



REPUBLIC OF KENYA



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Amimo & another v Adhaya (Suing as the Legal Representative of the Estate of John Ooro Mosi - Deceased) (Civil Appeal E152 of 2023) [2025] KEHC 6045 (KLR) (7 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6045 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E152 OF 2023**

AM MUTETI, J

MAY 7, 2025

BETWEEN

BRAMUEL RODGERS AMIMO 1ST APPELLANT

JULIUS OKELLO AMIMO 2ND APPELLANT

AND

**LILIAN AKINYI ADHAYA (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF JOHN OORO MOSI - DECEASED) RESPONDENT**

*(Being an appeal from the ruling and/or order of Honorable G.C.SEREM
(RM) delivered on the 27/07/2022 in Kisumu CMCC NO.E253 of 2022)*

JUDGMENT

Introduction

1. This matter arises out of an accident that happened on 4/12/2021 along Kisumu Ahero road.
2. The accident involved motor vehicle number KBA 512Y and motorcycle KMCF 031 L.
3. The respondent in this appeal filed the claim blaming the appellant for the occurrence of the accident.
4. After the appellant entered appearance and filed a defense, he filed a Notice of Preliminary objection dated 27th April 2023 challenging the competency of the suit.
5. It is the ruling delivered by the lower court in respect of the Notice of preliminary objection that triggered the instant appeal.
6. The appellant has raised the following grounds of appeal in the memorandum of appeal dated 11th August 2023:-



- a. That the Learned Trial Magistrate erred in law and in fact in dismissing the Appellant's Preliminary objection dated 27/04/2023 on grounds that it lacks merit despite giving sufficient reasons to warrant it to be allowed.
- b. That the Learned Trial Magistrate erred in law and in fact in holding that the trial court suit was filed within 6 months of obtaining the grant to file it.

Appellant's Case

7. The crux of the appellants appeal is that the learned Honorable court erred in law in determining the issue of the respondent's locus standi to institute the suit on behalf of the deceased as per the provisions of section 2(1) and 2 (3) (A) of the [Law Reform Act](#).
8. The appellant urged this court to find that a learned Honorable magistrate erred in law by not allowing the objection to the suit.
9. In his submission the appellant contends that Section 2(1) and 2(3) (a) of the [Law Reform Act](#) provided as follows:-

Section 2(1): "Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate"

And Section 2(3)(a) provides that "no proceedings shall be maintainable in respect to a cause of action in tort which by virtue of this section has survived against the estate of the deceased person unless proceedings against him in respect of that cause of action were pending at the date of the date of his death"
10. According to the appellant, the suit by the respondent is in respect of personal injuries to the deceased the suit was filed after the death of the deceased thus this court should find that the same was improperly initiated.
11. Further, the appellant argues that upon a perusal of the death certificate of the deceased, it is clear that the deceased died on 29/12/ 2021. The death was sudden and there is no indication that it was due to RTA.
12. Further, according to the appellant the suit was filed on 2/8/2022 about one (1) year after the death of the deceased.
13. The appellant therefore argues that the proceedings were not subsisting at the time of the deceased's death thus the proceedings are a nullity as the respondent did not comply with the mandatory provisions of Section 2(1) and 2 (3) (A) of the [Law Reform Act](#) cap 26 of the Laws of Kenya.
14. The appellants went further to argue that the cause of action did not survive the deceased since at the time of the death of the deceased, the suit had not been filed.
15. The appellants invoked the legal maxim action personalis moritur cum persona (a personal action dies with the person),
16. Further, the appellants argued that Section 2 of the [Law Reform Act](#) excludes cases of tort that were not in existence before the death of the claimant.



17. The appellants maintained that this is a court of equity and stated that equity aids the vigilant and not the indolent. According to the appellants the estate of the deceased only woke up from slumber and decided to institute proceedings 1 year after the demise of the deceased.
18. The appellant raised the following questions in respect of the claim:-
- a. Who will identify the injuries for quantification?
 - b. Who will attend the second medical examination which is mandatory requirement before paying a claim as per the Provisions of Section 10 (3A) of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act.
 - c. Who will give clearly the account of how the accident occurred considering there is no eyewitness?
 - d. Where was the plaintiffs all the time after the accident which occurred in the year 2017 and even after the death of the deceased?
19. In the appellant's view the plaintiffs should let the deceased to continue resting in peace. In support of the argument the appellant cited the case of Ibrahim Mwangi Vs. Francis Ndegwa Mwangi [2014] eKLR where the court quoted the following passage from Smell's Equity by John MC Ghee Q.C 31st Edition at page 99:-
- “The Court of equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these want the court is passive, and does nothing.”
20. The appellants urged the court to follow the Supreme Court decision in Joshua Werunga Vs. Joyce Namnyak [2013] eKLR where it was held:-
- “In the case of Raila Odinga v I.E.B.C & Others (2013) eKLR, the Supreme Court said that Article 159(2) (d) of *the Constitution* simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.”
21. The appellants took the view of that Article 159(2) (d) of *the Constitution* should not be used by litigants as a panacea to all irregularities and procedural technicalities.
22. The appellants urged the court to allow the appeal, set aside the ruling and order the suit to be struck out.

