



**Momanyi v Mayieka & another (Suing as the legal representatives
of the Estate of Benesensia Nyangweso Ondieki) (Civil Appeal
E009 of 2021) [2023] KEHC 27627 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 27627 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E009 OF 2021
RL KORIR, J
OCTOBER 19, 2023**

BETWEEN

BENJAMIN MOMANYI APPELLANT

AND

JOASH NYAKARU MAYIEKA 1ST RESPONDENT

SAMUEL DICK MAYIEKA 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF
BENESENSIA NYANGWESO ONDIEKI**

*(Being an Appeal against the Ruling of the Principal Magistrate, Kiniale
L. in Bomet Principal Magistrate's Civil Suit Number 22 of 2018)*

JUDGMENT

1. The Respondents (then Plaintiffs) sued the Appellant (then Defendant) for General and Special Damages that arose from a road accident that involved the Motor Vehicle Registration Number KBN 601R and Motor Vehicle Registration Number KBU 462F in which Benesensia Nyangweso Ondieki suffered fatal injuries.
2. The Appellant entered appearance on 3rd May 2018 and filed his defence on the same day.
3. The Appellant filed a Notice of Motion Application dated 28th January 2021 where he wanted the Respondents suit struck out for being vexatious, frivolous, scandalous and an abuse of the court process.
4. In her Ruling dated 29th March 2021, Kiniale L. disallowed the Application.



5. Being aggrieved with the Ruling of the trial court, Benjamin Momanyi through his Memorandum of Appeal dated 13th April 2021 appealed against the Ruling and relied on the following grounds: -
 - i. That the learned trial Magistrate erred in law and in fact by dismissing the Appellant's Application dated 28th January 2021 in totality.
 - ii. That the learned trial Magistrate erred in law and in fact by finding that the Appellant's Application dated 28th January 2021 lacked merit.
 - iii. That the learned trial Magistrate erred in law and in fact by failing to give due regard to the grounds raised by the Appellant in the Application dated 28th January 2021.
 - iv. That the learned trial Magistrate erred in law and in fact in failing to consider the Appellant's written submissions and filed list of authorities.
6. My duty as the 1st appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions. This principle was espoused in the Court of Appeal case of Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR.

The Appellant's/Defendant's case

7. The Appellant through Kelvin Ngure (hereinafter referred to as Ngure (advocate) swore a supporting affidavit on 29th January 2021 and stated that he was the legal officer at Directline Assurance Company Ltd who were the insurers of the Appellant's Motor Vehicle Registration Number KBN 601R.
8. Ngure advocate deposed that in the year 2018, they were served with a Notice of Institution of Suit against the Appellant for recovery of damages as a result of an accident in which Benesensia Nyangweso Ondieki suffered fatal injuries. That they dutifully instructed their advocates who then entered appearance and filed a holding defence pending communication with the Appellant who would give them his account of events that lead to the accident.
9. Ngure advocate stated that they commenced investigations into the circumstances and cause of the accident. That the investigations revealed that at the time of the institution of the suit (12th March 2018), the Appellant had already passed away on 13th November 2015.
10. It was Ngure advocate's submission that after that discovery, their advocates on record advised that the appropriate step would be to file an Application seeking orders to strike out the suit. That a suit against a dead person was bad in law, frivolous, vexatious and an abuse of the court process.
11. Ngure advocate stated that the Appellant would be greatly prejudiced if the orders sought were denied and the suit allowed to proceed as it was.

The Plaintiffs/Respondents' case.

12. The Respondents filed a Replying Affidavit dated 15th February 2021 in response to the Application. The Replying Affidavit was sworn by Timothy Okemwa Nyangosi Advocate (hereinafter referred to as Nyangosi advocate who had conduct of the matter on behalf of the Respondents.
13. Nyangosi advocate stated that once the Appellant and his insurer had been served with the suit, he entered appearance and filed a defence. That on 30th January 2019, the Appellant sought leave to amend their defence vide Application dated 30th January 2019. He further stated that the Appellant was granted leave to amend his defence and the amended defence was served upon him on 15th May 2019.



14. It was Nyangosi advocate's case that the Appellant sought leave to enjoin third parties vide an Application dated 29th September 2019 and the leave was granted. It was his further case that the Appellant changed advocates vide a notice of change of advocates dated 17th June 2020.
15. Nyangosi advocate stated that the Application was laughable as it had been brought at the behest of a dead person. That it was trite law that proof of death was evidenced by a certificate of death and in its absence the Appellant's advocates could not purport to state that the Appellant was dead.
16. It was Nyangosi advocate's argument case that a dead man could not posthumously give instructions to his advocates and that it was incumbent for the advocates to reveal the source of their instructions.
17. On 11th October 2022, I directed that the Appeal proceeds by way of written submissions.

