



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 177 OF 2016

VERONICA GATHONI MWANGI

SIMON NJUGUNA SEUR (Suing as the legal Representation of the estate of the late

RICHARD MWANGI GATHONI.....APPELLANT

VERSUS

SAMUEL KAGWI NGURE

BIRYA MWAKOMBE BIRYA.....RESPONDENT

JUDGMENT

(Being an appeal against the Judgment of Hon Nyakweba SRM delivered on the 26.4.2016 in Mombasa CMCC No. 1965 of 2010)

1.This appeal arises from the judgment of Hon. Nyakweba in Mombasa CMCC No. 1965 of 2010 wherein the Appellant unsuccessfully sued the Respondents for fatal injuries sustained in a road traffic accident from which the Appellants estate was put to loss and damage. Liability was agreed by the parties at 50:50.However, the suit was dismissed with costs for having been filed out of time.

2. Dissatisfied with the said Judgment and Decree, the appellant herein, filed this appeal setting out five grounds of appeal vide a Memorandum of Appeal dated 16.12.2016. The grounds of appeal precisely are as follows:-

- a) That the Learned magistrate erred in law in dismissing the Plaintiff's case on issues not pleaded by the parties.
- b) That the Learned magistrate erred in law in dismissing the Plaintiff's case on a technicality.
- c) That the Learned Magistrate erred in law in framing his own issues.
- d) That the Learned Magistrate erred in law in dismissing the Plaintiff's case while the issue of liability had been agreed and recorded by consent of the parties.
- e) That the Learned Magistrate erred in law in failing to award the estate of the deceased.

3.By consent of the parties, this appeal was argued by way of written submissions.

4. In her arguments for the appeal, Mrs. Kariuki, Learned Counsel for the Appellant submitted that in an adversarial system of litigation, it is for the parties themselves to set the agenda for the trial Court. Therefore, the trial Court misdirected itself when it proceeded to frame its own issues, which were never raised or framed by the parties.

5.Counsel further submitted that the trial Magistrate dwelt on a procedural technicality instead of focusing on substantive justice as required under Article 159(2)(d) of the Constitution.

6.Mr. Gor, Learned Counsel for the Respondent submitted that the trial Court's finding was on the issue of law and not facts. Therefore, the Court has the right to frame issues and determine them even if they have not been raised by the parties as derived from Order 15 rule 2(c) of the Civil Procedure Rules.

7.Counsel further submitted that a limited grant was issued to the Appellants on the 4.10.2010 yet the suit was filed in 2012 and with the background on legal provisions on fatal matters, the trial Court had the right to frame the issue of limitation and make a determination on it.

ANALYSIS & DETERMINATION

8.This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. This was aptly stated in the cases of *Selle vs Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters vs Sunday Post Limited* [1985] EA 424.

9. The issues for determination in this case are as follows:-

(a) Whether the trial Court had the jurisdiction to frame and determine its own issues

(b)whether the issue of limitation is a procedural technicality

(c) Whether dependency was proved by the Appellant

1. Whether the trial Court had the jurisdiction to frame and determine its own issues.

10.I have considered the appeal fully by reading through the memorandum of appeal herein, the proceedings and judgment of the lower court together with the cited statute and case law.11.On the outset I agree with the appellant on the objective of pleadings in an adversarial system that the court can only lawfully determine issues that are specifically pleaded and proved before it and that the court cannot base its decision on an unpleaded issue. This has been restated times without number but we take it from the case of *Gandy v. Caspair Air Charters Ltd.* (1956) 23 EACA 139 where Sir Sinclair, V-P, said:-

“The object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them, so that each may have full information on the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given.”

11.However, there are exceptions to that rule even under the strict adversarial system. The exception was noted in the Court of Appeal case of *Nyaga Cottolengo Francis v Pius Mwaniki Karani* [2017] eKLR where the Court stated as follows:

“ the notion that the courts are mere bystanders in adversarial litigation process has been rendered blurry by amendments to the Civil Procedure Act in Sections 1A and 1B as well as the Appellate Jurisdiction Act in Sections 3A and 3B which give the courts considerable latitude to intervene with a view to achieving the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of civil disputes in Kenya. Thus, the courts have a duty and will play their part in the just determination of the proceedings, the efficient disposal of the business of the Court, the efficient use of the available judicial and administrative resources, the timely disposal of all the proceedings before the Court, at a cost affordable by the respective parties, and with the use of suitable technology”

12.Under Order 15 Rule 1 of the Civil Procedure Rules, an issue arises when one party makes a material proposition of fact or law which is denied by the other party. Order 15 Rule 2 which deals with the framing of issues provides as follows;

“2) The court may frame the issues from all or any of any of the following materials –

a) Allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of such parties;

b) Allegations made in the pleadings or in answer to interrogatories delivered in the suit;

c) The contents of documents produced by either party.”

(Emphasis added)

13.From the foregoing, it is clear that the trial Court had the right to exercise its discretion as provided under order 15 rule 2 of the Civil Procedure Rules to frame its own issues as derived from the contents of the documents produced by either party as was the case herein. Whether the Plaintiff could maintain a suit under the law reform Act & the Fatal Accident Act.

14.Section 2 sub-section 3 of the Law Reform Act provides:

“(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless either: -

a) proceedings against him in respect of that cause of action were pending at the date of his death; or

b) proceedings are taken in respect thereof not later than six months after his executor or administrator took out representation.”

15. The above position is mirrored in Section 9 (2) (b) of the Fatal Accidents Act. It is a fact that the grant of representation was obtained by the Appellant herein on the 4.10.2010 and the suit was filed on the 18.9.2012 which was nearly two years , long after the limitation period had lapsed. For the Plaintiff to institute their claim under the Law Reform Act and the Fatal Accident Act, they needed to commence proceeding Section 27 of the Limitation of Actions Act (cap 22) seeking leave to file their claim out of time and to give reasons for failing to file their claim within six months.

16. In the upshot, this Court finds no fault in the trial Court finding that the Plaintiff suit was statute barred and no leave was sought by the Plaintiff to have its claim admitted out of time.

Whether dependency was proved by the Appellant

17. Section (4) (1) of the Fatal Accidents Act provides as follows:-
“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child(emphasis court) 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 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:
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.”

18. I am in agreement with the learned trial magistrate that on awards for dependency, brothers do not qualify to be dependents in their siblings cause. However, if they are named as dependents then the same ought to be proved as was held in the case of in the case of GERALD MBALE MWEA VS KARIKO KIHARA & ANOTHER (1997) KLR (Civil Appeal NO. 112 of 1995), the court stated;

" The issue of dependency is always a question of fact, to be proved by he who asserts it".

19. This Court agrees with the trial Court’s finding that the testimony of the brother to the deceased person was not enough to proof dependency since he was not a dependent. Therefore, the loss of dependency ought to have been proved by the mother to the deceased who unfortunately never gave evidence.

20. The upshot is that, the appeal is without merit and is dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 14TH day of MAY, 2020.

D.O. CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes