



**Obinda (Appealing on Behalf of the Estate of Moses Maloba Obinda) v Oduori & another
(Civil Appeal E046 of 2022) [2024] KEHC 10943 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10943 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E046 OF 2022
WM MUSYOKA, J
SEPTEMBER 20, 2024**

BETWEEN

**GODFREY KULUNDU OBINDA APPELLANT
APPEALING ON BEHALF OF THE ESTATE OF MOSES MALOBA OBINDA**

AND

**PHILIP WANDERA ODUORI 1ST RESPONDENT
CHABATA OKOTSI 2ND RESPONDENT**

*(Appeal from judgment and decree of Hon. EC Serem, Resident Magistrate,
CM, in Busia CMCCC No. 121B of 2015, of 5th December 2022)*

JUDGMENT

1. The appellant had been sued by the respondents, at the primary court, for compensation arising out of the death of Moses Maloba Obinda, to be referred, hereafter as the deceased, following a road traffic accident on 16th October 2014, along Busia-Mumias road. The deceased was a pillion passenger on motor cycle registration mark and number KMCQ 792Q, which was being ridden on the said road, when the same was in collision with motor vehicle registration mark and number KDL 114, said to have belonged to the respondents, and liability was attributed on the respondents on account of negligence.
2. The appellant filed a defence, denying everything pleaded in the plaint, and, in the alternative, pleading contribution on the part of a third party, indicating that they would apply, later on, to join the third party to the suit. It was specifically pleaded that the appellant did not have capacity to bring the suit, and that the respondents were not the driver nor beneficial owners of the subject motor vehicle.
3. A trial was conducted. 2 witnesses testified for the appellant, while 1 testified for the respondents. Judgment was delivered on 5th December 2022. The suit was dismissed, on grounds that the appellant lacked locus standi to institute the suit on behalf of the estate of the deceased person.



4. The appellant was aggrieved, hence the instant appeal. The appeal has raised only 1 ground, that the trial court was in error in holding that a grant of representation was mandatory, for suits brought under the *Fatal Accidents Act*, Cap 32, Laws of Kenya.
5. The parties agreed, on 24th June 2024, to canvass the appeal by way of written submissions. In the end, only the appellant filed written submissions.
6. The appellant argued that the suit, at the primary court, had been brought by him, in his capacity as father of the deceased. He relied on CA & 5 others vs. Joel Mureithi & 3 others [2021] eKLR (Chitembwe, J).
7. It will be noted, from the heading of the plaint, that the suit was brought by the appellant in his alleged capacity as the personal representative of the deceased. The heading reads: “Godfrey Kulundu Obinda (suing as a personal representative of the estate of MOSES Maloba Obinda).”
8. From that heading, it should be clear that the said appellant approached the court in a representative capacity, as personal representative of the estate of the deceased, to represent the deceased or his estate in the suit. The appellant was in court on behalf of the estate of the deceased.
9. It is trite that no suit can be commenced on behalf of the estate of a dead person, without the person, purporting to file it, having obtained representation to the estate. Under section 45(1) of the *Law of Succession Act*, the property of a dead person can only be lawfully handled by a person who has obtained representation to that estate. Under section 45(2)(a), handling an estate, in the absence of a grant of representation, amounts to an offence, exposing the person to criminal proceedings, which can lead, upon conviction, to the person being jailed or fined or both. See Christine Kajuju Mwenda vs. Gervasio M’Rukunga [2006] eKLR (Lenaola, J) and Jane Wairimu Mathenge vs. Joseph Wachira Mathenge & 3 others [2016] eKLR (Ngaah, J).
10. Under section 79, a grant of representation vests the estate of a dead person in the personal representative, whether an administrator or an executor, and such personal representative can then exercise the powers of a personal representative set out in section 82, and is under the duties set out in section 83. A person who handles an estate without a grant of representation is said to intermeddle with it, according to section 45. Filing suits on behalf of the estate, or engaging in any form of litigation, without such a grant, has also been said to amount to intermeddling. See Kothari vs. Qureshi and another [1967] EA 564 (Rudd, J), John Kasyoki Kieti vs. Tabitha Nzivulu Kieti & Annah Ndileve Kieti (2001) eKLR (Mwera, J), Priyat Shah & another vs. Myendra Devchand Meghji Shah [2017] eKLR (N. Mwangi, J), In re Estate of Asman Nambwaya Shibwabo (Deceased) [2018] eKLR (J. Njagi, J), Jackim Onyango Misewe & another vs. Bernard Otieno Odhiambo & another [2019] eKLR (Aburili, J), In re Estate of Biruri Kihoria (Deceased) [2019] eKLR (Sewe, J) and Pravinchandra Jamnadas Kakad vs. Estate of Lucas Oluoch Mumia & 2 others [2022] eKLR (Mogeni, J).
11. The relevant portions of section 45, 79 and 82 provide as follows:
 45. No intermeddling with property of deceased person
 - 1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - 2) Any person who contravenes the provisions of this section shall-



