



REPUBLIC OF KENYA



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Odera v Wasonga & another (Suing as Legal Representative of the Estate of Bernard Ooko Otieno alias Bernard Otieno Odera - Deceased) (Civil Appeal E002 of 2023) [2025] KEHC 5417 (KLR) (2 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5417 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E002 OF 2023**

DK KEMEL, J

MAY 2, 2025

BETWEEN

DUNCAN ONYANGO ODERA APPELLANT

AND

MARY ADHIAMBO WASONGA 1ST RESPONDENT

ELIUD OTIENO ODINGO 2ND RESPONDENT

**SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF BERNARD OOKO
OTIENO ALIAS BERNARD OTIENO ODERO - DECEASED**

*(Being an appeal from the Ruling and order of Hon. J.P Mkala
(RM) delivered on 30/11/2023 in Siaya CMCC No. 89 of 2019)*

JUDGMENT

1. The Appeal arises from the ruling and order of Hon. J.P Mkala (RM) delivered on 30th November 2023 in Siaya CMCC No. 89 of 2019.
2. Vide a Complaint dated 6th June 2019, Mary Adhiambo Wasonga and Eliud Otieno Odingo (Respondents) filed the suit on 14th August 2019 as the legal representatives of the estate of Benard Ooko Otieno alias Benard Otieno Odera (Deceased) against the Appellant herein under the Fatal Accident Act and the [Law Reform Act](#) for damages. The brief facts of their claim are that on/or about 10th November 2018, the deceased was riding his motorcycle registration number KMDP 395J Boxer along Siaya-Kisumu road when the Appellant's motor vehicle registration number KBM 896M Toyota Saloon lost control, veered off the road and knocked down the deceased's motorcycle. The deceased sustained fatal injuries and as a result, he died on the spot. The Respondents sought the following reliefs; a). general damages under the Fatal Accident Act and the [Law Reform Act](#) (Miscellaneous Provisions) Act; b). costs of the suit; and c). interest on (a) and (b) at court rates from the date of filing the suit.



3. The Appellant lodged a defence dated 13th March 2020 amended on 9th January 2023 and filed on 10th January 2023. At paragraph 13B, the Appellant pleaded that the legal representatives had no locus standi to institute the suit on behalf of the deceased.
4. In their Reply to the amended defence dated 17th May 2023, the Respondents denied the contents of paragraph 13B of the amended defence.
5. The Respondents filed a Notice of Motion dated 22nd August 2023 seeking an order to enlarge and extend the time for filing the suit, and that the suit filed on 14th August 2019 be deemed as properly on record.
6. The application was premised on the grounds inter alia; that on 21st March 2019, a Limited Grant of Letters of Administration Ad Litem in respect of the estate of the deceased herein was issued to the Respondents to file a suit for compensation arising out of the fatal injuries sustained by the deceased in a road traffic accident which occurred on 10th November 2018; that on 14th August 2019, the Respondents filed the suit and only to realize on 10th August 2023 that by that time the suit was filed, Limited Grant of Letters of Administration Ad Litem issued to the Respondents on 21st March 2019 had expired as the same was for a limited period of 90 days; that on 15th August 2023, the Respondents applied and obtained an order for extension of the letters of Administration Ad Litem issued on 21st March 2019 in Siaya CM Probate and Administration Cause No. 56 of 2019; that the failure on the part of Respondents to file the suit within the period provided in the Limited Grant of Administration Ad Litem of 90 days was never deliberate nor intentional but an oversight.
7. In opposition to the suit, the Appellant filed a Notice of Preliminary Objection dated 24th August 2023 on 20th September 2023, seeking that the entire suit be struck out because the legal representatives don't have locus standi to institute the suit on behalf of the deceased estate as the period for filing the suit as per the grant ad litem had lapsed, hence contravening Section 80(2) of the Succession Act, Cap.160.
8. In opposition to the Preliminary Objection, the Respondents filed Grounds of Opposition dated 26th September 2023 stating that;
 1. The Letters of Administration Ad Litem issued on 21st March 2019 was extended on 15th August 2023 pursuant to the provisions of Rules 49 and 63 of the Probate Administration Rules, Order 37(6) of the Civil Procedure Rules, 2010, and Section 95 of the [Civil Procedure Act](#).
 2. The Respondents have filed a Notice of Motion dated 22nd August 2023 seeking for enlargement and extension of time to have the suit herein filed on 14th August 2019 to be deemed as being properly on record and that the said application is pending hearing and determination.
 3. In light of the foregoing, it would be fair in the interest of justice and in line with the provisions of Sections 1(A), 1(B), and 3A of the Civil Procedure Rules 2010 and Article 159 of [the Constitution](#), 2010 that the Preliminary Objection be disallowed.
9. The Respondents prayed that the Appellant's Preliminary Objection be dismissed with costs.
10. The Respondents' advocate Amos Ogutu Oyuko filed a replying affidavit sworn on 23rd October 2023 wherein he averred inter alia; that he only learned on 10th August 2023 when the suit came up for hearing that the Limited Grant issued on 21st March 2019 was limited for 90 days and expired on 14th August 2019; that the Limited Grant was extended on 15th August 2023 for an unlimited period to prosecute the suit, that the Respondents do have the locus standi to prosecute the suit; that the



