Onjoro & another v Ekaka (Suing as the Administrators of the Estate of Edisa Nasirumbi, Deceased) (Civil Appeal E004 of 2021) [2023] KEHC 20051 (KLR) (17 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20051 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CIVIL APPEAL E004 OF 2021

WM MUSYOKA, J

JULY 17, 2023

BETWEEN

ANDREW SO ONJORO ..... 1ST APPELLANT

WILBRODA ONJORO NIGHT ..... 2ND APPELLANT

AND

DAVID OBARASA EKAKA (SUING AS THE ADMINISTRATORS OF THE ESTATE OF EDISA NASIRUMBI, DECEASED) ..... RESPONDENT

(An appeal arising from the judgment of Hon. RN Ng'ang'a, Resident Magistrate, RM, delivered on 30th November 2020, in Busia SRMCCC No. 13 of 2019)

JUDGMENT

1. The suit at the primary court was initiated by the respondent against the appellants, for compensation, on account of damages arising from a road traffic accident, where he prayed for general damages, special damages, interests and costs. The respondent is the alleged administrator of the estate of the deceased, who was lawfully travelling as a pillion passenger on a bicycle along the Busia-Kisumu road, when the bicycle was involved in a collision with motor-vehicle KBM 553Y, causing her death. The appellants filed a defence, in which they denied liability. They averred, in the alternative, that the pedal cyclist, on whose bicycle the deceased was pillion passenger, contributed to the accident. It was also averred that the respondent lacked capacity to file the suit.

2. A trial was conducted, in which the respondent testified, and called a police witness. The 2nd appellant testified, and did not call a witness. A judgment was delivered on 30th November 2020. Liability was assessed at 100% against the appellants. A total of Kshs. 1,335,760.00, being Kshs. 20,000.00 for pain and suffering, Kshs. 120,000.00 for loss of expectation of life, Kshs. 1,120,000.00 for loss of dependency, and Kshs.75,760.00 special damages, was awarded.

3. The appellants were aggrieved, hence the instant appeal. The grounds in the memorandum of appeal, dated 22nd January 2021, revolve around liability, the age of the respondent, capacity to sue, the multiplier and multiplicand, apportionment of the decretal amount between the beneficiaries, and failure to consider authorities.

4. Directions were given on 6th March 2023, for disposal of the appeal by way of written submissions. There has been compliance. Both sides have filed written submissions.

5. The appellants urge that the testimony of the 2nd appellant on the accident was not considered; that if there was no concrete evidence on who was to blame then the court ought to have apportioned liability equally; that the respondent had no capacity to act as sole administrator of the estate of the deceased, in view of section 58 of the *Law of Succession Act*, Cap 160, Laws of Kenya; that the trial court ought to have adopted the global award approach rather than the computation approach, as the income and age of the deceased were uncertain; that the trial court was wrong in principle in the manner that it apportioned dependency.

6. The respondent submitted that the testimony of PW3, the rider of the accident bicycle, settled the question of liability; that the grant issued to the respondent was for the sole purpose of initiating the suit, and did not have to comply with section 58 of the *Law of Succession Act*; that the court did not err in the assessment of damages; and that the trial court properly exercised discretion in the apportionment of damages between the dependants.

7. I should, perhaps, start with the matter that touches on the competence of the suit. The suit was initiated by the respondent in a representative capacity, on behalf of the estate of the deceased herein. For that purpose, he had obtained a limited grant of letters of administration ad litem, issued on some unclear date in October 2018. Representation was made solely to him. The issue is whether he could be appointed as sole administrator, where some of the survivors of the deceased were minors, in view of section 58 of the *Law of Succession Act*. Section 58 states:

> "58.
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> Number of administrators where there is a continuing trust
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> (1) Where a continuing trust arises -
>
> (a) no grant of letters of administration in respect of an intestate estate shall be made to one person alone except where that person is the Public Trustee or a Trust Corporation.
>
> (b) no grant of letters of administration with the will annexed shall be made to one person alone except where-
>
> (i) that person is the Public Trustee or a Trust Corporation; or
>
> (ii) in the will the testator has appointed one or more trustees for the continuing trust who are willing and able to act.
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> (2) Where an application for a grant of letters of administration in respect of an intestate estate is made by one person alone and a continuing trust arises the court shall, subject to section 66, appoint as administrators the applicant and

not less than one or more than three persons as proposed by the applicant which failing as chosen by the court of its own motion."

