REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 143 OF 2012

HAMID ABDULRAHMAN ABDALLA

ALI FAIZ SAID ……………………………………………..…..…………. APPELLANTS

V E R S U S

TEREZIA MSHAI MAGANGA

ZALINA MALALE MWAMBURI (both suing on behalf of the estate of ANOLD MZEE WASOME (Deceased) ……..……………………………………………… RESPONDENTS

(An appeal from the Judgment and Decree of the Hon. A. M. Obura – PM given at Kilifi on 8th August, 2012 in SRMCC 386 of 2010)

JUDGMENT

1. This Appeal relates to the case filed in **Kilifi SRMCC No. 386 of 2010**. That suit was filed by **TEREZIA MSHAI MAGANDA** and **ZAINA MALAE MWAMBURI WASOME** who were suing on behalf of the Estate of **ANOLD MZEE** (Deceased). The Deceased died in a car accident that occurred on 16th May 2010. The Deceased was a passenger in a Probox motor vehicle Registration No. KBJ 493J, travelling from Mombasa to Malindi when it collided with a lorry Registration No. KAG 085G. The Deceased was the only fatality in that accident, others were injured to various degrees. There were various cases filed before the Magistrate's Court and with the consent of the parties – **Kilifi SRMCC No. 281 of 2010** became the test suit. That test suit was also appealed against in this Court being Mombasa High Court **Civil Appeal No. 1412 of 2012**. In that **Civil Appeal No. 141 of 2012** I have determined the liability which finding shall apply to this appeal. Accordingly this Court upholds the trial Court's finding on liability that the Appellants were 100% liable for the accident.

2. This being the first Appellate Court the role of the Court has often been stated as it was stated in the case **ABOK JAMES ODERA T/A A. J. ODERA & ASSOCIATES v JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES [2013]eKLR** where the Court of Appeal stated-

   "This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of KENYA PORTS AUTHORITY –Vs-

KUSTON (KENYA) LIMITED (2009)2EA 212 wherein the Court of Appeal held inter alia that:-

> ‘**On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”**

3. Having dealt with the ground of appeal on liability I am left with two issues for consideration-

i. **Quantum**
ii. **Locus standi**

<u>LOCUS STANDI</u>

4. I will begin by considering locus because if indeed Respondents had no locus the quantum will be affected.

5. Appellant submitted both in the trial Court and before this Court that Respondents had no locus because they relied on Limited Grant of Letters of Administration ad colligenda bona which was contrary to the provisions of Section 67(1) of the Law of Succession Act Cap 160 which provides-

“No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for the grant, inviting objections thereto to be made known to the Court within a specified period of not less than <u>thirty days</u> from the date of publication, and the period so specified has expired.”

6. The authorities relied upon by the Appellants are outdated since the Law of Succession relating to Limited Grant of Letters of Administration has changed. This change was well captured by a Court of Appeal decision of 24th October 2013 in the **<u>case JOEL MUGA OPIJA –Vs- EAST AFRICAN SEA FOOD LIMITED [2013]eKLR</u>** . The justices in that case were facing a ground of appeal very similar to the one before me. The ground of appeal they were considering was-

“The Learned Judge of the superior Court erred in law in holding that the Appellant herein had no locus standi to file the original suit by rejecting exhibit 5 (Limited Grant of Letters of Administration) when it was expressly endorsed thereon that the said grant was for filing suit.”

The Judges of Court of Appeal made the following holding in respect of that ground-

> **“We will consider the issue of status first. The main reason why the learned Judge sustained the Respondent’s arguments on this issue is that the form used and its contents limited the Appellant to “collect, get and receive” the Estate and doing such things as may be necessary for the preservation of the same until further presentation be granted. She rightly in our view considered that as a very limited grant which did not authorize the respondent to institute or defend any claims on behalf of the estate of the Deceased. Mr. Okoth responds to that by submitting that at the relevant time when the accident happened that Form P & A 47 was the form used for purposes of instituting and defending claims such as was made in this case. He says that the separate forms now in use came into use much later. The accident took place on 16th June, 2001. That is not in dispute. The deceased died on that same day according to the evidence which includes Certificate of Death produced as exhibit. Section 67(1) of the Law of Succession was clear that no representation, other than a limited grant for collection and presentation of assets, could be made until there had been published Notice of the application for the Grant. Form 47 used**

here was undoubtedly that for limited grant and ideally was not a suitable form for grant that would authorize a person to sue or to defend a suit on behalf of the estate of a Deceased person. However, Rule 70 of the Probate and Administration Rules states:-

