REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 217 OF 2018

CA(Suing as the next of kin of ANN)..... 1ST PLAINTIFF

JO(Suing as the next of kin of AME).....2ND PLAINTIFF

JASuing as the next of kin of HA).....3RD PLAINTIFF

CN (Suing as the next of kin of EN)..... 4TH PLAINTIFF

JL(Suing as the next of kin of THJ)..... 5TH PLAINTIFF

FV(Suing as the next of kin of MMJ)..... 6TH PLAINTIFF

= VERSUS =

JAEL MUREITHI..... 1ST DEFENDANT

TEACHERS SERVICE COMMISSION..... 2ND DEFENDANT

BOARD OF MANAGEMENT, MOI GIRLS'

SCHOOL NAIROBI.....3RD DEFENDANT

ATTORNEY GENERAL..... 4TH DEFENDANT

RULING

This Ruling is in respect of a Notice of Preliminary Objection by the 1st and 3rd Defendants dated 23rd November, 2020 on the grounds that;

i) the suit is time barred; and

ii) the Plaintiffs have no locus standi because they have not obtained letters of administration ad litem to enable them file suit for and on behalf of the deceased persons' estate.

The background of this case is that the Plaintiffs brought these proceedings against the Defendants vide a Plaint dated 30th August, 2018 in their capacity as 'next of kin' and parents of deceased former students of Moi Girls' School Nairobi. The Plaintiffs allege that the fire incident that razed the school dormitory leading to death of their children was as a result of the Defendants'negligence. The suit seek orders for general damages for pain and suffering, loss of expectation of life, loss of dependency, special damages and exemplary damages together with interests at court rates as well as costs of this suit. On 8th December, 2020, the court directed that the preliminary objection proceed by way of written submissions and the same was highlighted on 5th May 2021. The Plaintiffs via a Notice of Withdrawal dated 9th March, 2021 withdrew the suit as against the 2nd and the 4th Defendants.

1st and 3rd Defendants' Submissions:

In their submission dated 31st December, 2020 the 1st and 3rd Defendants state that their offices constitute government agencies or departments as contemplated under the Public Authorities Limitation Act, Cap 39 thus redering the suit against them statute barred. Section 2(a) of the Act provides that;

"Proceedings against the Government includes proceedings against the Attorney-General or any Government department or

any public officer as such;"

Section 3(1) of Public Authorities Limitation Act, Cap 39

> **"No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued."**

Mr. Wambola, counsel for the 1st and 3rd defendants, further submit that the suit as filed offends the provisions of both the Law Reform Act, Cap 26 and the Law of Succession Act, Cap 160 because the Plaintiffs instituted the suit without first seeking letters of administration ad litem to vest them with the authority to file the suit for and on behalf of the estates of the deceased minors. Section 4 of the Fatal Accidents Act, Cap 32 provides that;

> **"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;..."**

To butteress this position, Counsel cited the case **of Julian Adoyo Ongunga & Another vs Francis Kiberenge Bondeva(Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased[2016] eKLR,** where the court held that failure by the plaintiff to apply for and obtain letters of administration ad litem before filing a suit on behalf of the deceased deprived her of the legal capacity to institute the same. Reference is also made to the case of **Frederick Wachira Ndegwa (Substituting Ndegwa Wachira (Deceased) Vs Richarda Wanjiku Ndanjeru & Another[1997]eKLR,** where the Court of Appeal in reversing the decision of Bosire J.(as he the was), stated as follows;-

> **"Mr. Khana invited us to say that the Hintz appeal was wrongly decided by the majority and that we Should Overrule it. In view of what we said in the foregoing paragraphs we respond positively to that invitation and hold that the Hintz case is no longer good law, if it ever was. We think it must go. and the decision of Bosire, J. which was founded on it, must go with it. We Conclude, therefore that the damages awarded in favour of the respondents in the sum of Kshs. 50,000 under the Law Reform was wrong and ought to be set aside with costs. We do so order."**

Respondent/Plaintiffs Submissions:

Ms. Sharon on behalf of the Plaintiffs entirely relied on the submission dated 10th March, 2021 in opposition to the Preliminary Objection before court. The Plaintiffs identified two issues for determination by this court, these are; a) Whether the suit is time barred and b) whether obtaining letters of administration ad litem raises a pure point of law.