The Appellant's written submissions.

18. Through his advocates' submissions dated 30th March 2023, the Appellant submitted that the Police Abstract attached by the Respondents showed that the Appellant who was the owner of KBN 601R was deceased. That this was more than enough proof that the Respondents knew the Appellant was deceased but still went ahead and sued a deceased person contrary to the law.
19. It was the Appellant's submission that motor vehicle registration number KBN 601R was insured by Directline Assurance and they issued instructions to the firm of Kairu & McCourt to enter appearance pending further instructions and investigations. That they later came to know that he was deceased.
20. The Appellant submitted that the Respondents knew that Benjamin Ondera Momanyi died in the suit accident but still went ahead to sue him. That no Application had been made by the Respondents to cause the legal representative of Benjamin Ondera Momanyi to be made a party and proceed with the suit. It was the Appellant's submission that the suit abated and that by operation of the law, the Respondents suit abated on 13th November 2015. He relied on Order 24 Rule 4 of the Civil Procedure Rules and *Onger Geni, Evans Boera Mwabora & Alfred Nyambegea Ombusuro vs Denish Otieno Oyugi & Land Registrar, Rachuonyo District (2016) eKLR*.
21. It was the Appellant's submission that the alleged Appellant died in the suit accident and the Respondents failed to invoke the laid down provisions on substitution. That the suit was void ab initio and it had already abated and consequently, the suit should be struck out.

The Respondents' written submissions.

22. Through their advocates' submissions dated 9th May 2023, the Respondents submitted that the issue of death could only be proved by the production of a death certificate or an order of presumption of death. That in the absence of the two, there was no proof of death of the Appellant. It was their further submission that a Police Abstract was not proof of death.
23. The Respondents submitted that the allegedly dead Appellant gave posthumous instructions to his advocates to enter appearance, file a defence, file an Application seeking leave to enjoin a third party, file the Application which gave rise to the impugned Ruling and instructions to lodge the present Appeal.
24. It was the Respondents submission that the Appellant's counsel were estopped by law from claiming that the Appellant was dead yet they had been receiving instructions all along from the Appellant to defend the suit and to even lodge the present Appeal.
25. The Respondent submitted that this court should sustain the Ruling of the trial court dated 29th March 2021.



26. I have gone through and carefully considered the Record of Appeal dated 28th March 2022, the Appellant's written submissions dated 30th March 2023, the Respondents' written submissions dated 9th May 2023 and the sole issue for my determination is whether the suit in the trial court was a nullity on account of the Appellant's alleged death.
27. It is imperative to capture in summary the history of the suit in the trial court to help this court determine the issue in question.
28. The suit in the trial court was filed by the Respondents, Joash Nyakaru Mayieka and Samuel Dick Mayieka the legal representatives of the late Benesensia Nyangweso Ondieki on 12th March 2018 against the Appellant Benjamin Ondera Momanyi for general and special damages as a result of a fatal road accident that occurred on 13th November 2015.
29. The firm of Kairu & McCourt entered appearance on behalf of the Appellant (Benjamin Ondera Momanyi) on 3rd May 2018 and filed a Defence on the same day.
30. The Appellant filed a Chamber Summons Application dated 11th August 2018 where he sought leave to issue a Third Party Notice against Betty Chepkemoi Kirui and Peter Manyeki Gitau. The said leave was granted by the trial court on 29th October 2018.
31. The Appellant filed a Notice of Motion Application dated 30th January 2019 where he sought leave to amend their Defence. The Application was allowed by the trial court on 25th March 2019. The Appellant then filed his Amended Defence on 3rd May 2019.
32. The Appellant filed a Notice of Motion Application dated 7th June 2019 where he sought leave to serve the Third Party Notices by way of registered post and the same was allowed by the trial court on 10th June 2019.
33. On 15th July 2019, Judgment was entered against the third parties, Betty Chepkemoi Kirui and Peter Manyeki Gitau as a result of their failure to enter appearance and file their defences. The matter was to be set down for hearing to determine the liability between the Appellant and the third parties. The matter was set down for formal proof hearing on 23rd September 2019.
34. The Appellant filed a Notice of Motion Application dated 20th September 2019 where he sought consolidation of suits i.e. Civil Suit No. 12 of 2017 and Civil Suit No. 79 of 2016 which the Appellant was the Defendant in both suits. On 30th April 2020, the trial court allowed the consolidation of the suits.
35. The suit was thus set for hearing on 26th October 2020 but it did not take off. It was further set down for hearing on 18th January 2021 and on that day the Appellant's counsel informed the trial court that they intended to file an Application to strike out the suit for being incompetent and time barred hence the Notice of Motion Application dated 28th January 2021 (hereinafter referred to as the subject Application).
36. The main contention in the subject Application was whether the Appellant Benjamin Ondera Momanyi was dead thereby making the suit in the trial court a nullity. His advocates stated that the Appellant died in the subject accident on 13th November 2015 and that the suit was bad in law as it was against a dead person.
37. Kelvin Ngure who was the Legal Officer of the Appellant's Insurance Company stated upon receipt of the summons to enter appearance and the Respondent's pleadings, they instructed the firm of Kairu & McCourt to defend the Appellant. That the advocates entered appearance and filed a holding defence while awaiting communication from the Appellant regarding his version of the circumstances of the