- a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
- b)

79. Property of deceased to vest in personal representative

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative; ...”

12. At the trial, the appellant conceded that he had not obtained any form of representation to the estate of his son, the deceased herein. He had no full grant nor one limited to the purpose of initiating the suit on behalf of the estate. That means that when the appellant was filing the suit, on behalf of the estate, he had not been appointed its administrator. He was not, therefore, a personal representative of the deceased, and he could not represent him anywhere, including in court. The estate had not been vested in him, by virtue of section 79 of the [Law of Succession Act](#), to enable him exercise the power to sue on behalf of the estate, which is given to administrators or personal representatives, under section 82(a) of the [Law of Succession Act](#). That power had not yet accrued to him at the time he filed suit. He could not, therefore, lawfully initiate a suit on behalf of the estate without having obtained representation to the estate. See *In re Estate of Mbiyu Koinange (Deceased)* [2020] eKLR (Machelule, J). The estate did not vest in him, and he could not sue on its behalf. As he had no standing to sue, on behalf of the estate or the deceased, the suit that he filed was incompetent from inception.
13. The appellant has argued that he brought the suit as father of the deceased. It is true that he pleaded that he was the father of the deceased, but the fact that he was the father of the deceased could not salvage the situation, for assets of a dead person do not vest in other persons based on their familial relationship with the dead, rather they vest only upon a grant of representation. See *Hawo Shanko vs. Mohamed Uta Shanko* [2018] eKLR (Chitembwe, J), *In re Estate of Barasa Kanenje Manyu (Deceased)* [2020] eKLR (Musyoka, J) and *Joseph Muriuki Kithinji vs. Peterson Ileri Mwaniki & 3 others* [2021] eKLR (Kaniaru, J).
14. The appellant argues that his suit was founded on the [Fatal Accidents Act](#), which does not require that a grant of representation be obtained. He has cited *CA & 5 others vs. Joel Mureithi & 3 others* [2021] eKLR (Chitembwe, J). Unfortunately, the Judge, in that matter, did not decide on that point, as he ruled that it was contested, and required it to be thrashed out at the full hearing of the matter, for he was only handling a preliminary objection. The appellant highlighted the portion of a decision in *Waceke Wahinya (suing as a dependant of the estate of Peter Gathii Wahinya) vs. Kenya Tea Development Authority (Makomboki Tea Factory)* [2016] eKLR, which was cited by one of the parties in *CA & 5 others vs. Joel Mureithi & 3 others* [2021] eKLR (Chitembwe, J). However, the Judge, in *CA & 5*



others vs. Joel Mureithi & 3 others [2021] eKLR (Chitembwe, J), did not discuss that decision, nor indicate whether he approved it or not.