8. A continuing trust arises where a deceased person is survived by minors, and, to a limited extent, surviving spouses. At distribution of the estate, the shares due to a minor are not devolved to the minor during his minority, but are held by the administrators or personal representatives, during the minority of the minor, in trust. The effect of it is that the share of a minor falls into a trust, taken care of by the administrator or personal representative or trustees, from the date their offices become operational, until the minor attains majority age. The trust exists during the minority regardless of whether the grant has been confirmed or not. For the surviving spouse, there is entitlement to a life interest in the net intestate estate. The life interest terminates only upon the demise of the surviving spouse, or upon the surviving spouse exercising the power of appointment of all the property under life interest. What section 58 provides is that where the deceased is survived by a minor or a spouse, there would be continuing trusts, and in such cases no grant of representation should be made to one personal representative. That applies whether the deceased died testate or intestate, subject to certain qualifications where there is a testacy, and the testator has appointed trustees for the continuing trust. The only exception is where the personal representative is a trust corporation or the Public Trustee.

9. So, is there any consequence to non-compliance with section 58 of the *Law of Succession Act* Section 58 is in mandatory terms. It says that no grant of letters of administration intestate or with will annexed should be made to one person, save for a trust corporation and the Public Trustee. Non-compliance would mean that the grant made is void, and is for revocation, under section 76, for having been made through a defective process. It means that a continuing trust cannot vest in one administrator. Section 58 should be read together with sections 71(2A), 75(A), 81 and 95(2) of the *Law of Succession Act*, all of which touch on continuing trusts, and appointment of more than one personal representative.

10. It has been submitted that the grant that the respondent obtained was limited to filing suit, and, therefore, section 58 did not apply to it. There is nothing in section 58 which states that that provision is limited to full grants, or does not apply to limited grants. The qualifications or criteria for appointment as administrator are uniform, whether one seeks a full or limited grant, and the provisions in sections 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65 and 66 of the *Law of Succession Act*, on forms of grants, and the persons entitled to a grant, apply to both full and limited grants. In *Veronicah Mwikali Mwangangi v Daniel Kyalo Musyoka* [2005] KLR (Ang'awa, J), a suit was struck out, because the limited grant, giving the administrator authority to sue, contravened section 58, which requires appointment of more than one administrator where a continuing trust arises.

11. The plaint filed at the trial court indicates that the deceased was survived by 8 minor children. Consequently, a continuing trust arose with respect to her estate, and a grant obtained in intestacy, in respect of her estate, whether full or limited, was bound to comply with section 58. No grant ought to have been made in her case to one administrator. The fact that one was made would mean that the said grant is invalid, and available for revocation under section 76 of the Law of Succession Act. A suit founded on it is equally invalid or void, and should suffer the fate of that in *Veronicah Mwikali Mwangangi v Daniel Kyalo Musyoka* [2005] KLR (Ang'awa, J). Article 159 of the *Constitution* cannot save it, as this is not a matter of technicality of procedure, but the capacity of the persons suing. The competence of a suit is dependent on the capacity of a person to initiate it. Where capacity is lacking, the suit cannot be valid. A person who holds a grant that ought not to have been made to him in the first place, has no capacity to initiate a valid suit. Capacity to sue is a qualification to sue, a condition precedent to filing suit. The matter of capacity cannot possibly be a question of procedure.

12. On liability, I note that the respondent was not at the scene of the accident, and he called PW2 to testify on that. PW2, the police witness, said he investigated the accident, visited the scene, but did

not draw a sketch plan. He produced a police abstract. It is a matter of curiosity as to whether PW3 testified or not. His testimony is not captured in the handwritten/original trial court record, nor in the typescript. In the judgment, the trial court did not recite the narratives of the witnesses, but refers to a PW3 in the section where the submissions by the Advocates for the parties are analyzed, and under the section on pain and suffering, and liability. In the written submissions, the respondent referred to that mysterious PW3, but the submissions by the appellants referred to only 2 witnesses having been called by the respondent.

