



**Imbali v Mbulika & Mugami (Suing as the Legal Representative in
the Estate of Tolina T Liduli (Deceased) & another (Civil Appeal
2 of 2023) [2024] KEHC 11375 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11375 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL 2 OF 2023
JN KAMAU, J
SEPTEMBER 23, 2024**

BETWEEN

ONESMUS MANYONI IMBALI APPELLANT

AND

**BENSON KIHAMBA MBULIKA & JAMES OOTSI MUGAMI (SUING AS
THE LEGAL REPRESENTATIVE IN THE ESTATE OF TOLINA T LIDULI
(DECEASED) 1ST RESPONDENT**

WESTERN SHUTTLE SACCO 2ND RESPONDENT

*(Being an appeal from the Ruling of Hon S. Ongeru (SPM) delivered at Vihiga in
Senior Principal Magistrate's Court Case No 132 of 2021 on 16th February 2023)*

JUDGMENT

Introduction

1. In his decision of 16th February 2023, the Learned Trial Magistrate, Hon S. Ongeru, Senior Principal Magistrate, dismissed the Appellant's Preliminary Objection dated 12th October 2022 with costs to the 1st Respondent herein.
2. Being aggrieved by the said decision, on 24th February 2023, the Appellant filed a Memorandum of Appeal dated 20th February 2023. He relied on three (3) grounds of appeal.
3. His Written Submissions were dated 9th February 2024 and filed on 21st February 2024 while those of the 1st Respondent were dated 19th March 2024 and filed on 15th April 2024. The 2nd Respondent did not file any Written Submissions. The Judgment herein is therefore based on the said Written Submissions which the parties relied upon in their entirety.



Legal Analysis

4. Having looked at the grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not the 1st Respondent had the locus standi to institute the suit at the Trial Court for the benefit of the deceased's estate as per the provisions of Sections 2(1) and 2(3)(a) of the Law Reform Act Cap 26 (Laws of Kenya).
5. The Appellant made reference to Section 78 of the Civil Procedure Act and submitted that the court herein was duty bound to re-assess and re-evaluate the evidence adduced before the Trial Court and arrive at its own independent conclusion bearing in mind it neither saw nor heard the witnesses testify in the first instance as was held in the case of Kenya Ports Authority vs Kushton (K) Ltd (2009) 2 EA 212.
6. He argued that the Trial Court arrived at a wrong finding in dismissing his Preliminary Objection dated 12th October 2022. He pointed out that locus standi was defined in Black's Law Dictionary, 9th Edition as the right to bring an action or to be heard in a given forum. He contended that locus standi went to the root of any case in a much similar manner as of jurisdiction of courts.
7. He also cited Sections 2(1) and 2(3)(a) of the Law Reform Act Cap 26 (Laws of Kenya) and argued that the 1st Respondent's suit was inept as he was seeking for prayers of the deceased's personal nature which suit was filed after her death which was not as a result of the accident and even before she testified to identify her injuries. He was categorical that such a cause could not survive for the benefit of a deceased's estate as was expounded in the legal maxim action personalis moritur cum persona.
8. He argued that as per the Death Certificate, the deceased died on 8th March 2019 due to malaria. He pointed out that the Plaint dated 5th August 2021 was filed two (2) years after she died. He contended that her estate woke up from slumber to institute the suit for compensation of her bodily injuries five (5) years later. He wondered where the 1st Respondent was, the accident having occurred in 2017 and even after the deceased's death.
9. He invited the court to interrogate who would identify her injuries for quantification, the fact that there would be no second medical examination which was a mandatory requirement before paying claims as per the provisions of Section 10(3A) of the Insurance (Motor Vehicle Third Party Risks) (Amended) Act and the fact that there was no eye witness to the accident. He asserted that the best the 1st Respondent could have done was to leave the deceased to rest.
10. He was emphatic that equity aided the vigilant and not the indolent and that delay defeated equity. In this regard, he placed reliance on the case of Ibrahim Mungara Mwangi vs Francis Ndegwa Mwangi [2014] eKLR where the court quoted the passage from Snell's Equity by John MC Ghee Q.C (31st Edition at page 99 to the effect that the court of equity had always refused its aid a party who had slept on his rights and acquiesced for a great length of time.
11. He urged the court to find that the 1st Respondent's suit was incompetent and untenable under the aforesaid provisions of the law. He contended that in the event that the 1st Respondent relied on Section 1A and 1B of the Civil Procedure Act and Article 159(2)(d) of the Constitution, the said provisions were not a panacea for all irregularities and procedural technicalities.
12. To buttress his point, he relied on the case of Joshua Werunga vs Joyce Namuyak [2013] eKLR where it was held that Article 159(2)(d) of the Constitution was never meant to oust the obligations of litigants to comply with procedural technicalities.