15. Suits brought under the *Fatal Accidents Act* are dependency suits, where a claim is initiated on account of loss of dependency or lost benefit from such a deceased person, following his death, and it is brought by a person who alleges to have been himself dependent on the deceased, or on behalf of others who were dependent on the deceased. In the plaint, filed at the trial court, other than pleading that he was the father of the deceased, the appellant pleaded that the deceased was a provider to his parents. Although he pleaded that the deceased had a wife and 2 children, there is no pleading that the 3 were dependent on him, nor that he had brought the suit on their behalf. In his testimony, he made no mention of dependency, either by the wife and children or the parents, which would be surprising given that the suit was founded on the *Fatal Accidents Act*, which is all about dependency.
16. However, that is beside the point, for the question is whether or not a grant of representation, whether full or limited, is required to advance a case under the *Fatal Accidents Act*. That should then take us to the provisions of that Act. The relevant provisions are in sections 4 and 7 of the Act.
17. Section 4 states as follows:



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| <p>“4.</p> | <p>Action to be for benefit of family of deceased</p> <table border="1" data-bbox="574 336 702 1995"> <tr> <td data-bbox="574 336 638 1995">(1)</td> <td data-bbox="638 336 702 1995"> <p>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</p> </td> </tr> </table> | (1) | <p>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</p> |
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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.

(2) In assessing damages, under the provisions of subsection (1), the court shall not take into account —

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the
Minister,
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notice published in the Gazette, to be a scheme for the purpose of this paragraph.”

(a) any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Act;

(b) any widow's or orphan's pension or allowance



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| | <p>payable or any sum payable under any contributory pension or other scheme declared by the Minister, by notice published in the Gazette, to be a scheme for the purpose of this paragraph.</p> |
| (1) | <p>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</p> |



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| | <p>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:</p> <p>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.</p> | | |
| (2) | <p>In assessing damages, under the provisions of subsection (1), the court shall not take into account—</p> <table border="1" data-bbox="576 1413 762 1995"> <tr> <td data-bbox="576 1413 639 1995">(a)</td> <td data-bbox="639 1413 762 1995">any sum paid or payable on the death of the deceased under any contract of assurance or insurance,</td> </tr> </table> | (a) | any sum paid or payable on the death of the deceased under any contract of assurance or insurance, |
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| | <p>whether made before or after the passing of this Act;</p> | <p>(b) any widow's or orphan's pension or allowance payable or any sum payable under any contributory pension or other scheme declared by the Minister, by notice published in the Gazette, to be a scheme for the purpose of this paragraph.</p> |
| <p>(a)</p> | <p>any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Act;</p> | |



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| (b) | any widow's or orphan's pension or allowance payable or any sum payable under any contributory pension or other scheme declared by the Minister, by notice published in the Gazette, to be a scheme for the purpose of this paragraph." |
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18. From the language of section 4(1), such a suit should be brought, for the benefit of the family of the deceased, by the personal representatives of the deceased, be they executors of his will or administrators of his estate. Family is limited to spouse, child and parent, where the latter 2 are defined to mean "a son, daughter, grandson, granddaughter, stepson or stepdaughter," and "a father, mother, grandfather, grandmother, stepfather or stepmother."

19. Section 4 is to be read together with, or as subject to, section 7, which states:

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| "7. | <p>Action by persons beneficially interested</p> <p>If at any time, in any case 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."</p> |
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20. The effect of section 7 is that a suit may be brought by or at the instance of any of the persons with beneficial interest, in circumstances where no suit is instituted by a personal representative within 6 months, or where there is no personal representative at all. When sections 4 and 7 are read together, the meaning would be that suits by personal representatives ought to be filed within 3 years, with a window that such suits could be brought by non-personal representatives, being persons beneficially entitled, should there be no personal representatives at all, or the personal representatives fail to initiate the suits within 6 months. Personal representatives could be persons who, themselves, have a beneficial interest under the *Fatal Accidents Act*, or persons who have no such interest. It would appear that section 7 is of relevance only where the personal representatives have no beneficial interest in the matter, and they fail to act, in which case those with beneficial interest would be at liberty to move the court, without having to take out representation.

