



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CIVIL APPEAL NO. 11 OF 2014
FORMERLY NAROK HIGH COURT CIVIL APPEAL NO. 1 OF 2014

(Being an Appeal from Narok SRMCC No. 148 of 2011)

NELSON OLE KEIWUA (*Suing on his own behalf*)

and as the administrator of the Estate

of

KISHOIYAN CHEPUKEL.....APPELLANT

-VERSUS-

VICTORIA LIMITED.....1ST RESPONDENT

PHILLIP NAIJAH.....2ND RESPONDENT

J U D G M E N T

1. This is an appeal from the Judgment of the lower court dismissing the Appellant’s claim for general and special damages. The claim was based on the tort of negligence, on the face of the amended plaint filed on 14/4/2014. The suit was brought by the Plaintiff Nelson Keiwua in his own behalf and as the “administrator of the Estate of the Late Kishoyian Chepukel.”
2. The amended plaint is a poorly drafted piece of pleading but from averments in paragraphs 3 (a) to 5, it is evident that the cause of action arose on 2nd June, 2009 when a collision, allegedly occurred, between motor cycle KMCF 122F Focin, driven by the said Kishoyian with the Plaintiff as a passenger, and the 1st Defendant’s vehicle KYF 482 Land Rover driven at the time, allegedly in a negligent manner, by the 2nd Defendant along Narok – Maasai Mara Road, that Kishoyian died in the accident while the motor cycle was extensively damaged. At paragraph 6 of the amended plaint it is averred that

“6 By reason of the matters aforesaid, the Plaintiff has suffered loss and damage as a result of both Defendants negligence jointly and severally” (sic)

3. Special damages claimed included funeral expenses for the deceased as well as lost dependency, and medical expenses allegedly incurred by the Plaintiff. Under general damages the Plaintiff sought for himself Shs 1,000,000/= for pain and suffering and Shs 500,000/= as future medical expenses. The Defendants filed a joint defence denying all the key averments in the Plaintiff’s

plaint including, the occurrence of the accident, ownership of the accident vehicle, negligence and in the alternative pleaded negligence against the deceased Kishoyian.

4. From the proceedings of the lower court, the parties appeared before the court for hearing on 30/7/2013. A consent on liability in the ratio of 15:85% in favour of the Plaintiff was recorded and was captured in the subsequently filed amended plaint. It seems that efforts to settle the question of quantum were unsuccessful hence the matter proceeded to hearing. The Plaintiff and a clerical officer-cum-anaesthetist Stephen Tallam testified as PW1 and 2 respectively. The Defendants did not adduce any evidence. After parties filed submissions the lower court delivered a reserved judgment on 19/8/2014.
5. Aggrieved by the decision dismissing the suit, the Appellant filed a memorandum of appeal, later amended. Eleven grounds are listed in the Amended memorandum including the following:-

“2. THAT the Honourable court erred in law and fact by purporting that the Appellant had no *locus standi*/letters of administration to file a claim on behalf of the late Kishoyian Chepukel.

3. THAT the Honourable court erred in law and fact by not recognizing limited letters of administration (*ad colligenda Bona*) issued to Nelson Ole Keiwua, the Appellant herein on 31/05/2011 in Narok Succession Cause Number 2 of 2011.

9. THAT the Honourable Magistrate erred in law and fact by concluding that no particulars of injuries were pleaded hence visiting the same on the Appellant while there were documents relied upon to evidence the injuries suffered.

9.9. THAT the Honourable Magistrate erred in law and fact by concluding that no particulars of injuries were pleaded hence visiting the same on the Appellant while there were documents relied upon to evidence the injuries suffered by the Appellant in line with Article 22 of the Constitution of Kenya.”

6. The parties agreed to dispose of the appeal by way of written submissions. The submissions primarily touch on three issues namely, the effect of the recorded consent on liability; the capacity of the appellant to bring the suit on behalf of the deceased's estate, the extent of the Plaintiff's injuries and damages sustained.
7. On the first question, the Appellant's view was inter alia that:

“the respondents had conceded liability and therefore the veracity of the Appellant's claim is accepted and underscored. The Respondent's admission of liability is sufficient proof of the Appellant's case or claim.”

