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

Civil Case 618 of 1997

LYDIA NTEMBI KAIRANYA……..1ST PLAINTIFF

FREDRICK MUGAMBI DOMENIC……..2ND PLAINTIFF

-versus-

THE HON. ATTORNEY GENERAL……DEFENDANT

J U D G M E N T`

The Plaintiffs filed this suit praying for Judgment against the Defendant for

"***(a) General damages under the Law Reform Act and the Fatal Accidents Act:***

(b) Special damages of Kshs.135,150/=

(c) Costs and Interest."

The two Plaintiffs are a widow and brother respectively of the late Mario Nyaga Mucee, according to the plaint and what this court has been told. They filed and have presented this suit on the strength of a Limited Grant of Letters of Administration Ad Litem granted under section 54 of the Law of Succession Act (Cap 160 Laws of Kenya) and the 5th schedule thereof. They therefore say they have brought this suit on behalf of the Estate of the late Mario Nyaga Mucee, the deceased, under the Law Reform Act and on behalf of all the dependants under the Fatal Accidents Act.

The Defendant, the Attorney General of the Republic of Kenya, is sued on behalf of the Government pursuant to Government Proceedings Act, section 12.

The motor vehicle said to have been involved in the accident, a Mercedes Benz Lorry, Registration Number 02 KN 36, belongs to the Kenya Navy and was being driven by Corporal Juma Simiyu, an officer of the Department of Defence of the Government of Kenya.

It was on 4th March 2007 at around 1.00 a.m. when the Deceased was driving his motor vehicle, a Toyota Corolla Registration Number 173F, along Ngong Road Nairobi at Zambia Area when the two motor vehicles aforementioned collided thereby causing the death of the deceased.

It is the Plaintiff's case that the traffic accident was caused by the sole negligence and recklessness of the driver of the Kenya Navy lorry Corporal Juma Simiyu.

Particulars of negligence are given in the plaint as

"***1. Driving too fast.***

2. Driving without due care and attention.

3. Failing to slow down, brake, stop or otherwise manage to avoid the accident.

4. Causing the vehicle to veer off his lane into the deceased's lane thereby causing the fatal accident."

As a result of the death of the deceased resulting from that accident, the Estate of the deceased and dependants of the Deceased have suffered loss and damage and that is what the Plaintiffs are claiming in this suit that they be paid for.

The first Plaintiff who was the only witness for the Plaintiffs produced a bundle of documents in Plaintiff exhibit 1 upon which she said she relied. She did not witness the accident.

The bundle of documents contains a Police Abstract Form at page 1 indicating the driver of the Kenya Navy Lorry Corporal Juma Simiyu was subsequent to the accident charged with the offence of causing death by dangerous driving contrary to section 46 of the Traffic Act. At page 58 there is the relevant charge sheet against JUMA OJUMA SIMIYU.

At page 59 are relevant court proceedings of The Chief Magistrate's Court at Nairobi in Traffic Case No.15159 of 2007. The following is what the learned trial Senior Principal Magistrate, R.A. Mutoka (Mrs.) said from the middle of page 43 to page 46 of her judgment (page 100 of Plaintiff's exhibit).

"Above then is a summary of both the prosecution as well as defense evidence on record. I have carefully considered the same. It is not contradicted that the deceased died as a result of injuries sustained due to the collision between his vehicle and that of accused person herein. The prosecution called two eye witnesses to the accident and their testimony was not only corroborated but also straight forward.

In my view the two were independent and credible witnesses whose observation of the collision was unhindered and enabled by the security lights outside the car – wash facility. Both were corroborated that not only was the accused's motor vehicle without its headlights on, it was also being driven in the middle of the road and fast i.e. Mary's (P.W.1) testimony or this is pertinent she stated that: -

"I saw a motor vehicle from Karen direction headed towards Ngong. It had no headlights but I saw its form was big. I wondered what was wrong with the vehicle and if its' occupants would reach their destination. The motor vehicle was being driven in the middle of the road and was fast. Then I saw headlights coming from Ngong direction headed towards Nairobi and I turned to look at it and it was headed towards the dark vehicle…….then the saloon swerved off the lane –left- but the big vehicle had reach it and hit the saloon at the front……"

Indeed the sketch plans exhibits 3 corroborate the evidence of Mary and Cyrus as it shows the skid marks of the accused's vehicle from the right to the left (when facing Ngong direction), and even the accused person in his evidence in chief (before he changed it towards the end) confirmed that he swerved to his right.