21. So what was the situation here? The appellant was not a personal representative of the deceased, as he had not taken out a grant of representation, in respect of the subject estate. The pleading that he was a personal representative was, therefore, misleading. Being the father of the deceased, he fell within the



members of the family, with beneficial interest. He was qualified, therefore, to initiate a suit, by virtue of section 7 of the [Fatal Accidents Act](#), on his own behalf and on behalf of others, without him taking out a grant of representation to the estate, if there was no administrator, or, if there was an administrator, who failed to file suit within 6 months, to lodge the suit without a grant of representation. The deceased died on 16th October 2014, and the suit commenced on 1st April 2015, which was 6 months after the death of the deceased, for 6 months expired on or about 16th March 2015. On the face of it, it would appear that the suit was properly commenced after the 6 months expired from the date of death, in the event there was an administrator who had failed to act. However, the appellant did not demonstrate that he filed suit after the administrator or executor failed to act, neither did he attempt to demonstrate that there was no such executor or administrator in the first place. Section 7 is an exception to section 4, and anyone coming under section 7 ought to demonstrate that they fall under the exception, to justify their filing suit under section 7.

22. The plaint filed at the trial court was in very vague and general terms, and it did not attempt to bring the suit within the confines of the provisions of the [Fatal Accidents Act](#). As drafted, the plaint appeared, at once, to make a claim founded on the [Law Reform Act](#), Cap 26, Laws of Kenya, on behalf of the estate, and under the [Fatal Accidents Act](#). For the purposes of the [Fatal Accidents Act](#), it is not clearly pleaded whether the claim is for the benefit of others. There is mention of a wife and children, but there is no pleading that the claim is brought on their behalf. There is mention of the deceased having been a provider for his parents, but the alleged parents are not mentioned by name. In short, the plaint was very poorly or badly drafted. A party is bound by its pleadings, and no room should be left for the court to fill in any gaps left in pleadings by the parties.
23. In view of what I have discussed, in the foregoing paragraph, I should advert to the law on pleadings. Whereas the [Fatal Accidents Act](#) provides for compensating the families of persons killed in accidents, it ought not be read in isolation of other legislation, governing aspects relating to process and procedure. The matter of framing suits is provided for in the [Civil Procedure Act](#) and the Rules made under it. under Order 1 rule 8 of the Civil Procedure Rules, where several persons have the same interest in any proceedings, the same may be commenced and continued in the name of one such person representing all the rest. The instant case was one such, as there was mention of the spouse and children of the deceased, and a suggestion that the other parent of the deceased, apart from the appellant, were also interested in the matter. All these probably had an interest in the proceedings, and the matter should have been properly initiated in their interest, and it should have been so pleaded.
24. Order 4 rule 4 of the Civil Procedure Rules is also relevant, with respect to where a party sues in a representative capacity, by requiring that the plaint state the capacity in which the party sues, and how that capacity arises. In the instant case, the suit was about dependency, or the beneficial interests of the family of the deceased. The capacity of the appellant was pleaded, yet it was mentioned that the deceased had a wife and children, and it was suggested that his other parent survived him. It was not pleaded that the suit was also brought in a representative capacity, on behalf of those others. It is under this rule that the appellant should have pleaded why he was coming to court under section 7, rather than section 4, of the [Fatal Accidents Act](#).
25. In court proceedings, it would be important for parties to avoid being 1 dimensional. Most suits are subject to a variety of statutes, or pieces of legislation, and it would be important that all are brought together, and read and applied together. A single piece of legislation does not stand alone. It ought to be read, construed and applied in the context of all the others relevant to the subject at hand. In this instance, there was need to consider the [Fatal Accidents Act](#), alongside the [Law of Succession Act](#), the [Law Reform Act](#), the [Civil Procedure Act](#) and the Civil Procedure Rules.



26. In view of everything, I would be in agreement with the trial court, that there was something fundamentally wrong with the pleadings, and no orders could properly be made based on them. I am persuaded that the suit was properly dismissed. I, accordingly, find no merit in this appeal, and I hereby dismiss it. As the respondents made some attendances, through their Advocates, I shall award costs to them.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS 20TH DAY OF SEPTEMBER 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Mr. Jumba, instructed by Balongo & Company, Advocates for the appellant.

Mr. Were, instructed by Gabriel Fwaya, Advocate for the respondents.