Preliminary Objection was lodged after the extension of the said Limited Grant, thus overtaken by the extension of the Limited Grant; that the supporting affidavit to the application was duly commissioned on 22nd August 2023; and that the Preliminary Objection has no merit and in the interest of justice and in line with provisions of Section 1A, 1B and 3A of the Civil Procedure Rules and Article 159 of the Constitution, 2010 and ought to be disallowed.

11. In opposition to the Respondents Grounds of Opposition, the Appellant's advocate Everline Ogato filed a replying affidavit sworn on 24th October 2023 wherein she averred inter alia; that the Respondents did not seek leave of court to file the replying affidavit sworn on 23rd October 2023 as they have already filed grounds of opposition and ought to be struck out; that the replying affidavit sworn on 23rd October 2023 was filed without leave o sneak in the replying affidavit sworn on 22nd August 2023 to defeat the Preliminary Objection; that the supporting affidavit to the application having not been commissioned, the application should be struck out for being defective.
12. On 19th October 2023, the learned trial magistrate directed the Preliminary Objection to be heard first. The Preliminary Objection was canvassed by way of written submissions.
13. In his ruling, the learned trial magistrate found the grant was only limited to filing a suit before the court within 3 months but the Respondents filed their suit on 24th August 2019, a month after the expiry of the statutory period of 3 months. According to the learned trial magistrate, the Appellant having raised the issue of locus standi, the Preliminary Objection raised a pure point of law. As to whether the Preliminary Objection was merited, the learned trial magistrate held that a grant of letters of administration issued after the fact cannot confer locus to a party who filed suit before the issuance of that grant. According to the learned trial magistrate, any claimant on behalf of the deceased under the Law Reform Act must first take out a grant of letters of administration ad litem to give him the authority to act on behalf of the deceased. Regarding the argument by the Respondents' advocate that the time had been enlarged on 15th August 2023, therefore, the suit was deemed to be properly filed, the learned trial magistrate held that no kind of resuscitation could bring the suit under the Law Reform Act to life since one cannot legalize what the law had deemed as illegal. The learned trial magistrate found the Notice of Preliminary Objection dated 24th August 2023 had merit, thus the suit filed on 24th August 2019 and only limited to the claim brought under the Law Reform Act was struck out with costs to the Appellant.
14. In addition, the learned trial magistrate held that there was no requirement for a grant of letters of administration ad litem before filing a suit under the Fatal Accident Act, since the suit is brought by the dependants themselves on their behalf and own benefits. The learned trial magistrate found the Appellant's claim for dismissal of the claim under the Fatal Accident Act was made in misapprehension of the law and that the same was dismissed. The suit lodged under the Fatal Accident Act was found to be properly filed and upheld.
15. Aggrieved, the Appellant lodged his Memorandum of Appeal dated 22nd December 2023 contending that:
 1. That the learned trial magistrate erred in law and fact in holding that a suit under the Fatal Accidents Act can proceed without letters of Administration ad litem
 2. That the learned trial magistrate erred in fact and law by disregarding the submissions of the Defendant that the Legal Representative had no locus to institute the suit under the Fatal Accidents Act as the Plaintiff was filed after letters of administration Ad litem had expired.
 3. That the learned trial magistrate erred in fact and law in failing to consider the Appellant's submissions on the lack of locus of the legal representative to institute the suit under the Fatal



Accident Act as the letters of Administration ad litem had expired at the time of filing the Plaintiff by completely disregarding the submissions and authorities of the Appellant and as a result arrived in an unjustified decision on quantum by ordering the suit to proceed under the Fatal Accident Act only.