13. The 1st Respondent also relied on Section 2(1) of the [Law Reform Act](#) which provided that certain causes of action survived a deceased for the benefit of his estate. He asserted that the cause of action from which the 1st Respondent's suit arose was tort of negligence which was not excluded under Section 2(1) of the [Law Reform Act](#).
14. He further averred that the fact that the deceased died prior to the filing of this suit and her cause of death being unrelated to the suit accident did not mean that her claim had also died and that her estate could not claim against the tortfeasor. They argued that just like in cases of fatal claims, a deceased's estate was usually entitled to recover damages for pain and suffering that the deceased underwent prior to his/her death and hence the estate of the deceased herein was equally entitled to file suit and claim for damages that she suffered as a result of the Appellant's negligence acts.
15. He pointed out that he had obtained the requisite Letters of Administration Ad litem and was therefore well placed to file this suit on behalf and for the benefit of the deceased's estate.
16. He placed reliance on the case of *United Millers Limited vs Yano Omoro Oindo* [2007] eKLR where it was held that damages recoverable under the [Law Reform Act](#) were basically the loss that the deceased himself would have been entitled to had he not died. He also cited the case of *Monica Kakiki vs Wasufe Shire Abdo & 2 Others* [1990] eKLR where it was held that a tortfeasor should not be permitted to benefit from his wrong doing merely because his victim died.
17. He also referred to Section 2(3)(a) of the [Law Reform Act](#) and pointed out that the same was in respect of proceedings against a deceased person and not proceedings for the benefit of a deceased's estate. He was categorical that the said provision did not therefore apply to him and/or to the case herein as he had already obtained Letters of Administration Ad litem which fact the Appellant herein had not disputed. He stated that the said Letters of Administration Ad litem gave him the powers to institute the suit on behalf of the deceased and for the benefit of her estate.
18. In this regard, he relied on the case of *Mohamood Abdallah Mohamed & Another vs Bebi Aisha Ali Swaleh & 2 Others* [2014] eKLR where it was held that the aforesaid provision referred to a claim brought against a deceased's estate and not for the estate's benefit.
19. To further buttress his point, he placed reliance on the case of *Roman Karl Hintz vs Mwang'ombe Mwakima*[1984]eKLR where it was held that the right of action vested in the deceased himself for his injuries, passed under the [Law Reform Act](#) to his personal representatives and was not for the benefit of the deceased's dependants but rather it was for the benefit of his estate.
20. He therefore submitted that the Appellant's appeal was incompetent, bad in law, made in bad faith and an abuse of the court's process and as such, the same should be dismissed in its entirety with costs to him.
21. Notably, the 1st Respondent (who consisted of two (2) representatives but referred to in singular form from the way the pleadings were drawn) filed a *Plaint* dated 5th August 2021 on 8th August 2021 pursuant to leave that was issued by the court on 28th July 2021. He had sought general damages, special damages, costs and interest of the suit.
22. On 18th October 2022, the Appellant filed a *Notice of Preliminary Objection* dated 12th October 2022 on the ground that the 1st Respondent did not have *loci(sic)* to institute his suit on behalf of the deceased as per the provisions of Sections 2(1) and 2(3)(a) of the [Law Reform Act](#) Cap 26 of the Laws of Kenya.