8. With regard to the capacity of the Plaintiff to bring the suit, it was submitted that the relevant grant (*Ad Colligenda Bona*) dated 31st May 2011 was “annexed on the pleading as provided by law.” Rule 70 of the Probate and Administration Rules is cited in this regard. Counsel for the Appellant also submitted that death in respect of Kishoyian (deceased) and injuries sustained by the Appellant were pleaded and proved.
9. She further argued that apart from the receipt tendered in respect of the damaged motorcycle, other receipts were all proximate to the date of the accident and should not have been disregarded and finally, that the award of Shs 1,000/= to the Plaintiff as was grossly inadequate in the circumstances of the case.
10. On their part, the Respondents submitted that the consent on liability did not automatically entitle

the Appellant to the sums claimed as general and special damages, that it was upon the Appellants to prove damages due to him. On the question of the Appellant's capacity to bring the claim on behalf of Kishoyian's estate, the Respondents submitted that no grant of letters of administration was tendered in the lower court and that the one annexed to the pleadings cannot be considered at this stage and is extraneous in terms of Order 42 of the Civil Procedure Rules (**See Joseph Kinyanjui Mwai t/a Sandworth Printing & Packaging –Vs- Kenya Power & Lighting Co. Ltd [2014] eKLR**).

11. Moreover the pleadings did not refer to the any grant, which in any event should have been properly a grant *ad litem* or a grant of letters of administration rather than grant *ad colligenda bona*. The matter of the Estate of **Morarji Bhanji Dhanak (Deceased) [2000] eKLR** where distinction between various types of grant were made, and **Zipporah K. Mbaya –Vs- Mwongera Miruri [2007] eKLR** on who can represent the estate of a deceased person were cited in support of the Respondents' submission.
12. Regarding damages claimed by the Appellant, it was submitted that the motor cycle was not his property, while the injuries he sustained were not pleaded. Similarly the claims related to the burial of the deceased could not succeed in light of the lack of capacity on the part of the Appellant to sue on behalf of the estate of the late Kishoyian.
13. I have considered the pleadings and proceedings in the lower court including the judgment. I have also considered the submissions made by the parties to this appeal. The first Appellate court is obligated to look at the evidence adduced in the trial, to evaluate it and draw its own conclusions, while bearing in mind that the trial court had the advantage of seeing and hearing witnesses testify (**See Selle –Vs- Associated Boat Co. [1968] EA 123; Peters –Vs- Sunday Post [1958] EA 424 and Williamson Diamonds Ltd –Vs- Brown [1970] EA 1**).
14. In my considered view this appeal turns on the correct interpretation of the consent parties' on liability, the capacity of the Appellant to bring the suit and nature of injuries and damages alleged. The relevant part of the consent, recorded by the parties on 30/7/2013 reads as follows:

“1. The liability be apportioned 15:85 in favour of the Plaintiff. (The Plaintiff is admitting 15% while the defendant is admitting 85 % of liability.)”
15. Thereafter the parties took a further mention date to attempt settlement on quantum. It must be understood that liability in this context relates to the negligence alleged in respect of the accident hence the apportionment thereof. In my considered view, the admission of liability cannot, as claimed by the Appellant, amount to an admission of the “veracity of the Appellants claim” as submitted by the Appellant. Indeed as the Respondent have argued the Appellant had onus of proving what he is entitled to by way of damages. He is only absolved from the duty of proving the occurrence of the accident and liability for the same, in negligence.
16. In essence, upon admitting liability only what a Defendant says to a Plaintiff is “I agree I was wholly (or partially) responsible for the accident. Now prove what injury, damage, loss you incurred and how much you are entitled to by way of compensation (damages).” In discharging the burden the Plaintiff is bound by his pleadings.
17. I find it useful in this appeal to consider separately the Plaintiff's claim and the claim in respect of the deceased. In the former, the Plaintiff merely pleaded at paragraph 6 of the amended plaint that he had suffered loss and damage due to the negligence of the Defendants. However nowhere in the plaint does he particularize the injuries subsequently alleged at the trial to have been sustained by him during the accident. This despite there being a special damage claim for Shs 275,415/= and general damages amounting to Shs 1,500,000/= presumably in respect of injuries sustained.
18. The submissions by the Appellant that the medical evidence adduced suffices cannot hold. Indeed it should not have been entertained at the trial as no injuries had been pleaded in plaint. Equally,

the nexus between the Appellant and the allegedly damaged motor cycle was not pleaded. Evidence was led by him at the trial that the motor cycle belonged not to him but to a third party who did not testify. Besides, no motor vehicle assessor gave evidence in proof of the alleged salvage value of Shs 69,500/=.