The Appellant prays the court:

1. To allow his appeal and the part of the ruling allowing the Lower Court suit to proceed under the Fatal Accident Act to be set aside
 2. The Court does re-evaluate the law and evidence of the parties on locus of the Legal representative to institute this suit under the Fatal Accident Act and strike out the Plaintiff's suit with costs to the Appellant
 3. The Appellant be awarded the costs of this appeal and the lower court suit.
16. The Appellant submits that the ruling by the trial court was arrived at in error and ought to be set aside. Reliance was placed on several court decisions such as; *Selle & Another v Associated Motor Boat Co. Limited & Others* [1968]EA 123; *Julian Adoyo Ongunga & Another v Francis Kiberenge Bondeva* (Suing as the Administrator of the Estate of Fanuel Evans Amudavi (Deceased) [2016]eKLR; *Hawo Shanko v Mohamed Uta Shanko* [2018]eKLR; *Alfred Njau & Others v City Council of Nairobi*[1982-88]1KAR 229; and *Emmanuel Wawole Mochawa v Harun Kariuki Kamande* [2020]eKLR. The Appellant sought for costs of the appeal.
17. The Respondents submits that the Limited Grant of Letters of Administration Ad Litem issued on 21st March 2019 was extended by the Court on 15th August 2023 thereby validating the Plaintiff filed on 21st June 2019, thus the Respondents were entitled to claim under the *Law Reform Act*. Reliance is placed on Nairobi HCCC No. 6577 of 1991 *Jacinta Wangari v Kenya Bus Service* where the suit was filed without obtaining Letters of Administration but subsequently, the Plaintiff obtained the same. Juma J. held that the Letters of Administration obtained after the filing of the suit validated the suit and proceeded to award damages to the Plaintiff under the Law Reforms Act. According to the Respondents, a claim under the Fatal Accident Act is in respect of the loss of Dependency and indeed the Respondents are dependants of the deceased, therefore they don't need to first obtain a Limited Grant of Letters of Administration Ad Litem to be able to claim under that head. Reliance is placed on *Troustik Union International & Another v Jane Mbeyu & Another* (1993) eKLR where the Respondent did not obtain Letters of Administration before commencing the suit, the Court of Appeal affirmed the damages awarded to the Respondent under the Fatal Accident Act as well as the modest sum of Kshs. 6,100.00 was awarded for funeral and incidental expenses. According to the Respondents, the learned trial magistrate was right to hold that there is no requirement for the grant of letters of administration Ad litem before filing a suit under the Fatal Accident Act. The Respondents urge this Court to find that the appeal has no merit and dismiss the same with costs.
18. I have considered the appeal in light of the evidence on record and submissions on behalf of the parties. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. (*Selle v Associated Motor Boat Co.* [1968] EA 123).
19. Odunga J. (as he then was) in *China Wi Yu Company Limited v Ronald Manthi David* [2021] KEHC 1626 (KLR) stated that this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyze the same, evaluate it and arrive at its



independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

20. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR, the duty of the first appellate court was spelt out thus;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess, and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

21. In *Ephantus Mwangi and Another v Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988]* 1KAR 278 the Court of Appeal held that:

“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

22. The record of the lower court indicates that the Appellant had raised a Notice of Preliminary Objection dated 24/8/2023 which sought to strike the Respondent’s suit on the grounds that the legal representatives of the estate of the deceased do not have locus standi to institute the suit on behalf of the estate of the deceased. As the period for filing the suit as per the Grant Ad litem had lapsed thereby contravening Section 80 (2) of the *Law of Succession Act*. The trial magistrate heard the rival contentions and submissions by the parties and made two determinations, firstly, that the preliminary objection has merit and thus the Respondents’ suit was bad in law and void ab-initio as the Respondents lacked capacity to sue; secondly, that there is no requirement for a grant of letters of administration ad litem before filing a suit under the *Fatal Accidents Act*.

The foresaid decision of the trial magistrate triggered this appeal.

23. I have given due consideration to this appeal as well as the rival submissions. The issue for determination is whether the order of the learned trial magistrate was proper.

24. It is noted that the Respondents were late in filing the Succession Cause in time and that they had sought for letters of Grant Ad Litem in order to enable them acquire the requisite capacity (locus standi) and file the suit. Apparently, the trial court gave them a period of ninety days within which to do the same. They eventually filed the suit but it later turned out that at a time of filing the suit, the ninety days had expired. It is at that juncture that the Appellant made the move to challenge the capacity of the Respondents to prosecute the suit on behalf of the estate. As noted from the ruling of the learned trial magistrate, the same appears to be ambivalent since he ordered the suit struck out where the claim is brought under the *Law Reform Act* on one hand and on the other hand he sustained it only to the extent that the claim under the *Fatal Accidents Act* is sustainable. This finding by the lower court has forced the Appellant to lodge this appeal and that his contention is that the trial court ought to have struck out the entire suit without sustaining any portion thereof.