Respondent's Case

23. The respondents opposed the appeal insisting that the suit is properly before the court and that the learned Honorable magistrate's decision was right.
24. The respondents urged this court to exercise its jurisdiction as envisaged in the case of Peters Vs. Sunday Post Ltd [1958] EA 424 which is to reassess the entire evidence and draw its own conclusion basis of the material placed before the lower court.



25. The respondents went further to submit that a preliminary objection should be raised on a pure point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued would dispose of the suit.
26. The respondent cited the case of Mukisa Biscuits Manufacturing. Co. Ltd versus Westend Distributors Ltd at page 710;

“...The second matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objections. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts as pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and on occasion, confuses issues. This improper practice should be estopped....”
27. The respondents urged the court to disregard the questions posed by the appellants arguing that they do not constitute pure points of law and that they are matters that should ordinarily be dealt with at the trial.
28. The respondents further argued that the questions posed by the appellant are a deviation from the grounds set out in the memorandum of appeal and should therefore be ignored and disregarded.
29. The respondents contend that they have an eyewitness who has recorded a statement and will be ready and willing to testify and the appellants will have an opportunity to challenge his evidence.
30. According to the respondents Section 10(3A) of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act becomes in operable where the victim of the accident dies.
31. Further, the respondents contend that the purpose of a second medical report is to assess the injuries but does not in any way negate the injury suffered by the victim of the accident.
32. The respondents argue that under Section 82 of the *Law of Succession Act* they have the locus standi to bring the suit for the benefit of the estate of the deceased.
33. Further, the respondent argued that a grant of letters of administration takes effect from the date of such grant. The plaintiffs thus initiated the suit after the grant was issued as required under the law otherwise, the suit would have been incompetent had they filed it before obtaining the grant.
34. According to the respondents the cause of action arose on 4 /12/2021 as per the police abstract filed together with other documents by the respondents and not in the year 2017.
35. The deceased died on 29th December 2021 exactly 25 days from the date of the accident as per the death certificate filed in court.
36. The respondent argued that a cause of action arose and was vested in the deceased at the time of his death thus his legal representatives could initiate the suit on behalf of the estate.
37. The respondent cited the case of Roman Karl Hintz Vs. Mwang’ombe Mwakima (1984) eKLR where the court had this to say:-

“Now, the first step is to consider the remedy the child had if he had lived. A cause of action in negligence arose and vested in him at the moment he was injured, and the measure of damages, if he could prove Hintz was liable, included fair compensation for his injuries and



such loss of expectation of life as was caused to him by that tort. The child had a right of proceeding in a court of law to recover pecuniary damages for the infliction of a wrong. This is a legal chose (thing) in action and it was his while he lived. He was a minor when he was injured so, if he survived, his suit had to be instituted in his name by a person who in that suit is called his 'next friend'. Order XXXI rule 1(1) Civil Procedure Rules. It would probably have been his father, the respondent. The child died, however, before his suit was instituted and the question which then arose was what was the fate of his chose in action? At common law in England, it was destroyed by his death because an action in tort was regarded originally as purely punitive and only later as compensatory. Actio personalis moritur cum persona is the latin expression for this. [A personal action dies with the person]. The effect of this rule was largely abolished by the Law Reform (Miscellaneous Provisions) Act, 1934, which provided that on the death of a person all causes of action subsisting against or vested in him should survive against, or for the benefit of, his estate, with the exception of defamation, seduction, enticement of a spouse, and claims for damages for adultery. And here in Kenya by section 2(1) of the [Law Reform Act](#):"

That the respondent herein has the locus standi to institute a suit as a legal representative of the deceased, since the cause of action directly affected her and that she equally have a lot of interest in the estate of the deceased as the wife. This is well elaborated in the case of Khelef Khalifa El-Busaidy v Commissioner of Lands & 2 others [2002] eKLR while canvassing the issue of Locus Standi stated thus:

"...for an individual to have a locus standi, he must have an interest either vested or contingent in the subject matter before the court, which interest must be a legal one. Such interest must be above that of other members of the public in general,"

Analysis And Determination

38. The issue to be determined in this matter is fairly straightforward. It is whether the suit filed by the respondent is competent and sustainable in law in view of the provisions of sections 2(3) (a) (b) of the [Law Reform Act](#).
39. The Section Provides:-
 - No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless either-
 - (a) proceedings against him in respect of that cause of action were pending at the date of his death; or
 - (b) proceedings are taken in respect thereof not later than six months after his executor or administrator took out representation.
40. A reading of the provision of the law reveals two scenarios when a suit in respect of injury sustained by an individual who has since died may be instituted or continued.
41. It is clear that where a suit had been filed before the death of the deceased, it may be continued by his personal representatives by dint of Section 2 (3) (a) of the [Law Reform Act](#).
42. In the second instance, a suit may be filed by personal representatives of a deceased person after obtaining the necessary grant of letters of administration.



43. The respondent in this matter filed the suit after the deceased's death. The documents filed in the lower court starting with the plant show clearly that the accident giving rise to the suit occurred on 4/12/2021.
44. The limited grant of letters of demonstration ad litem were issued on 25th May 2022 and in the grant, it is clear that the deceased died on 29/12/2021.
45. At the time of the deceased's death the cause of action was ripe and the deceased died within the statutory period of three years when he could have initiated the suit for compensation against the appellant. It is needless to say that considering the period between the date of injury and death of the deceased it would be unjust to hold that the suit ought to have been instituted by the deceased during his life time for he does not appear to even had the slightest moment of enjoying good health after the accident. His beneficiaries besides coming to terms with the demise of the deceased, they too had to obtain the letters of administration in order to file the suit.
46. It is therefore not true that there was any indolence on the part of the deceased or his personal representatives in filing the suit. His death happened barely 25 days after the accident.
47. The respondent's list of documents in the lower court include a medical report dated 14/12/2021 and a P3 form dated 7/12/2021. The Police abstract shows that it was issued on 8/12/2021.
48. It is clear therefore, contrary to the appellants assertion, that there was robust activity on the part of the deceased indicating willingness to pursue the appellants over the accident.
49. That is not the conduct of an indolent victim of an accident.
50. The grant was issued again within the statutory period of 3 years under the Statute of Limitation of Actions Act Cap 22 Section 4.
51. Section 4 of the Act provides:- 4.

Actions of contract and tort and certain other actions (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued— (a) actions founded on contract; (b) actions to enforce a recognizance; (c) actions to enforce an award; (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture; (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law. (2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from such date. (emphasis miner). (3) An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action. (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due. (5) An action to recover any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of a written law may not be brought after the end of two years from the date on which the cause of action accrued. (6) This section does not apply to a cause of action within the Admiralty jurisdiction of the court which is



enforceable in rem, except that subsection (1) of this section applies to an action to recover seamen's wages. [[Act No. 10 of 1970](#), s. 20.]

52. It is clear from a reading of the provisions of Section 2 (1) (b) of the [Law Reform Act](#) and Section 4 (2) of the Limitations of Actions Act Cap 22 the suit by the respondent was brought within time.
53. It is therefore the view of this court that learned Honorable magistrate was right in rejecting the preliminary objection raised on the competency of the suit.
54. The court at least agree that the issue around the interpretation of the provisions of Sections 2 (1) (a) and (b) of the [Law Reform Act](#) was a pure point of law capable of disposing the suit. However, the appellants misguided their arsenal given the express wording of Section 2(1) (b) of the [Law Reform Act](#).
55. Taking into account the age of this matter, I hereby direct that the lower court file be immediately transmitted to lower court for the suit to be set down for hearing on a priority basis.
56. The issues raised on how evidence is to be adduced in the lower court and by whom, is not a matter for this court.
57. The issues raised by the appellant beyond the interpretation of Section 2 (1) (a) and (b) of the [Law Reform Act](#) are matters for the resolution by the trial court and do not amount to matters of pure points of law. The issues are contestable thus do not meet the test of a preliminary objection in law.
58. In conclusion, this court finds that the appeal lacks merit and is hereby dismissed with costs
59. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF MAY 2025.

A. M. MUTETI

JUDGE

In the presence of-

Court Assistant: Kiptoo

Kimondo Gachoka for the Appellant

Dan Ochieng h/b for the Respondent

