administrators of the estate of Pamela Anyango Mboya (the deceased) sued the respondent for damages under the *Fatal Accidents Act (Chapter 31 of the Laws of Kenya)* and the *Law Reform Act (Chapter 26 of the Laws of Kenya)* as a result of her death a road traffic accident which took place on 25th August 2007. In her statement of defence, apart from denying negligence attributed to her, the respondent averred that the subject matter of the suit had been settled by an agreement between herself and the adult children of the deceased where they accepted the sum of Kshs. 60,000/- as funeral expenses. She therefore contended that the matter had been resolved amicably after payment was made.
3. Not long after the pleadings closed, the respondent moved the court under the provisions of **Order 2 rule 15(1)** and **Order 46 rule 20** of the **Civil Procedure Rules** and **sections 1A, 1B and 3A** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** to strike out the suit on the ground that it had been settled amicably outside the court and that the claim did not disclose a reasonable cause of action and was otherwise an abuse of the court process.
4. The application was supported by the respondent's affidavit sworn on 16th January 2014. She annexed two agreements to the affidavit. The first one was dated 20th September 2007 in which the Ruth Atieno Ajwang', George Otieno Ajwang' and Boas Omondi Ajwang accepted Kshs. 60,000/- as burial expenses and upon receipt thereof they agreed not pursue any case of compensation from the respondent or her driver. The second agreement dated 20th September 2007 was an additional agreement for payment of

Kshs. 30,000/- to the mother of the deceased.

5. The appellants filed grounds of opposition dated 20th January 2014. Their counsel argued that the agreements were made out of ignorance and bad advice from the respondent's advocate who purported to act for the appellants. That the agreements were not binding and that they were illegal immoral and contrary to public policy.

6. The trial magistrate allowed the application as she was satisfied that the agreements were entered voluntarily and that it was not contrary to public policy and in fact consistent with **Article 159** of the Constitution which obliges the court to promote alternative dispute resolution. It is this order that precipitated this appeal.

7. In the Memorandum of Appeal dated 31st March 2014, the appellant raised the following grounds;

1) The learned trial magistrate grossly misdirected himself in seeking to summarily strike out the Plaintiff's suit.

2) The learned trial magistrate grossly misdirected himself in both law and fact in upholding an agreement entered by persons with no legal capacity to bind the estate of the deceased.

3) The learned trial magistrate erred in law and fact in entertaining an application by the Defendant under the wrong provisions of the law.

4) The court lacked jurisdiction to strike out the Plaintiff's suit.

5) The learned trial magistrate erred in both law and fact in failing to consider the Plaintiff's submissions while arriving at the decision.

8. Mr Odeny, counsel for the appellants, argued that the agreement could not have settled the matter as the consent of the appellant as administrator of the deceased's estate was not sought. He urged that the settlement was only in respect of burial expenses yet the entire claim was for damages under both the **Law Reform Act** and **Fatal Accidents Act**. He contended that the agreement was not in the interests of justice and should be set aside by allowing the appeal.

9. Mr Onyino, counsel for the respondent, took the view that the parties were entitled to enter the agreement and compromise the case as the respondent was the owner of the vehicle and the parties to the agreement children of the deceased. He pointed to the fact that the appellant himself was a witness to the agreement and could not be heard to complain about the agreement. He submitted that the agreement was made before the suit was filed hence the matter had indeed been compromised.

10. I have considered the application and arguments and I take the following view of the matter. The appellant did not file any replying affidavit to controvert the assertions of fact made out in support of the application. Counsel for the appellant could not assert any factual matters in the absence of any deposition to that effect. In the circumstances, the facts set out in the respondent deposition must be taken as true. It is also worth noting that the settlement agreement dated 20th September 2007 was entered 5 years before the suit was filed on 3rd October 2012. At the time the parties were free to enter any agreement compromising their legal claims including renouncing their rights to claim in consideration for receiving any sum of money. Such an agreement is neither illegal, immoral or contrary to public policy.

11. Since the settlement agreement preceded the claim in court, I reject the appellant's argument they deceased's children could not renounce their rights to make a claim under the **Law Reform Act** and **Fatal Accidents Act**. It is also apparent that the appellant only became the administrator ad litem of the deceased's estate on 30th September 2010 after the deceased's children agreed to the settlement. Since the appellant is only a brother to the deceased, he cannot have a greater interest greater than the children of the deceased who in any case have an independent right to make the claim.

12. The trial magistrate was right in holding that the claim had been compromised and I take a similar view.

13. The appeal is dismissed with costs.

DATED and DELIVERED at KISUMU this 20th day of December 2016.

D.S. MAJANJA

JUDGE

Mr Odeny instructed by Bruce Odeny and Company Advocates for the appellant.

Mr Onyino instructed by Geoffrey Okoth and Company Advocates for the respondent.