19. With regard to the claim in respect of the deceased Kishoyian, death apparently instant, is pleaded at paragraphs of the amended plaint. The death certificate was also tendered. What is the nature of damages sought in respect of the deceased? In paragraph 6a under the headline “particulars of special damages” are the following:

- a. Funeral expenses for Kishoyian Chepukel – Shs 340,000/=.
- b. Pain and suffering for the late Kishoyian Chepukel – Shs 20,000/=.
- c. Loss of dependency – Shs 60,000/=
- d. Post mortem report – Shs 5,000/=

20. Evidently, as noted by counsel for the Respondent, the relationship between the deceased and the Plaintiff is not pleaded in the amended plaint, nor does it come out clearly in the evidence. Damages sought under items a), b), d) above ideally above relate to the estate of the deceased under Section 2 (2) c) of the Law Reform Act. Damages for loss of dependency are awarded under the Fatal Accidents Act for the benefit of the family of the deceased and claims thereof must be brought in the name of the executor or administrator of the estate, except where the administrator has failed to bring the action within 6 months of the death.

21. Read together Section 4 and 7 of the Fatal Accidents Act provide that whether the action is brought by the administrator (or executor) or in default by persons beneficially interested, it shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused. Thus the Plaintiff herein in order to be entitled to the listed claims needed to bring himself within either of the categories of beneficiaries or administrator (executor).

22. Even then it had to be demonstrated for whom and on whose behalf and benefit the claim was lodged, in compliance with Section 8 of the Fatal Accidents Act. From the pleadings and the evidence at the trial, the relationship between the deceased and the Appellant was not disclosed (in terms of the Fatal Accidents Act). Nor are the particulars of the beneficiaries of the suit identified in the plaint or the evidence. During cross-examination the Appellant claimed that the deceased left a widow and four children but he did not disclose their particulars.

23. Finally, the proceedings in the lower court show that no grant of representation was produced at the trial. In the amended plaint itself, all there is an allusion made at the title of the plaint that the Plaintiff is acting as an administrator of the estate of the deceased. However nowhere is this authority pleaded in the body of the amended plaint or raised in evidence.

24. Before the appeal could be heard counsel for the Respondent objected to the inclusion of the said *ad colligenda bona* at page 21 of the record of appeal pointed out that no such evidence was tendered at the trial. Having compared the record with the original lower court record I ruled to retain the said document on the file. Looking at it now closely, I note that while all the other documents seemingly filed with it are date stamped 26th August 2011, the alleged grant is not stamped. I find it surprising that the Appellant could have failed to list such an important document as the copy of *ad colligenda bona* now referred to, among his initial filed lists of documents or to refer to it in his evidence. There is every possibility that the document was inserted in the file after the judgment. At any rate it was not exhibited at the trial.

25. The amended plaint heading purported that the Appellant was the administrator of the estate of the deceased. No grant of letters of administration were tendered before the court and neither did he tell the trial court in the course of his testimony that he was the administrator of the estate of the deceased. All he said is that the deceased was a “colleague”. Clearly therefore the Appellant had no authority or capacity and was therefore not entitled to damages in respect of the estate of the

deceased as an administrator or as a person beneficially entitled under the Fatal Accidents Act or even the Law Reform Act.

26. I agree with the conclusions of the lower court with regard to the alleged injuries sustained by the Appellant and his capacity to sue on behalf of the estate of the deceased. On my own assessment of the pleadings, the evidence and the law I cannot fault the findings of the lower court. The learned magistrate stated inter alia:

“The effect of failure in stating the particulars of injuries complained of would render the entire suit as disclosing no reasonable cause of action. One wonders what would form the basis of assessing general damages if no particulars of injuries are included in the plaint even after amendment.....guide by the numerous authorities.....[this court] finds that the Plaintiff had and has no capacity to file the present suit on behalf of the estate of the deceased..... the Plaintiff cannot claim to have the authority to file the present claim for and on behalf of the deceased’s estate: Section 4 of the Fatal Accident Act is clear on this.”

27. The court proceeded magnanimously to award the Appellant Shs 1,000/= as nominal damages. Based on the court’s earlier findings on this aspect, it is questionable whether there was a basis for awarding any sums to the Appellant for his alleged injuries. However, in view of the minimal amount involved, I will not disturb the award. All in all, the appeal before me has no merit and is dismissed with costs.

Delivered and signed at Naivasha this 30th day of July, 2015.

In the presence of:

Miss Oseko holding for Ms Muigai For Appellant

Miss Amboko holding brief for Miss Kirimi for For Respondents

Court Assistant Stephen

C. W. MEOLI

JUDGE