



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 31 OF 2019

BETWEEN

JOE OWAKA AGERAPPELLANT

(suing as Administrator of the estate of the late Mary Sleccor Adeg Ager)

AND

SANLAM GENERAL INSURANCE LIMITED.....RESPONDENT

(Being an Appeal from the Ruling and Order in Kisumu CMCC No. 109 of 2018 by Hon. C.Yalwala (PM) on 19th February, 2019)

JUDGMENT

1. **JOE OWAKA AGER (Appellant)** suing as Administrator of the estate of **Mary Sleccor Adeg Ager (deceased)** filed suit against **SANLAM GENERAL INSURANCE LIMITED (Respondent)** in the lower court claiming seeking a declaration that the Respondent was under a statutory duty to satisfy the decree in **KISUMU HCCC NO. 04 OF 2014** where the court had awarded damages against the Respondent's insurer **JOHN OTIENO AWINJE & 2 others** following the death of the deceased when she was involved in an accident while travelling in M/V KBQ 303L (*accident motor vehicle*).

2. The Defendant/Respondent in its defence filed on 19th September, 2018 denied having insured M/V KBQ 303L vide policy number 090/070/1/2011 and further that **KISUMU HCCC NO. 04 OF 2014** was filed and judgment entered long after **JOHN OTIENO AWINJE** had died.

3. Subsequently, the Respondent on 19th September, 2018 filed a notice of motion dated 13th September, 2018 seeking to strike out the plaint on the ground that **KISUMU HCCC NO. 04 OF 2014** abated after the death of **JOHN OTIENO AWINJE** on 24th October, 2014 which was long before the judgment in was delivered on 1st March, 2017.

4. The Appellant vehemently opposed the application. The trial court after hearing both parties agreed with the Respondent and by a ruling dated 19th February, 2019 struck out the Plaint with costs to the Respondent.

The Appeal

5. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 15.03.19 filed the Memorandum of Appeal dated 14.03.19 which sets out four (4) grounds but mainly that even if the suit against **JOHN OTIENO AWINJE** had abated as a result of his death, the judgment was still enforceable on account of the co-defendants who were liable jointly and severally with **JOHN OTIENO AWINJE**.

6. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities.

Appellant's submissions

7. The Appellant holds the view that the trial court erred in driving him out of the seat of judgment yet he had a reasonable cause of action. In support thereof, reliance was placed on **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another [1980] eKLR** where the Court of Appeal stated as follows on striking out of pleadings:

Let's understand the principles upon which the court acts when dealing with an application under O.VI rule 13.

"No exact paraphrase can be given but I think reasonable cause of action means cause of action with some chance of success when (as required by paragraph (2) of the rule) only the allegations in the plaint are considered."

8. It was further submitted for the Appellant that the order striking out its suit denied him a chance to present his case and in support thereof relied on Crescent Construction Co. Ltd v Delphis Bank Ltd [2007] eKLR where the Court of Appeal stated:

However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle.

9. The Appellant submitted that one **Rolex Dan Omondi**, the driver of the accident motor vehicle and the 2nd Defendant in KISUMU HCCC NO. 04 OF 2014 was convicted of his own plea on the charge of causing death by dangerous driving and that Respondent having been served with a statutory notice could not evade liability.

10. In its submission, the Respondent placed reliance on Order 24 Rule 4(3) which states that **"Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant."**

Analysis and Determination

11. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123).

12. The gravamen of this appeal is whether the Appellant's case abated following the death of **JOHN OTIENO AWINJE**. It is not disputed that **JOHN OTIENO AWINJE** died on 14.10.14 whereas the judgment in KISUMU HCCC NO. 04 OF 2014 was delivered on 1st March, 2017.

13. There's no evidence that an application for substitution was made. That far, I find that the trial court rightfully found that the suit against **JOHN OTIENO AWINJE** abated within one year of his death.

14. A perusal of the decree in KISUMU HCCC NO. 04 OF 2014 demonstrates that judgment was entered jointly and severally against **JOHN OTIENO AWINJE** and two others one of whom was the driver of the accident motor vehicle.

15. The parties agree that the judgement was obtained by the Appellant in KISUMU HCCC NO. 04 OF 2014 against **JOHN OTIENO AWINJE** and two others jointly and severally. The *Black's Law Dictionary* defines joint and several liability as:

"A liability is said to be joint and several when the creditor may demand payment or sue one or more of the parties to such liability separately, or all of them together at his option."

16. **Joint and several liability** is a form of **liability** that is used in civil cases where two or more people are found **liable** for damages. The winning plaintiff in such a case may collect the entire judgment from any one of the parties, or from any and all of the parties in various amounts until the judgment is paid in full. (See Mohamed & Muigai Advocates V Samuel Kamau Macharia & Another [2005] eKLR)

17. Halsbury's Laws of England Vol 26 page 276 reads as follows: -

"So long as proceedings are taken against all joint contractor's judgment obtained summarily or otherwise against one or more is no bar to the action proceeding against the remaining defendant or defendants."

18. From the foregoing analysis, I find that the Learned Trial Magistrate erred when he failed to address his mind to the judgment as against the other two judgment debtors and thereby arrived at a mistaken conclusion.

DISPOSITION

19. In the end, I find that this appeal has merit and is allowed in the following terms:

1) The ruling and order dated 19th February, 2019 striking out the Plaint with costs to the Respondent is set aside and substituted with an order dismissing the application dated 13th September, 2018 with costs to the Appellant/Plaintiff

2) The Respondent is condemned to pay the costs of this appeal.

DELIVERED AND SIGNED IN KISUMU THIS 13th DAY OF February 2020

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

For the Appellant - Mr. Mwamu hb for Mr. Mwesigwa

For the Respondent - N/A