accident. The Legal Officer further stated that they commenced investigations and that by the time the suit was being filed on 12th March 2018, the Appellant was already dead as he passed away on 13th November 2015.

38. I am not convinced by the assertion that the Appellant was dead. It was clear from the averments of the Legal Officer of Directline Assurance that they commenced investigations into the circumstances of the accident. The Appellant's advocates did not attach an investigation report to support this assertion.
39. I find it hard to believe that the fact of the Appellant's death was not ascertained at the nascent stage, as they stated that he died on the day of the accident.
40. As demonstrated earlier in this Judgment, the Appellant's advocates filed a wave of Applications in an effort to share liability. Of particular interest was the Application dated 11th August 2018 where the Appellant sought leave to issue Third Party Notices to Betty Chepkemoi Kirui and Peter Manyeki Gitau. It was the Appellant's contention that after their investigations into the circumstances of the accident, it was discovered that the two third parties were the registered owners of motor vehicle registration number KBU 184A. It was interesting to note that the outcome of those investigations was the ownership of the motor vehicle KBU 184A and not the fact of the Appellant's death as alleged by the Appellant's Insurance Company.
41. I take judicial notice of the practice that the Insurer usually takes up cases on behalf of their insured under the subrogation rule. This raises the possibility that the Insurer's counsel may have conducted the case without necessarily receiving direct instructions from the Appellant hence the reason why the Appellant was an active participant in the suit where he even sought consolidation with other suits in which he was a Defendant. Nonetheless, this court is not persuaded that the Appellant in this case had all along been dead. The assertion by his advocates that he was dead smirks as an afterthought.
42. The burden of convincing the trial court of the fact of the death of the Appellant was with his advocates. I have gone through the Application and the supporting affidavit and there was no evidence of the death of the Appellant. Without documentary evidence to show that the Appellant had died, the contents contained in the supporting affidavit were mere statements which held no evidentiary value.
43. The Appellant's advocates attached a copy of the Police Abstract dated 15th December 2015 which was marked as KN1. The Respondents' advocate submitted that a Police Abstract was not proof of death and that only the production of a death certificate or an order of presumption of death would suffice. I agree with the Respondents and I find that a Police Abstract is not conclusive proof of death. I am persuaded by Odunga J. (as he then was) in Catherine Mbithe Ngina vs Silker Agencies Limited (2021) eKLR, where he held that:-

“.....I must point out however, that the contents of the police abstract as extracted from the records held by the police is merely evidence that a report of an accident was made.....”
44. As I have already stated, there was no evidence tendered by the Appellant's advocates to indicate that the Appellant was dead. There was no death certificate attached or an order of the High Court declaring the Appellant dead. I have noted from the proceedings that after the subject Application was filed, the matter was scheduled for mention on 1st February 2021 to enable the Appellant's advocate produce a death certificate. The same was not produced.
45. Based on the totality of the evidence before me, I am unable to find that the Appellant is dead as the Appellant's advocates had not discharged their burden of proof.



46. The Appellant's advocates submitted that the suit had abated by operation of Order 24 Rule 4 of the Civil Procedure Rules. That the Respondents had failed to make an application for the substitution of the deceased Appellant within one year. Order 24 Rule 4 of the Civil Procedure Rules states that:-
- (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
 - (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
 - (3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.
47. It is my finding that the provisions of Order 24 Rule 4 of the Civil Procedure Rules do not apply in the current case. This is so because the said provisions only kick in once the fact of death has been established and in the present case that fact has not been established. As death is a matter of fact, nothing shall stop the Appellant's Insurer from proving the alleged death before the trial court.
48. In the final analysis, I agree with the trial court's Ruling dated 29th March 2021 which dismissed the subject Application.
49. In the end, the Memorandum Appeal dated 13th April 2021 has no merit and the same is dismissed.
50. The Respondents shall have the costs of the Appeal and the costs of the Application shall be as awarded by the trial court.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 19TH DAY OF OCTOBER , 2023.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the absence of the parties who had notice of judgment. Siele (Court Assistant)