These same skid marks again are a pointer to the speed at which the accused person was driving. He skidded across the road for a distance of 10.9 metres then got off the road and drove, in a curve for another 40 metres before hitting the deceased's vehicle which was on the edge of the road then pushed the deceased's vehicle for a distance of 15.6 metres before both vehicles stopped, in a tangle. This evidence was not disputed by the defense. Indeed in his submissions dated 6th June 2008, Mr. Ngatia for the accused claimed that the prosecution failed to prove that the accused drove in a dangerous manner because, he claim, both Mary and Cyrus likely never witnessed the collision. That is however conjecture on Mr. Ngatia's part as the two gave evidence that remained unshaken during cross-examination. His claim that the two were biased against accused because he is a military officer is simply pathetic in the circumstances.

The prosecution has proved that accused drove dangerously by not putting the lights of his tanker on and by moving dangerously on the road. He was very fast and this is shown by the distances of the skid marks on the road (exhibit 3).

It is particularly because of the two instances above that I find the prosecutions case proved beyond all reasonable doubt. Clearly the accused person did not exercise any prudence and was extremely careless and perhaps the opinion of Mary that he was drunk would be the cause of the same save that no such test was conducted.

In any case, I find that the prosecution has proved the charge against the accused person beyond reasonable doubt. He is found guilty as charged and he is convicted accordingly."

The prosecution in that Traffic case was the Republic, ironically, the present Defendant in this suit. As such this is a suit which should have been settled by consent without going into hearing because the Defendant, as a Government governing this country under the rule of law, ought not be heard, for example, saying in the Traffic case as a Prosecutor that motor vehicle Registration Number 02 KN 36 belonged to the Kenya Navy and was being driven by Corporal Juma Simiyu on 4th March 2007 when he carelessly caused an accident in which the late Mario Nyaga Mucee died and when the same Government now as a Defendant comes into this Civil Suit, it denies knowledge and existence of those same facts.

In its defence dated 6th November 2007 the Defendant is saying:

"***the Defendant denies each and every allegation at paragraphs 2, 3, 4 and 5 of the plaint."***

Those are paragraphs of the plaint containing facts about ownership of motor vehicle Registration No.02 KN 36 and mentioning the person who was driving it on 4th March 2007, how the motor vehicle was being driven and what happened as a result of that negligent (careless) driving; and the Defendant's above quoted words are found in paragraph 2 of the said defence, so that in paragraphs 3 and 4 the Defendant states as follows:

"***3. The Defendant further denies that the said accident was ever occasioned by the alleged or any negligence on the part of the Defendant's driver, servant or agent as alleged or at all. The Defendant deny each and every particular of negligence alleged against the Defendants and or its driver, servant or agent at paragraph 3 of the plaint or at all.***

5. The Defendant in its defence state that the said accident was solely caused or alternatively substantially contributed to by the negligence of one late, Marie Nyaga Mucee driver of the said motor vehicle Registration Number KAM 173F. The Defendant will seek leave to issue a third party Notice against the Estate of the said Mario Nyaga Mucee who allegedly died as a result of the said accident."

The Defendant in the same paragraph 4 of the defence goes on to give particulars of the negligence of the said Mario Nyaga Mucee, the negligence the same Defendant said in the Traffic case then as a Prosecutor, that was never there and convinced the learned trial Senior Principal Magistrate in that case to agree with the Prosecutor.

