



- 1) Civil Preliminary Objection on two points of law:-
- 2) (i) Res Judicata
 - a) There has been a suit filed, tried finalized and damages paid by the defendant
 - b) The subsequent suits 6261/91 and Hccc.2422/91 touched on the same matter.
- ii) Failure by plaintiff to issue a notice under the Government Proceeding Act Section 13A
- 3) In response to the Preliminary Objection
 - i) a) The plaintiff in Hccc 6261/91 had no locus to bring the suit
 - ii) b) It is conceded that notice indeed was not issued but that the suit filed within time.
- 4) Held:

The suit is res judicata under the Law Reform Act. The Fatal Accidents is not available if there is a legal representation.
- 5) Case law – Nil
- 6) Advocates:-

Ali & Associates advocates for the plaintiff
A.M. Sitima state counsel for the defendant

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 6261 OF 1991

FATUMA ALI PLAINTIFF

VERSUS

ATTORNEY GENERAL DEFENDANT

RULING

On the 27th of November 2001 the parties appeared before Rawal J for hearing when the issue for Res Judicata was raised. The suit was stood over generally to enable the parties address the court on the Preliminary Objection of Res judicata under Order XIV Civil Procedure Rules.

The parties took no action on this file until 20.2.03 when the parties were absent and the suit duly dismissed. It was thereafter reinstated. The issue of Res judicata was taken up on the 14.7.04 and 22.7.04. This court called for file Hccc 2422/91 said to have determined the matters in question in this suit.

The following facts are not disputed. Amina Wafula Alias Mwajuma Khayele is the mother to the deceased one Mohammed Wafula. She filed suit against the defendant Zacharia Kitheka and the Attorney General (being the driver and employer respectively) for the cause of the deceased's death as a result of a road traffic accident. The deceased was driving his vehicle when it collided with that of the defendants that caused him to sustain fatal injuries. The suit was filed on the 28.5.91.

The plaintiff in that said Hccc2422/91 was awarded a claim under the Law Reform Act. The Hon. Judge Mwera J heard that the plaintiff was unable to prove the claim under the Fatal Accidents Act and indeed that there existed children. She was not awarded any damages under this head but was awarded damages under the Law Reform Act. This was on the 17.3.93 and it is unclear whether she held letters of grant of representation.

It is also not disputed that the said Amina Wafula alias Mwajuma Khayeke was paid the full decretal amount and the file was closed. Fatuma Ali who claims to be the wife of the deceased filed her suit on 26.11.91, 6 months after the mother's suit was filed. To her mind she was not aware of the previous suit and indeed made the very same claims for damages under the Law Reform Act and the Fatal Accidents Act touching on the same matter.

The Attorney General filed defence and raised a Preliminary Objection stating that this matter was finalized and spent. The advocate for the plaintiff in Hccc 6261/91 (widow to the deceased) conceded that indeed a similar suit had been filed but that the previous suit of Hccc 2422/91 was so done fraudulently. That the said plaintiff had no locus to do so.

Is the plaintiff entitled to persecute this suit? I do not think so as it involves an action that had been filed, a trial heard and the award made and paid to the previous plaintiff. I am aware that Mwera J did raise considerable doubts to the claims and some of them concerned the Fatal Accidents Act which he made no award.

The plaintiff in this case has no right to claim under the Law Reform Act as this claim rightly or otherwise was awarded to the previous plaintiff.

If there is no letters of grant then the previous suit would perhaps not stand and other remedies may be found by the plaintiff. The plaintiff though as a dependant may claim under the Fatal Accidents Act if she proves there was indeed no administrator or legal representative to the suit. If there was then her only alternative to review the previous suit and state that she was a dependant and or legal representative who was not catered for. I doubt if she too had letters of representative

I would uphold the Preliminary Objection on the grounds that the suit is res judicata as far as the claim under the Law Reform Act is concerned. Under the Fatal Accidents Act no claim can be made if there is a legal representative to the estate. This was not very clear in the previous cause but indeed the award under the Law Reform is an indication that such award is made to the legal representative.

Further the issue of serving the requisite notice to the Attorney General had not been done. This is a technicality that is fatal to the suit.

I would struck out this suit with costs to the defendant.

Dated this 29th day of July 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

Ali and Associates Advocate for the plaintiff

A.M. Sitima state counsel for the defendant

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