25. The rationale for parties in succession matters to ensure that they have capacity is to prevent busy bodies from clogging the courts with cases yet they do not have the right to sue (locus standi). In succession



matters, Section 80(2) of the [Law of Succession Act](#) requires that parties filing suit must have locus standi. The said provision is as follows:

“A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of such grant.”

26. Again, under Section 54 of the [Law of Succession Act](#) provides further limitations and guidelines as follows:

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

At paragraph 14 of the Fifth Schedule a Plaintiff is required to obtain an Ad litem Grant for the purposes of representing the estate of the deceased 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 in issue in the cause or suit.

27. Learned counsel for the Respondent vide his submissions has contended that the suit should be sustained because the interest of justice should call for an order that letters of administration obtained even after filing of the suit are valid. He went on to have that the Respondents had a valid Limited Letters of Ad litem and that they were entitled to claim under the [Law Reform Act](#). Further, he contended that under the [Fatal Accidents Act](#), the Respondents are dependents of the deceased. Therefore, they do not need to obtain limited grant of administration Ad litem to enable them claim for the same. On the other hand, the counsel for the Appellant contended that the Respondents had instituted the suit without having valid letters of administration Ad litem to vest them with the authority to file the suit on behalf of the estate of the deceased. It was further submitted that the suit became void ab initio and cannot be sustained. The Appellant therefore sought that the appeal be allowed and the ruling by the trial magistrate set aside.

28. It is noted that the Respondents' claim was based on the [Law Reform Act](#) and the [Fatal Accidents Act](#). The entry of the Respondents into the suit was on the basis that they had obtained the requisite Grant Ad litem which was mandatory in order for them to have the capacity (locus standi) to sue or represent the estate of the deceased. It was therefore erroneous for the trial magistrate to rule that there was no need for an Ad litem regarding claims under the [Law Reform Act](#) since the claims under that act are tied or joined in the hip with the claims under the [Fatal Accidents Act](#) and therefore it was not prudent to split the suit into two with a view to saving one limb of the claim. It is clear that the suit as filed by the Respondent offends the provisions of the [Law Reform Act](#) and [Law of Succession Act](#) as the suit was filed without letters of administration ad litem giving them the requisite locus standi (capacity) to sue on behalf of the estate of the deceased. In the case of *Julian Adoyo Ongunga & Another v Francis Kiberenge Bondeva (suing as the Administrator of the Estate of Fanuel Amudavi, Deceased)* [2016] eKLR, Mrima J held as follows:

“a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party the impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”



Also, in the case of *Hawo Shanko v Mohamed Uta Shanko* [2018] eKLR while dealing with a similar issue held that:

“The general consensus is that a party lacks the locus standi to file a suit before obtaining a grant limited for that purpose. This legal position is quite reasonable in that if the Plaintiff or applicant has not been formally authorized by way of a grant limited for that purpose then it will be difficult to control the flow of court cases by those entitled to benefit from the estate. If each beneficiary is allowed to file a suit touching on a deceased estate without first obtaining a limited grant, then several suits will be filed by the beneficiaries. It is the Limited grant which gives the plaintiff the locus standi before the court and argue the case.”

29. The Respondents do not deny the fact that the Limited Grant Ad litem that had been granted to them had expired by the time they filed the suit. Therefore, it is clear that they did not have the capacity to file the suit on behalf of the estate of the deceased yet the clear provisions of Section 80 (2) of the Laws of Succession Act dictates that a grant of letters of Administration, with or without the will annexed, shall take effect only as from the date of such grant. That being the position, the suit was void ab initio. The trial court’s attempt to resuscitate a limb of the claim was in error because the Respondents needed to have capacity to enable them represent the estate of the deceased. The Respondents claim that they are related to the deceased is not sufficient to give them capacity without obtaining the Grant Ad litem.
30. In view of the foregoing, the trial court ought to have allowed the Appellant’s preliminary objection and dismissed the Respondents’ suit because they do not have the locus standi.
31. In the result, it is my finding that the Appellant’s appeal has merit. The same is allowed. The ruling by the learned trial magistrate dated 30/11/2023 is hereby set aside and substituted with an order that the Appellant’s Notice of Preliminary Objection dated 24/8/2023 is allowed. The Respondents suit is ordered struck out with an order that each party bears their own costs. Each party to bear their own costs of this appeal.

DATED AND DELIVERED AT SIAYA THIS 2ND DAY OF MAY, 2025.

D. K. KEMEI

JUDGE

In the presence of:

M/s Wambani.....for Appellant

Oyuko..... for Respondents

Okumu..... Court Assistant