It is sad that it is the Government saying it. A Government claiming to govern this country under the rule of law. Such a Government must say one thing and be the truth only and stick to it throughout as an example to Wananchi and as a sign of its truthfulness as a trusted guardian of the public interest of this country. The type of conduct exhibited in this suit by the Defendant is not conduct of a Government governing under the Rule of Law to safeguard public interest in a democratic country. A Government professing to govern this country under the Rule of Law surprisingly conducting itself like a dishonest and irresponsible ordinary citizen. A defense which ought to have been struck out under Order VI Rule 13 of the Civil Procedure Rules was left to see the light of this day and that is why the Defendant could not bring evidence to support that defence although hearing was interpartes the delaying tactics the Defendant had reverted to having been rejected by the court. I do hereby reject the Defendant's defence, even if it were accepted that

"***a conviction in the Lower Court is not proof of 100% negligence on the part of a person so convicted"***

because

"***careless driving connotes some degree of negligence."***

It should not be forgotten that a lower court is a competent court of law and its decision, just like a decision of a superior court, is a lawful decision of a court of law and must be respected. This is more so in this country where lower courts are manned by Magistrates as senior as Senior Resident Magistrates up to Chief Magistrates. Traffic Case No.15159 of 2007 in question in this suit was head and decided by a magistrate of no lower rank than a Senior Principal Magistrate with a lot of experience on the bench.

As stated earlier, she carefully considered evidence on both sides and found no contributory negligence on the part of the Deceased meaning the Accused was 100% negligent. I have no evidence that that finding was subsequently overturned and section 47A of the Evidence Act has to be applied – stating that:

"***a final judgment of a competed court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."***

True, "***careless driving necessarily connotes some degree of negligence***",

and that is precisely why the issue of contributory negligence arises, and there is no doubt that that issue arose in that Traffic Case and as stated earlier the learned Senior Principal Magistrate found there was no contributory negligence in that case where the Accused had the opportunity to adduce evidence and did adduce evidence in his defence.

Before me in this suit, where the Defendant filed a defence denying even the obvious truth, the said defendant did not attempt to adduce any evidence to cloth the naked denials in the filed defence. On what basis then would this court apply what the learned Counsel for the Defendant says was said by the Court of Appeal in the case of ***ROBSON –vs- OLUOCH (1971) E.A. 376*** where that Superior Court had evidence from the Defendant to consider?

The learned Counsel must realize that the Court of Appeal was talking about "*pleadings*" and not therefore "a decision of the court" when the court said:

"***We are satisfied that it is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of same accident that the Plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident."***

And I add again,that, of course, that is why the defence of contributory negligence exists and the party alleging such contributory negligence must, during the trial, adduce sufficient evidence to convince the trial court that indeed there was contributory negligence. Mere putting of the allegation of contributory negligence in the pleadings without being able to prove the allegation at the trial and convince the trial court is not enough and that is exactly the position of the Defendant in this suit; hence, getting no credit for mere pleading of contributory negligence without more, particularly bearing in mind that that claim had been convincingly rejected in the Traffic case where the Accused had adduced relevant evidence in support of the said claim. What better evidence do I have in this suit from the Defendant? Absolutely nothing, and submissions urging this court to find contributory negligence on the basis of that nothingness are, with all due respect, misguided submissions. I am not here saying that a conviction for an offence involving negligent driving is conclusive evidence that the convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in subsequent civil proceedings. I have said already that it is quite proper to plead contributory negligence. What I am saying is that plead that defence and prove it to satisfaction of the trial court as mere pleadings without necessary satisfactory proof takes you no where in a court of law where justice has to be done.

I would, in the circumstances therefore, find the Defendant liable to the Plaintiff 100%. But I have also the issue of the propriety of the Plaintiff's Limited Grant of Letters of Administration to consider.

As correctly stated by learned Counsel for the Plaintiff, Mr. Murugera, that the duty of the court is to do justice to the parties in accordance with the law, that is what I am trying to do in this suit considering what I said when I refused to grant the Defendant's application for adjournment, describing it as mere delaying tactics, and proceeded to hear the case and now writing judgment where I have arrived at the finding on liability as stated earlier. My two questions to the 1st Plaintiff when she was concluding her evidence were therefore still aimed at doing justice to the parties for when parties in a suit go before a court of law each party is expected to present its case carefully, and in accordance with the law in order to assist the court do justice to the parties. That is more so where parties are represented by learned Counsel, like in this suit, who know the law. Where therefore a party leaves, in its case, predicaments which make it difficult for the trial court to find justice in order for justice to be done by that court to the parties, that party must realize that a judge or magistrate is a human being subject to limitation of a human being. If such a party therefore finds that justice has not been done to it (the party) by the judge or magistrate, that party should realize that it has contributed to the failure to do justice in the suit.