13. Did the mysterious PW3 exist? No one testified as PW3. The matter was initially being handled by Hon. TA Madowo, who took the evidence of PW1, PW2 and DW1, before she disqualified herself, and DW1 completed her testimony before Hon. Ng'ang'a. Hon. Madowo heard PW1 and PW2 on 16th July 2019, and then the respondent closed his case. The matter was then adjourned to 26th November 2019, for further hearing. On 26th November 2019, the parties were not ready to proceed, and the matter was adjourned to 18th February 2020. On 18th February 2020, DW1 took to the stand, and testified partially, and, in the middle of it, Hon. Madowo recused herself, after it transpired that she was handling a traffic matter arising from the same accident. Hon. Madowo stood down DW1, and referred the matter to Court No. 6, presided over by Hon. Ng'ang'a, who took over, and heard DW1, the same day, 18th February 2020, the defence closed, and the matter was marked for written submissions. No other witness testified thereafter. No PW3, therefore, ever testified.

14. I note from the trial record that the respondent filed a list of witnesses, which had names of 3 individuals, and he also filed 3 witness statements. However, out of the 3 proposed witnesses, only 2 took to the witness stand and testified. Perhaps, the PW3 being referred to in the written submissions of the respondent, and in the judgment, is the third proposed witness, who was never called to testify, to breathe life to his witness statement. A witness statement is not a pleading. It is not on oath, and it cannot be relied on without the maker taking to his witness stand. There is nothing in the trial court which indicates that the statement of the third proposed witness was ever adopted by the court, with the consent of the parties, as evidence. It was, therefore, mischievous of the respondent, or his Advocate, to sneak in material suggesting that there was a PW3, who testified, when in reality there was none. It is also foolhardy for the trial court to have relied wholly on what was stated in the written submissions, without cross-checking the statements made in the written submissions against the record that it had kept or maintained. The trial court, because of that failure on its part, made critical determinations on liability, relying on alleged evidence, which had not been adduced before it.

15. From what I have discussed above, the only versions of what transpired, that the trial court should have looked at, are by the 3 witnesses who actually testified in court, that is to say PW1, PW2 and DW1. Of the 3 only DW1 was an eyewitness, as she was party to the accident. PW1 was not at the scene. The testimony by PW2 was vague. Although PW2 claimed to have had visited the scene, and investigated the accident, he gave no details of what he saw when he visited the scene, or investigated the accident, neither did he share his conclusions, based on what he observed after the visit to the scene or upon the investigation he conducted. He drew no sketch plan of the scene of the accident. The best he could do was to inform the court of the vehicles and persons involved in the accident, and the aftermath, that is the death of the deceased and the charging of the 1st appellant with a traffic offence. He expressed no opinion on who was to blame for the accident. That then meant that the only testimony that could help the court was that from DW1, the eyewitness or party involved in it. However, her narrative was equally vague. She said that she did not see the bicycle and the cyclist before the accident, she only heard a bang, and she did not know whether her vehicle hit the bicycle. She only realized that her vehicle was hit, after she saw a body on the ground. She said she did not know the point of impact.

16. The respondent led evidence which only established that an accident happened, where the deceased died, but adduced no evidence at all on how it happened, and who was to blame for the collision. PW2 had no sketch plan, and said nothing about a point of impact. DW1 was not helpful either. She did not see the bicycle carrying the deceased, before her vehicle hit it or collided with it, and she could not tell the point of impact. All she could say that her vehicle was hit. There is no material upon which the trial court could conclude that the collision was wholly caused by the 2nd appellant, or by the rider of the bicycle on which the deceased was a pillion passenger. It is in cases of this nature, that the principle, stated in *Farah v Lento Agencies* [2006] eKLR, that where there is no concrete evidence to determine who is to blame between 2 drivers, both should be held equally to blame. However, there was a problem, the rider of the bicycle was not a party to the suit before the trial court, and liability could not be apportioned against him. No liability could attach to the deceased, as she was a mere passenger on the bicycle, and did not have control or management of it. In the absence of the rider of the bicycle, as a party in the suit, the trial court was not in error in apportioning liability wholly on the only party who was in the suit, the 2nd appellant herein. If the appellants desired to have liability apportioned between them and the rider of the bicycle, they ought to have brought in the said rider as a third party, by way of third-party proceedings.

