



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 64 of 2004

**MERCY MUTHONI MURITHI & ERASTUS RIUNGU MUTIGA
(Suing as the administrators
and personal representatives of the estate of the late
JAMES MURITHI RUTERE.....APPELLANT**

VERSUS

ATTORNEY GENERAL.....RESPONDENT

***(Appeal from the judgment of the Senior Principal Magistrate's Court at Nairobi, of the Honourable
Mrs. C. Meoli (SPM) delivered on 16th January, 2004 in CMCC No.3170 of 2003)***

J U D G M E N T

1. This appeal originates from a suit which was filed by the appellants Mercy Muthoni Murithi and Erastus Riungu Mutiga, in the High Court at Nairobi. The appellants were suing as the administrators and personal representatives of the estate of James Murithi Rutere, deceased. The appellants had sued the Attorney General (hereinafter referred to as the respondent), in his capacity as the legal representative of the Government.
2. The appellants sued the respondent for recovery of damages under the Fatal Accidents Act and the Law Reform Act, arising from the death of the deceased who was an employee of the Government of Kenya, working with the Ministry of Finance. The deceased died as a result of fatal injuries sustained in an accident which resulted from a blast in his office. The appellants contended that the deceased died as a result of negligence due to failure to provide a safe working place and failure to provide safe tools.
3. The suit was brought on behalf of the deceased's dependants, who included his widow Mercy Muthoni Murithi, two sons Cosmas Denis Kimathi and Tyson Evanson Mutwiri, and daughter Rachel Gakii. On the 4th October, 2002, the appellant sought and obtained judgment against the respondent under Order IXA Rule 7 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, on the grounds that the respondent had failed to file its defence within the stipulated period.
4. On 7th October, 2002, the respondent filed a defence in which it denied that the appellants had proper authority to bring the suit. The respondent further denied that the deceased was involved in any accident, or that there was any blast in his office. The particulars of negligence were also denied. Further, the respondent averred without prejudice to its denial, that the appellants' suit was statute barred under the Provision of Public Authorities, Limitations of Actions Act Cap 39 Laws of Kenya.
5. At the request of the appellants, the suit was transferred to the Chief Magistrate's Court at Nairobi for hearing and final disposal. During the hearing, Mercy Muthoni was the only witness who testified. She

explained that the deceased who was her husband died on 15th September, 1996 as a result of an explosion in his office. She produced a copy of a death certificate. She also produced letters of administration issued to her by the court appointing her as the administrator of the deceased's estate. She produced a letter of appointment dated 15th May, 1987 showing that the deceased was working with the Ministry of Finance from 1982. She also produced a copy of his payslip for September 1996 showing that he was earning Kshs.7,082 per month.

6. Mercy Muthoni Murithi testified that there were 3 issues of their marriage, whose birth certificates she also produced. She further produced receipts showing that as a result of the death, she incurred funeral expenses. The witness explained that she was unemployed and that it was the deceased who used to provide for the family.
7. Before the witness completed her evidence, counsel who was appearing for the respondent requested for an adjournment on the grounds that she had just realized that judgment had been entered for the respondents. She therefore needed to get further instructions. The matter was adjourned to another date during which the appellants' counsel closed his case. Thereafter, each party filed written submissions.
8. In her judgment, the trial magistrate found that although an application was brought under Order IXA Rule 7 of the Civil Procedure Rules for leave to enter judgment against the respondent, no formal request for judgment was made nor was any judgment entered on record against the respondent. Therefore, the defence filed by the respondent was properly on record. The trial magistrate found that the allegations of negligence made by the appellants on the plaint were not proved. She noted that no attempt was made to explain how the explosion at the deceased workplace occurred, or who was responsible for it. She noted that the appellants did not discharge the burden of proof.
9. The trial magistrate further noted that the appellant did not produce any certified copy of an order granting leave to file the suit almost 6 years after the cause of action arose. She therefore upheld the defence that the appellants' suit was statute barred. She accordingly dismissed the appellants' suit.
10. Being aggrieved the appellants have lodged this appeal citing 10 grounds as follows:
 - (i) That the learned magistrate erred in law and in fact in failing to find that interlocutory judgment was entered against the respondent in default of defence with the leave of the court on 4th October, 2002.
 - (ii) That the learned magistrate erred in law and in fact in failing to find that there being interlocutory judgment against the respondent the appellants were not under any duty to prove negligence against the respondent.
 - (iii) That the learned magistrate erred in law and in fact in finding that there was no interlocutory judgment entered against the respondent.
 - (iv) That the learned magistrate erred in law and in fact in finding that the appellants had not discharged the burden of proof.
 - (v) That the learned magistrate erred in law and in fact in finding that the appellants claim was statutory barred *ab initio*.
 - (vi) That the learned magistrate erred in law and in fact in failing to find that the appellants were granted leave to file suit out of time on 19th July, 2002.
 - (vii) That the learned magistrate erred in law and in fact in finding that no certified copy of the order granting leave to file suit on time was extracted yet one was issued by the court on 5th September, 2002.
 - (viii) That in any event the learned magistrate erred in law in creating a presumption that the appellants were under a legal duty to extract the said court order.
 - (ix) That the learned magistrate erred in law and in fact in dismissing the appellant's suit with costs.