That notwithstanding, my intention in this suit is to do justice to the parties to the best of my ability knowing very well it is difficult to satisfy each party, and sometimes any of them.

My questions were two. Firstly, I wanted to know whether the Plaintiffs in this suit had obtained a full grant of Letters of Administration to the Estate of the deceased subsequent to the grant to them of a limited grant of Letters of Administration which had enabled them to file this suit in time. Secondly, after the 1st Plaintiff's answer in the negative, I wanted to know from her how she thought distribution of the proceeds of this suit, if Plaintiff's case is successful, would be done in the absence of the aforesaid full grant.

I must clarify that I never asked and never could have asked the 1st Plaintiff whether they had "applied to have the current letters confirmed." That is because I know that a limited grant under section 54 of the Law of Succession Act:

"***limited to the purposes only for filing suit, and until further representation is granted by this court"***

is never confirmable in law because that grant is only temporary pending the obtaining under Sections 67 to 70 of a full grant which is the only one lawfully confirmable under Sections 71 to 73 of the Law of Succession Act.

Perhaps it is not realized that confirmation of a grant is done

"***in order to empower the distribution of any capital assets"***

in the Estate of a deceased person. See the concluding words in section 71(1) of the Law of Succession Act. That being the position, a holder of the kind of limited grant Plaintiffs in this suit have has no business seeking confirmation of that grant which grant in its contents puts that holder on notice to have

"***further representation granted by (the issuing) court."***

To a holder who is properly handling his case together with his lawyers, they should have no difficulty in knowing that the words:

"***until further representation granted by this court"***

in the limited grant they have ordinarily means <u>until a full grant is issued by the court which issued their limited grant.</u>

To proceed to prosecute the suit on the basis of that limited grant and in the end keep on arguing that they have power to prosecute the suit and subsequently obtain proceeds from the suit and distribute the said proceeds, is clearly trying to be blind and deaf to what the law is clearly saying and courts ought not submit to that kind of behavior because once there is a law governing human conduct and behavior, justice in a democratic society governed under the rule of law is only obtained within the armpits of that law. It means what section 67(1) and section 71(1) and I may add section 55(1) of the Law of Succession Act are saying have to be complied with and the limited grant being relied upon by Plaintiffs in this suit has not yet complied with those three sections of the Law of Succession Act which state as follows:-

"***67(1) 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 specific period of not less than thirty days from the date of publication, and the period so specified has expired."***

"***71 (1) After the expiration of a period of six months or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for <u>confirmation of the grant in order to empower the distribution of any capital assets</u>."***

Emphasis are mine to mark the importance of the words emphasised in underlining bearing in mind that section 55(1) stats as follows:

"***No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by section 71."***

In my view, the legal effect of sections 67(1) and 71(1) and 55(1) aforesaid is that since limited grants issued under section 54 schedule 5 aforesaid are "***grants of representation, then "other than a limited grant for collection and preservation of assets"*** all other limited grants must be applied for in the same manner a full grant is applied for by petition and publication (gazetted) so that, where appropriate, they may be confirmed in the same manner a full grant is confirmed; and perhaps the Law of Succession Act has to be amended specifically making that position clearer so that limited grants are not obtained in the haphazard manner they are being obtained to-day without even observing Rule 12 of the Probate and Administration Rules. Such amendment should also be aimed at preventing use of grants anyhowly as it is being done to-day.

In light of what I am saying above, what is before me in this suit is a "limited grant to file suit." The learned Plaintiff's Counsel submitted that such a limited grant is provided for under Section 54 of the Law of Succession Act, Schedule 5 of that Act and paragraph 14 of the schedule. Learned Counsel for the Defendant does not say as much, though agreeing that the grant was given under section 54 of the Law of Succession Act which specifically uses schedule 5 aforesaid. As he does not say more on those provisions, I will take it that he agrees with the Plaintiff's Counsel that the grant was governed by paragraph 14 of the Schedule. As I think that paragraph 14 is the <u>nearest</u> considering the rest of the paragraphs in relation to circumstances of this case, I do also agree with both learned Counsel that the grant was under Section 54 Schedule 5 and paragraph 14 of that schedule.