17. On assessment of damages, the issue is as to whether the trial court should have adopted a global approach or the computation approach. The concern is that the income from the hustles of the deceased could not be easily ascertained, to enable the court determine what she earned monthly, for the purpose of assessment of damages. The computation process works best where there is clearly ascertainable sources of income, supported by documentation. Where no such documentation is available, the court may opt to apply the minimum wage, or it may opt for the global award approach. Either way, it should be at the discretion of the court.

18. The trial court acknowledged that there was no proof of income, and relied on a proposed income, which was not supported by any evidence. In the plaint, it is averred that the deceased was a businesswoman, whose monthly income was about Kshs. 15, 000.00. In his testimony in court, the respondent made no mention of what the deceased did for a living. He did not mention any income. So, the figure, that the trial court worked with, in computing the damages, was plucked from the air, as the respondent did not adduce any evidence on it. The figure of Kshs. 10, 000.00 was introduced by the Advocates for the respondent, through their written submissions. This is a case of evidence from the Bar, for the respondent and his witness led no evidence on income. Whether she had an income did not come up at the trial. The same cannot be introduced through the Bar, by way of written submissions. It was an allegation made in the plaint, but it was not proved. In cases initiated by plaint, the court should decide the matter based only on the pleadings or averments made in the plaint, that are subsequently proved through the evidence adduced. The allegations made in the plaint that are not proved, by way of the evidence adduced, at the trial, cannot be a basis for determination in the judgment. The court, no doubt, decided the matter on extraneous material, that had not been adduced before it. I would caution, again, the court ought to rely only on its record, and avoid being misguided by submissions made at the Bar. Whatever is asserted as facts in written submissions, must be scrupulously counter-checked against the evidence recorded by the court. As no evidence was led on income, no basis was laid upon which the court could determine loss of dependency, and no award should have been made at all under this head. He who alleges must prove. No proof was provided to support the assertions in the plaint.

19. The last issue is on apportionment of dependency, between the respondent and a certain Joseph Owino Karani. Apportionment should be to individuals on whose behalf the suit was brought, and more particularly, those disclosed in the pleading as such dependants. At paragraph 13 of the plaint, the

respondent listed some 9 minors as dependants. His name and that of Joseph Owino Karani are not there. That would mean that they were not dependants, and they were not entitled to a portion from the award under the head of loss of dependency. Indeed, Joseph Owino Karani is not even mentioned in the plaint. When the respondent testified, he did not mention him, nor even the 9 minors as dependants, and led no evidence on the nature of their dependency on the deceased. To the extent that there was no pleading on Joseph Owino Karani, the trial court did not have basis to make an apportionment in his favour. The respondent did not equally breathe life to his averments with respect to the dependency of the 9 minors, and neither of his own self, and there was no basis, therefore, for the making of an award under loss of dependency.

20. Overall, I find that the appeal herein has merit. The respondent had no capacity to initiate the suit, as the grant made to him was invalid, for violation of section 58 of the *Law of Succession Act*, and the suit, in Busia CMCCC No. 13 of 2019, should have been struck out. I, accordingly, therefore, allow the appeal herein, set aside the orders made in the judgment delivered in Busia CMCCC No. 13 of 2019, on 30th November 2020, and substitute it with an order that the suit in Busia CMCCC No. 13 of 2019 is hereby struck out. Each party shall bear their own costs. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 17TH DAY OF JULY 2023

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Otieno, instructed by Otieno & Amisi, Advocates for the appellants.

Ms. Anono, instructed by Mukisu & Company, Advocates for the respondent.