> **"The forms set out in the First Schedule with such adaptations, additions and amendments as may be necessary, shall, when appropriate be used in all proceedings under these rules.**
>
> **Provided that the Chief Justice may by Notice in the Gazette vary the forms and prescribe such other or additional forms as he thinks fit."**

A look at the first schedule indicates that Form 47 is one of such forms which could be used with variations as appropriate.

Thus before the Chief Justice gazette a varied form, applicants could use Form 47 as appropriate for all proceedings under the rules. This continued till Legal Notice No. 39 was introduced under the Probate and Administration (Amendment of the fifth schedule Rules) 2003, and a proper form was introduced. This was long after the death of the Deceased and indeed after the Appellant had applied for Letters of Administration under the old provisions.

We think that had the attention of the Learned Judge of the High Court been drawn to the above, and to the fact that the Learned Magistrate had in a ruling allowed the used of the form for filing the case, she would not have come to the same conclusion she came to in her judgment. We are persuaded that that ground was well taken."

7. That decision of the Court of Appeal in my view sufficiently responds to Appellant's ground of appeal on *locus standi*. A party can where the Limited Grant so authorizes file suit or defend suit on behalf of a Deceased person.

QUANTUM

8. The mother of the Deceased, Terezia Mshai in evidence stated that the Deceased who was 30 years old was married. His wife is the co-administrator of his Estate with Terezia. The witness said that Deceased was a Mason who used to earn Kshs. 500/- per day. He gave his family Kshs. 300/- per day for their use. The witness also gave evidence on special damages where she stated she paid Kshs. 15,000/- to obtain the Grant. She produced a receipt of that payment. She paid Kshs. 5,000/- mortuary fees and used Kshs. 50,000/- for funeral expenses.

9. The Learned Trial Magistrate in considering the earning of the Deceased had this to say in his judgment-

"Since there is no proof of his earnings. I shall apply the statutory minimum wage for Artisans i.e Kshs. 13,833/-. I shall accept the sum of Kshs. 7,000/- which is the lesser sum proposed by the Plaintiff's Advocates. I adopt a multiplier of 20 years as he could have lived upto 55 years of age considering the vagaries of life. It is uncertain that as a Mason he could have lived upto 60 years of age."

10. I will be guided by the holding in the case **CATHOLIC DIOCESS OF KISUMU –Vs- SOPHIA ACHIENG TETE – KISUMU CIVIL APPEAL NO. 284 OF 2001** as follows-

"It is trite law that the assessment of general damages is at the discretion of the trial Court and an appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial Court only if it is satisfied that the trial Court applied the

wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

11. Bearing in mind that holding and having considered the parties submissions both the trial Court and this Court I find no reason to interfere with the finding of the trial Court.

12. On the issue raised by Appellants that the Respondents must fail because of failure to produce evidence of employment I retort by quoting a Court of Appeal decision in the case **JACOB AYIGA MARUJA & ANOTHER –Vs- SIMEON OBAYO COURT OF APPEAL AT KISUMU CIVIL APPEAL NO. 167 OF 2002** where the Court stated-

"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the Respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed."

Similarly in this case the evidence of the 1st Respondent and the evidence of the other passengers in the Probox show that Deceased was a self employed mason. That evidence sufficiently prove Deceased was in gainful employment.

CONCLUSION

13. This appeal for the above reasons is dismissed with costs to the Respondents.

DATED and DELIVERED at MOMBASA this 26th day of FEBRUARY, 2015.

MARY KASANGO

JUDGE