But I have used the word <u>nearest</u> as seen from my emphasis above. That is because strictly speaking, <u>power to file suit</u> is not specifically included in paragraph 14 which states as follows:

"***When it is necessary that the representative of a deceased person be made a <u>party</u> to a <u>pending suit</u>, and the executor or person entitled to administration is unable or unwilling to act, Letters of Administration may be granted to the nominee of a party in the suit, limited for the purpose of representing the deceased therein, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution."***

Emphasis are mine.

That paragraph is among paragraphs 11 to 16 under the heading:

"***Grants for special purposes***"

Otherwise also known as

"***Limited Grant for Letters of Administration Ad Litem."***

As can be seen, prima facie paragraph 14 is about

"***a pending suit"***

as all the other things it says are about a pending suit and things concerning and connected thereto. But the parent section for

Limited Grants being section 54 of the Law of Succession Act in as much as it may appear to be also so limited, should be read with Rule 73 and Rule 49 of the Probate and Administration Rules concerning jurisdiction of the court and Forms of applications respectively. Section 54 states as follows:

"***A court may according to the circumstances of each case, limit a grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule."***

Rule 73, which is similar to section 3A of the Civil Procedure Act, states as follows:

"***73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."***

If a limited grant to file suit is not covered by paragraph 14 or any other paragraph of the Fifth Schedule as provided under section 54 yet for ends of justice it is necessary to allow a party claiming under a deceased person to file suit, the court can invoke its inherent power under Rule 73 to allow such person to file suit by giving him a limited grant to do so.

Such applicant should however realize that power to file suit, strictly speaking in law, is not power to prosecute the suit, or power to receive proceeds of the suit when successful (power for collection and preservation of assets). If the applicant who wants power to file suit is also desirous of getting any of the other powers mentioned above, the applicant should specifically, in his application, mention all the powers he wants so that the same or any of them are specifically spelled out in the Limited Grant he subsequently gets when successful in his application for a limited grant under Grants for Special Purposes within the Fifth Schedule of section 54 of the Law of Succession Act. That is what the Plaintiffs and their learned Counsel should have done in this matter to obtain a proper limited grant to enable them properly do, in law, all they are purporting to do in this suit under the regime of The Law Reform Act. Since they were able to obtain the kind of limited grant they have used to file this suit, I do not think they would have found it difficult to obtain the type of limited grant I am saying they should have obtained. I have deliberately omitted

"***the power to distribute any capital assets of the estate***"

because I do not think in the circumstances of this suit such powers were necessary in terms of section 54, in the absence of a full grant in respect of which I have no evidence proving why the Plaintiffs have not even filed relevant petition to-date more than two years from the date of their above mentioned Limited Grant of Letters of Administration Ad Litem issued on 14th June 2007. Had they been keen to obtain a full grant, to date such grant would have been confirmed and issues of limited grant taking our time in these proceedings would have been non-existent.

Further concerning the type of application the Plaintiffs ought to have used to obtain their limited grant, this court has no evidence, but as I remarked earlier, such applications are being made in a haphazard manner.

Under section 54, the Fifth Schedule, Rule 12 of The Probate and Administration Rules, is specific that:

"***An application for a grant of representation to be limited in any of the several respects described in the Fifth Schedule to the Act shall be by petition in the appropriate form and shall be supported by such evidence by affidavit in Form 19 as is required by these Rules including such evidence as is sufficient to establish the existence of the facts and circumstances relative to the particular respect in which the grant is to be limited."***

That rule makes it clear there has to be Petition in the appropriate Form and such Forms are provided. But since I am at the moment taking the line that there is no paragraph in the Fifth Schedule covering the type of limited grant Plaintiff in this suit desired, Rule 12 would not cover the Plaintiffs who in the circumstances could properly invoke Rule 49 of the Probate and Administration Rules which provides that

"***A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made else where in these Rules shall file a summons supported if necessary by affidavit."***

I think an affidavit in Form 19 (P&A 19) referred to in Rule 12 would do.