On the first issue, the Plaintiffs contend that the 3rd Defendant herein is a body corporate with perpetual succession and a common seal and has the capacity to sue and be sued as stipulated in the Fourth Schedule of the Basic Education Act, No. 14 of 2013 and do not fall within the ambit of the Public Authorities Act, Cap 39 or the Government Proceedings Act, Cap 40. Further assertion is that the 1st and 3rd Defendants have not demonstrated to the court the exact provision of the Basic Education Act No. 13 of 2013 that establishes the 3rd Defendant as a Government Agency. To support this proposition, the Plaintiffs have cited the case of **Board of Management-Pumwani Girls Secondary School v Joseph Mbulula t/a Lathemacs Engineering Works; Civil Appeal No. 406 of 2019[2019]eKLR** and the case of **Binja Kina Ireri v Board of Management S.A Kyeni Girls Secondary School; Nyeri ELRC Case No. 85 of 2016[2019]eKLR.**

In the alternative, the Plaintiff submit that 12 months started to run from the 2nd September, 2017 when the cause of action occurred and ended on 2nd September, 2018 which was on a Sunday. Consequently and in accordance with Section 57 (b) of the Interpretation and General Provisions Act, the last date for filing was 3rd September, 2018 thus the suit was filed within the statutory timelines.

On the second ground of the Preliminary Objection, the Plaintiff avers that the same is legally deficient, improper and unsubstantiated as it raises issues of facts as opposed to pure points of law. In **Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696** the court held that a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose off the suit. The Plaintiff submits that the Plaintiffs have the Letters of Administration and the same has to be adduced as evidence before court.

The Plaintiff confirms that the suit has been brought against the Defendants under both the Law Reform Act, Cap 32 and the Fatal Accidents Act, Cap 26 and that under Section 7 of the Fatal Accidents Act, an action can be mantained even without letters of administration being issued. This can be done if the action is brought by a person for whose benefit the action could have been brought by an administrator or executor of the deceased if letters of admnistration were issued. Therefore, by virtue of Section 4 of the Fatal Accident Act, the plaintiffs being the mothers to the deceased minors, qualify to bring the present suit. It is the Plaintiffs' assertion that there is no contradiction between Order 4 Rule 4 of the Civil Procedure Rules and Section 7 of the Fatal Accidents Act as long as there is an averment of the capacity in which the suit is brought as captured in the Plaint dated 30th August 2018. To butteress this position, the Plaintiffs relied on the case of **Monica Koros v James Omero & Another; Eldoret HC Civil Appeal No. 123 of 2010[2011] eKLR** where Mshilla J. held:-

> **"...Did the appellant comply with section 4, 7 and 8 of the Fatal Accidents Act, Cap 32. Section 7 allows a person other than an Administrator or Executor to bring an action provided it is in the name or names of that person as set out in Section 4 of the said Act. Section 4 identifies those persons as a spouse, parents or children of the deceased.**
>
> **The deceased in this case was a student and had no wife nor any children but had a parent, the appellant herein whom he would have supported in future. I find that the appellant complied with Sections 4 and 7 of the Fatal Accidents Act.**

At paragraphs 8 and 11 of the Plaint and I quote paragraph 8 of the same:-

"…… the plaintiff is the mother of the deceased claiming for and on behalf of herself……"

I find that section 8 of the Act has been complied with the respondent had the full particulars of the mother from the Plaint filed and the nature of the claim is as set out in paragraph 11 of the Plaint.

I repeat that the deceased had no wife nor children and it was the mother who brought the action for her benefit and no other persons particulars needed to be provided. *(emphasis mine)*

Counsel for the plaintiffs also referred to the case of **Waceke Wahinya (suing as a dependant of the estate of Peter Gathii Wahinya) vs Kenya Twa Development Authority (Makomboki Tea Factory) Nairobi HC Civil Appeal [2016] eKLR** where the court held:-

"…The Appellant indicated in the plaint that he was suing in his capacity as a dependant of the estate of the deceased. She testified that she was the mother of the deceased. She produced a letter from the area Assistant chief to that effect. That evidence was not rebutted. She therefore, in accordance with Section 4(1) of the Fatal Accidents Act, qualifies to be a person for whose benefit the action is brought. Further, Order VII Rule 4(1) of the Civil Procedure Rules on capacity of parties (now Order 4 Rule 4.)states as follows: -

"Where the plaintiff sues in a representative capacity the plaint shall state the capacity in which he sues and where the defendant is sued in a representative capacity the plaint shall state the capacity in which he is sued, and in both cases it shall be stated how that capacity arises."

The action was thus maintainable for the benefit of the Appellant under the Fatal Accidents Act. In the circumstances, I find that learned magistrate misapprehended the law in dismissing the Appellant's suit."

Analysis and Determination;

A preliminary objection must firstly, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.

The basis of the Preliminary Objection is that the suit against the 1st and 3rd Defendants is time barred as it was filed one (1) year after the cause of action arose in contravention of Section 3 (1) of the Public Authorities Limitation Act, Cap 39. The Act provides that;

"No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued."

Section 2 defines proceedings against the Government includes proceedings against the Attorney-General or any Government department or any public officer as such. Government has not been defined in the Constitutiin or the Government Proceedings Act. However a five Judge bench in the case of **Judicial Service Commission v Speaker of the National Assembly & 8 others [2014] eKLR** stated that;

"The Constitution does not define the national government, but it is implicit in its provisions that the national government is the national Executive, the Legislature and the Judiciary as opposed to the County or devolved government."