23. In his Ruling of 16th February 2023, the Trial Court held that Section 2(3)(a) of the *Law Reform Act* applied to actions against the deceased and not actions for the benefit of the deceased's estate. It therefore proceeded to dismiss the Appellant's Preliminary Objection.

24. Notably, Section 2(1) of the *Law Reform Act* provides that:-

“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:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.”

25. Section 2(3)(a) and (b) of the *Law Reform Act* further provides that:-

“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 (emphasis court):-

- 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.

1. In the case of *Mwangi & Another (Suing as the Legal Representatives of the Estate of the Late Richard Mwangi Gathoni Deceased) vs Ngure & Another (Civil Appeal 57 of 2020)* [2023] KECA 448 (KLR), the Court of Appeal emphasised that under both Section 2(3) of the *Law Reform Act* and Section 9 of the *Fatal Accidents Act*, personal representatives of estates of deceased persons were trustees and that under the *Law of Succession Act*, there were timelines within which the personal representatives were to administer and distribute the estates. It observed that it would therefore be unfair to have litigation hanging over their heads hence the need to have timelines within which liability could attach against them after grant of representations were obtained.
2. It was clear that under Section 2(3)(a) of the *Law Reform Act*, liability could not attach against the personal representatives unless proceedings therein had been pending as at the time a deceased died and/or that proceedings were instituted six (6) months after the personal representative to a deceased's estate had taken out a grant for letters of administration.
3. Under Section 2(1) of the *Law Reform Act*, actions vested in a deceased were for the benefit of his or her estate. The tort of negligence was not excluded from those actions that survived a deceased. It was for that reason that proceedings could be instituted where a deceased had died as a result of injuries that were occasioned by the negligence of a defendant. The action was vested in the deceased for the benefit of his or her estate and not for his or her benefit.
4. As at the time the deceased died, the cause of action for the tort of negligence still vested in her irrespective of the fact that the cause of action was statute barred. This is because



in the event she was alive, she could still have sought leave to file suit out of time as provided in Section 27(1) of the Limitations of Action Act Cap 22 (Laws of Kenya).

5. The said Section 27(1) of *Limitation of Actions Act* states as follows:-

“Section 4(2) does not afford a defence to an action founded on tort where the action is for damages for negligence...”

31. Indeed, Section 4(2) of the Limitations of Actions Act states that:-

“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...”

32. Upon the demise of the deceased herein, the cause of action for the tort of negligence survived for the benefit of her estate as provided in Section 2(1) of the *Law Reform Act*. The circumstances envisaged in Section 2(3) of the *Law Reform Act* and which the Appellant herein had argued subsisted herein were distinguishable from the facts of this case as that provision related to actions against a deceased's estate. The purport of that provision was that a defendant could not institute proceedings against a deceased after his or her death or after six (6) months of an executor or administrator obtained a grant of letters of administration.

33. In the premises foregoing, this court could not fault the Trial Court for dismissing the Appellant's Preliminary Objection dated 12th October 2022 as Section 2(3) of the *Law Reform Act* did not apply to the Appellant's case as it did not relate to an action against the deceased's estate but rather it was for her benefit. The question of whether the 1st Respondent would prove the case against the Appellant herein was a different matter altogether that would be canvassed during a full trial.

Disposition

34. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal lodged on 24th February 2023 was not merited and the same be and is hereby dismissed with costs to the 1st Respondent.

35. It is hereby directed that the lower court file be and is hereby returned to Vihiga Law Courts and the same be placed before the Head of Station on 3rd October 2024 for further orders and/or directions relating to the hearing of the case herein.

36. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 23RD DAY OF SEPTEMBER 2024.

J. KAMAU

JUDGE