Otherwise to avoid use of summons so that use of petition under Rule 12 aforesaid is maintained, there are case authorities where courts have held that an application for a limited grant to file suit is covered under paragraph 14 of Fifth Schedule of section 54. It is stated that paragraph 14 applied to intending or proposed Plaintiffs. However, it is not clearly stated how that paragraph applies. The case of ***HADIJA –v- IDD (1974) E A 50*** by Sir Dermont Sheridan J is a case in point and Lady Justice M. A. Angawa relied on that case in Nairobi High Court Succession Cause No.1731 of 2000; ***IN THE MATTER OF THE ESTATE OF MORARSI BHANJI DHANAK*** (Deceased).

Here also affidavit in Form 19 as stated in Rule 12 would do. But the petition is not prescribed to. Angawa J. suggested Form P&A 90 which is for ***grant pendente lite*** would do and cites Rule 70 which reads:-

"***These forms set out in the first schedule, with such adaptations, additions and amendments as may be necessary***

shall, when appropriate be used in all proceeding – 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."

I have no reason to disagree with the learned Judge who also refers to section 72 of the Interpretation And General Provision Act (Cap. 2 Laws of Kenya).

From what I have been saying therefore, there is no dispute that the Plaintiffs filed and have prosecuted this suit on the strength of a Limited Grant of Letters of Administration Ad Litem issued to them jointly by this High Court on 14th June 2007 and it is exhibit 1. It is not disputed that grant authorized the Plaintiffs to file this suit. But that is as far as that limited grant of Letters of Administration Ad Litem can go. That grant does not contain authority or power to prosecute a filed suit. It did not contain the power to collect or receive proceeds of the suit should Plaintiffs be successful. Those should have been included in the Limited Grant. The argument that the Limited Grant in question is in the same form as all others normally issued by the High Court does not convince me bearing in mind that the High Court issues what the Applicant has asked for. If the Applicant asks for quarter bread, it is issued to him. If he applies for half bread, it is issued to him. If he applied for a full bread, it is issued to him. What is issued to him is what he is entitled to in law because it is what he asked for and this court is telling the Plaintiffs in this suit that even if they know of other cases where courts have allowed applicants to eat more than what those Applicants were entitled to from their respective applications, what happened in those other cases does not constitute the law. The law is that a party only eats quantity of the loaf issued to him. Those others who ate more constituted irregularity were improper and cannot legitimize what Plaintiffs have done in this suit going a head to prosecute it and sitting ready to collect or receive proceeds from prosecution of the suit. There was nothing preventing the Plaintiffs from applying for rectification of the Limited Grant if Plaintiffs wanted powers beyond the power to file suit. This is not a matter of form. It is a matter of substance which goes to the core of the type of authority given in the Limited Grant.

Though the Plaintiffs prosecuted this suit therefore, they did it without legal power to do so and they lack legal power to collect or receive proceeds from prosecution of this suit in the event of success – under the Law Reform Act.

Connected thereto, is the fact that the 1st Plaintiff came alone to prosecute this suit. She alleged she had the authority of the 2nd Plaintiff, Frederick Mugambi Domenic to proceed with the prosecution on his behalf. That was an oral claim with no documentary basis. The 2nd Plaintiff is said to be the 1st Plaintiff's brother in law. No convincing evidence of the authority given to the 1st Plaintiff by the 2nd Plaintiff for the 1st Plaintiff to prosecute this suit alone.

It was necessary for the two Plaintiffs to jointly file this suit because there is what the Law of Succession Act calls a "continuing trust" and the Act in section 58 makes it mandatory that there be more than one administrator of the estate of a deceased person. They become Co-Administrators required to actively administer the estate together in the interest of minor beneficiaries as those are the ones for whom a "continuing trust" is intended. Unfortunately some of these Co-administrators, where there is a continuing trust, leave a lot to be desired as they do not have sufficient co-operation and some become co-administrators just because the law requires it and thereafter leave every activity in the administration of the estate to one of the administrators thereby defeating the intention of Section 58 of the Law of Succession Act which sttes as follows:-

"(1) Where a continuing trust arises –

(a) no grant of letters of administration in respect of an intestate estate shall be made to one person alone except where that person is the Public Trustee or a Trust Corporation.

(b) ……..

(2) Where an application for a grant of letters of administration in respect of an intestate estate is made by one person alone and a continuing trust arises the court shall, subject to Section 66, appoint as administrator the applicant and not less than one or more than three persons as proposed by the applicant which failing as chosen by the court of its own motion."