I note that the 3rd Defendant/Applicant is a creature of statute and body corporate established under Section 55 and 56 of the Basic Education Act, 2013. Paragraph 1 of the Fourth Schedule provides that the Board of Management shall be a body corporate with perpetual succession and a common seal, and shall in their corporate names, be capable of-

(a) suing and being sued;

(b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;

(c) borrowing, lending and granting money;

(d) entering into contracts; and

(e) doing or performing all other acts or things for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate.

The above is subject to the provision of Section 53 of the Basic Education Act which provides for the governance and management of education and training which is under the docket of the Cabinet Secretary for Education. Section 53 provides;

"(1) The Cabinet Secretary shall be responsible for the overall governance and management of basic education.

(2)Subject to the provisions of this Act, the Cabinet Secretary shall by regulation entrust the governance or management of any aspect of basic education and training to any agency, body, organ or institution as may be appropriate for the purposes of this Act."

In addition and pursuant to Section 62 (1) of the Basic Education Act, 2013 the 1st Defendant/ Applicant is the Secretary to the Board. The Act provides that;

"The head of a basic education institution shall be the secretary to the Board of Management pursuant to Section 62 (1) the said Act."

In the case of **J N & 5 others v Board of Management, St. G School Nairobi & another [2017] eKLR, Mativo J,** held that**;**

"18. My understanding of the law and the above provision is that the Board of Management is a legal entity, capable of suing and being sued and the School's principal cannot be sued in her name or personal capacity for decisions made by the Board. There is nothing to show that she made the impugned decision her personal capacity or acted outside her mandate to warrant personal liability.

Paragraph 7 of the Plaint describes the 1st defendant as the lead educator and administrator of Moi Girls' School Nairobi charged with the responsibility of implimenting educational policy guidelines and professional practices at the School. There is no specific allegations levelled against the 1st Defendant in her personal capacity that warrants her to defend herself in that personal capacity. I therefore hold that the 3rd Defendant is a Public body hence it falls under the ambit of the Government Proceedings Act. Further, the 1st Defendant is equally a public officer and a such subject to the provisions of the Government Proceedings Act.

The Plaintiffs have also urged this court to find that the suit was filed within the prescibed time. Section 57 of the Interpretation and General Provisions Act, provides that;

"In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time."

The cause of action arose on 2nd September, 2017 while the present suit was filed on 3rd September, 2018. I agree with the Plaintiffs counsel that the last date for filing the present suit was on the 3rd September, 2018 since 2nd September, 2017 fell on a Sunday thus an excluded day. From the above, I find the suit was filed on time and is not time barred.

The second ground raised by the 1st and 3rd Defendants was that the Plaintiffs lack the **locus standi** to commence, originate or mantain the present suit on behalf of the estate of the deceased before taking out letters of administration *ad litem*. Under Section 2 of the Law Reform Act and Section 4 of the Fatal Accidents Act, the person who is entitled to bring a cause of action in respect of the estate of a deceased person is a personal representative or an executor or administrator respectively. Section 54 of the Law of Succession Act, Chapter 160 of the Laws of Kenya (hereinafter referred to as 'the Act') states that:-

54. 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.

Limited Grant of Letters of Administration Ad Litem is usually used when the estate of a deceased person is required to be represented in court proceedings which is provided for under Form 14 of the Fifth Schedule of the Act and deals with suits. The said provision states as follows:-

"when it is necessary that the representation of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, 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 at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution."

In the case of **Julian Adoyo & Another vs Francis Kiberenge Bondeva(Supra), Mrima J.** discussed the importance of taking out the limited grant before instituting a suit and stated that;

> **"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."**

Similarly this Court 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 the Court 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's 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 to stand before the Court and argue the case."**

In the present case Counsel for the 1st and 3rd Defendants submits that the suit ought to be struck out for offending the provisions of both the Law Reform Act, Cap 26 and the Law of Succession Act, Cap 160. The Plaintiffs through their counsel however mantain that this assertion is false as they have in their possession letters of administration which can be adduced in court. Further, they contend that the mothers of the deceased qualify to bring the suit under the provision of Section 4(1) and 7 of the Fatal Accident Act and Order 4 Rule 4 of the Civil Procedure Rules. From the above, it is evident that the *facts are contested, then automatically, the issue falls out of the ambit of a preliminary objection. It would be improper for a court to make a contested determination of fact within a preliminary objection. The court has to consider whether the plaintiffs could still file the suit event if they do not have letters of administration.*

I am guided by the decision of J.B. Ojwang (as he then was) in Oraro v Mbaja [2005] eKLR where he epressed himself as follows:

> ***"I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed."***

In the end, the 1st and 3rd Defendants' Notice of Preliminary Objection fails and is hereby dismissed. Costs shall follow the outcome of the suit.

DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF JULY 2021.

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S. CHITEMBWE

JUDGE