- (x) That the learned magistrate erred in law in failing to state what the appellants would have been awarded as damages should the suit have been successful.
11. Mr. Kabaiko who argued the appeal on behalf of the appellants, submitted that the appellant having applied for judgment against the respondent for failing to file a defence, and that application having been granted, the defence filed by the respondent 3 days later was improperly on record, as no application was made for the setting aside of the judgment. Mr. Kabaiko argued that the applicant having applied for judgment under Order IXA Rule 7 of the Civil Procedure Rules, and the application having been granted, it was erroneous for the trial magistrate to find that there was no judgment on record. Mr. Kabaiko referred to ***Civil Case No.695 of 1997 Mwangi Nguro vs Commissioner of Lands***, wherein a defence filed by the Attorney General after the default judgment had been entered, was ignored and the suit considered undefended.
 12. Mr. Kabaiko further submitted that the suit was before the trial magistrate for formal proof, and all that the applicant was required to do was adduce evidence to assist the court with assessment of damages as liability was no longer an issue. Mr. Kabaiko therefore argued that the trial magistrate was wrong in finding that liability was not proved.
 13. As regards the issue of the appellant's suit having been filed out of time, Mr. Kabaiko referred to paragraph 6 and paragraph 10 of the plaint where it was indicated that leave to file the suit out of time was granted in HC. Misc. Suit No.812 of 2002. A copy of the order which was duly signed was included in the record of appeal. The court was therefore urged to set aside the judgment of the lower court and enter judgment in favour of the appellants. The court was further urged to refer the suit to the lower court for assessment of damages.
 14. Mr. Guyo who appeared for the respondent raised several issues. Firstly, he maintained that the judgment in default of defence was never sought by the appellant nor was it granted. Mr. Guyo pointed out that the application made by the appellant for judgment in the lower court, ought to have been a request for leave of the court to obtain judgment in default of defence. The judgment could have been entered 7 days thereafter upon application on form 26 in appendix C of the Civil Procedure Rules. Mr. Guyo therefore maintained that there was no proper judgment on record in favour of the appellant.
 15. The second issue raised by Mr. Guyo was the issue of the appellant's suit having been barred by statute. Mr. Guyo submitted that the plaint ought to have disclosed the order for extension of time, particularly since the issue was raised in the defence. It was noted that the order for extension of time which was included in the record of appeal was never produced in the lower court and therefore should not have formed part of the record of appeal. Relying on ***Civil Appeal No.192 of 1996, Thuraniira Karauri vs Agnes Ncheche***, it was submitted that the issue of limitation was an issue of jurisdiction.
 16. Finally on the issue of liability, it was submitted that the appellants did not adduce any evidence in support of the alleged negligence. Therefore there was no nexus to establish any link between the course of action and the deceased's death. Mr. Guyo urged the court to find the authorities which were referred to by the appellant's counsel distinguishable. He urged the court to dismiss the appeal.
 17. In response to the submissions made by the respondent's counsel, Mr. Kabaiko argued that there was no appeal against the order which was made by the court on 4th October, 2002 allowing the application for judgment. Counsel argued that Form 26 Appendix C in the Civil Procedure Rules did not relate to request for judgment in respect of general damages. Counsel pointed out that the issue of delay was not raised in the trial, nor were the particulars of negligence challenged by the respondent. It was maintained that any reference to the defence by the trial magistrate was improper as the defence was not properly on record.
 18. I have carefully perused the record of the lower court and reconsidered the evidence which was adduced. I have also considered the submissions which were made by counsel, the judgment of the trial magistrate, the

memorandum of appeal and the submissions made before me.

19. Firstly, there is the issue as to whether there was a proper judgment in favour of the appellant, or to put it in another way, whether the respondent's defence was properly on record. It is evident from the record of the lower court that the appellant filed an application under Order IXA Rule 7 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking inter alia an order:

“That judgment be entered with leave of the court against the defendant in favour of the plaintiff as prayed in the plaint in default of defence.”

20. The court record shows that the appellants' application which came up for hearing on the 4th October, 2002, was duly served on the respondent on 20th September, 2002. By the date of the hearing, neither a defence nor any response had been filed to the appellants' application. Further, there was no appearance for the respondent at the hearing of the application. The court having heard the application issued orders as prayed. The question is, what orders did the court grant? Going by the application which was before the court, the order granted by the court was two-fold: firstly, leave to enter judgment against the defendant in default of defence, and secondly, judgment in favour of the appellants as prayed in the plaint.

21. It was argued by the respondent that the appellant ought to have first applied for leave and then 7 days later applied for judgment using Form 26 of Appendix C. In order to address that argument, it is necessary to consider Order IXA Rule 7 of the Civil Procedure Rules which states as follows:

“No judgment in default of appearance or pleading may be entered against the government without the leave of the court and any application for leave shall be served not less than 7 days before the return day.”