Section 66 referred to in subsection (2) of Section 58 above is about preference given to certain persons to administer where deceased died intestate and the effect is that what Section 66 says has to be remembered when appointment of Co-Administrators is being made under Section 58-50 that the right people are the ones so appointed.

From what Section 58 says therefore when I see the 1st Plaintiff, in this suit coming to court in the absence of the 2nd Plaintiff her Co-Administrator to prosecute this suit, I become suspicious of the 1st Plaintiff's activities and that suspicion of the 1st Plaintiff becomes stronger when I realize that these are Plaintiffs who were given a limited grant more than two years ago and up to now there is no evidence before this court that they have taken steps to obtain a full grant of Letters of Administration to the Estate of the deceased. Are these the real people lawfully and properly entitled to administer the Estate of the Deceased and therefore people to be entrusted with proceeds of this suit.

In the circumstances the claim of the Plaintiffs under the Law Reform Act fails. I will however consider what has been done so far in terms of the Fatal Accidents Act. Section 4(1) of the Fatal Accidents Act states as follows:

"***Every action brought by virtue 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, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased, and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:***

provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person."

Section 7 of the same Act provides that:

"***If at any time, in any cause intended and provided for by this Act, there is no executor or administrator of the person deceased, or if no action is brought by the executor or administrator within six months after the death of the deceased person, then and in every such case an action may be brought by and in the name or names of all or any of the persons for whose benefit the action would have been brought if it had been brought by and in the name of the executor or administrator, and every action so brought shall be for the benefit of the same person or persons as if it were brought by and in the name of the executor or administrator."***

Under the Fatal Accidents Act the dependants bring the suit on their own behalf and on behalf of other dependants not in the suit. They need not be personal representatives of the deceased unlike under the Law Reform Act where such personal representatives bring the suit for damages on behalf of the estate of the deceased.

That being the position, then the 1st Plaintiff in this suit and the 2nd Plaintiff would properly file the suit as they did. However, it is the 1st Plaintiff only entitled to benefit from the claim because she is a wife. The 2nd Plaintiff – a brother – is not entitled – to any benefit.

But in this suit, a part from the 1st Plaintiff, other dependants, if any, are not named or particularized. As the issue of nullity of the suit has not been argued before me – whether suit filed prematurely – I will not go into it.

There is no dispute about the age of the Deceased at 40. He was a teacher with Teacher's Service Commission at a gross salary of Kshs. 23,020/= and with deductions because of PAYE, NHIF and others, balance 20,000/=.

His retirement age was 60 but no guarantee he was going to reach there. In the circumstances I will adopt a multiplier of 15 years. Dependancy ratio ¾ multiplicand Ksh.20,000/=.

Guided by case authorities referred to, I will adopt the loss of dependency option and that will work out as follows:-

Kshs.20,000 x 12 x 15 x ¾ = 2,700,000/=

Proved special damages Kshs. 135,150/=

Accordingly I do hereby enter judgment for the Plaintiffs against the Defendant in the sum of:

Kshs.2,700,000/= General damages under the Fatal Accident Act;

Kshs. 135,150/= Special damages

The Defendant will also pay costs of this suit to the Plaintiffs and will pay interest at court rate from the date of this judgment.

However as all dependants are not named or specified and a full grant of Letters of Administration in the Estate of the Deceased is yet to be obtained, while the effectiveness of the 2nd Plaintiff as a Co-administrator in the Estate of the Deceased person is not apparent, I do order that before payment of the damages, costs and interests awarded in this judgment is made, a petition for a full grant of letters of administration intestate in the Estate of the Deceased person, if not yet filed, must be filed by any persons qualified, including Plaintiffs in this suit if they do qualify, to file such petition and a full grant of letters of administration intestate be obtained for the damages, costs and interests awarded in this judgment to the Plaintiffs referred to in this judgment to be included among capital assets in the Estate of the Deceased distributable to the said dependants as will be determined by co-administrators and the court during the confirmation of the said full grant in the Family Division of this Court.

Dated this 9th day of October 2009.

J. M. KHAMONI

JUDGE

Present:

Mrs. Murugera for the Plaintiff

Mr. Onyancha Mose for the Defendant

Court Clerk - Florence