22. Order IXA Rule 7 of the Civil Procedure Rules does not state that an application for judgment under that rule, must be made in Form 26 of Appendix C. Reference to Form 26 of Appendix C is made in Order IXA Rules 3, 4, 5 & 6, of the Civil Procedure Rules, showing that those are the provisions in which Form 26 of Appendix C is applicable. This position is further supported by Form 26 of Appendix C which on the face of it is entitled *“Request for judgment (Order IXA rr 3,4,5 & 6 of the Civil Procedure Rules)”*. It is clear therefore that Form 26 of Appendix C is not applicable to an application for judgment under Order IXA Rule 7 of the Civil Procedure Rules.

23. From Order IXA Rule 7 of the Civil Procedure Rules, it is apparent that leave to obtain judgment against the Government under Order IXA of the Civil Procedure Rules, must first be obtained before the actual judgment can be obtained. The question that arises is whether such leave can be obtained simultaneously with the judgment in one application as the appellant herein appears to have done.

24. I find nothing in Order IXA Rule 7 of the Civil Procedure Rules that prohibits such a joint application. What is crucial is that leave of the court must be obtained. In this case, a formal application was made and there was leave granted by the court to the appellants to obtain judgment against the respondent in default of defence, as well as judgment in their favour. The defence filed by the respondent 3 days after the judgment was granted, without any application being made by the respondent to set aside the judgment, was irregular and of no consequence.

25. Judgment in default of defence having been entered in favour of the appellant, the issue of liability was settled. The hearing which came up before the trial magistrate was no more than a formal proof for purposes of providing evidence to enable the court assess the quantum of damages. Thus, the issue of negligence was not relevant at that stage and the trial magistrate was wrong in finding that the appellant had not proved liability.

26. As regards the issue as to whether the appellants' suit was statute barred, the appellants pleaded in paragraph

10 of the plaint, that leave to file the suit out of time was granted on 19th July, 2002 in HC. Mis. Suit No.812 of 2002. It is true that the appellant ought to have served a copy of the order extending time in conjunction with the plaint while serving the respondent. However, there was no proper defence to the appellants' claim, the averment in the plaint regarding the extension of time for filing the suit was deemed to have been admitted. The trial magistrate was therefore wrong in her finding that the appellants' claim was statute barred. I come to the conclusion that the trial magistrate erred in dismissing the appellants' claim.

27. The appellants adduced evidence which showed that the deceased who was employed in the Ministry of Finance, died as a result of an explosion which occurred at his place of work. An appropriate death certificate was produced. There was also evidence adduced regarding the deceased's income and the deceased's dependants who were his wife and 3 children. The trial magistrate therefore, had ample evidence before her upon which general damages under the Fatal Accidents Act and the Law Reform Act ought to have been assessed. Similarly, evidence was adduced regarding the funeral expenses incurred and the special damages were therefore proved.
28. I have considered whether I should remit this suit back to the lower court for assessment of damages. I note that the suit in the lower court was filed about 8 years ago. The cause of action arose about 12 years ago. It is obvious that the finalization of this suit has taken an inordinately long time. Remitting the suit to the lower court will only prolong the matter further. I find that it is in the interest of justice that I deal with the issue of assessment of damages.
29. From the evidence, the deceased was 35 years old. His dependants' ages ranged from 8 years to 34 years. In the circumstances, a multiplicand of 16 would have been appropriate. The deceased's monthly salary was Kshs.7,082/=. A dependency ratio of $\frac{1}{3}$ would also be appropriate. Accordingly general damages for loss of dependency under the Fatal Accidents Act would work out as follows:
 $16 \times 7,082 \times 12 \times \frac{1}{3} = 453,248/=$.
With regard to special damages receipts were produced in respect of the special damages of Kshs.57,656/= which was claimed by the appellants. Therefore the same ought to be allowed. As regards damages under the Law Reform Act a sum of Kshs.100,000/= would be appropriate for loss of life expectancy.
30. The upshot of the above, is that I allow this appeal, set aside the judgment of the lower court and substitute thereof a judgment in favour of the appellants as against the respondent on liability at 100% on liability. I award the appellants general damages as follows:
Under the Fatal Accidents:
Loss of dependency - Kshs.453,248/=
Special damages - Kshs.57,656/=
- Law Reform Act:
Loss of expectation of life - Kshs.100,000/=
Total - Kshs.610,904/=
31. Since three of the dependants are minors I apportion the award in respect of loss of dependency as follows:
Mercy Muthoni Murithi - Kshs.153,248/=
Cosmas Denis Kimathi - Kshs.100,000/=
Tyson Evanson Mutwiri - Kshs.100,000/=
Rachel Gakii - Kshs.100,000/=
32. I further order that the shares of the minor shall be invested in an interest earning account with a reputable financial institution in the joint names of the appellants and the Registrar of the High Court until they attain the age of majority. I award costs of the suit in the lower court and costs of the appeal to the appellants. Those shall

be the orders of this court.

Dated and delivered this 16th day of March, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Kabaiko for the appellant

Kamau for the respondent

Eric - Court clerk