Mbeyu Leli & Pascal Leli & another ((Suing as the Representative of the Estate of Leli Julo - Deceased)) v Cornerstone Clearing Limited (Civil Appeal 34 of 2012) [2019] KEHC 10890 (KLR) (19 February 2019) (Judgment)

Neutral citation: [2019] KEHC 10890 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 34 OF 2012

DO CHEPKWONY, J

FEBRUARY 19, 2019

BETWEEN

MBEYU LELI & PASCAL LELI (SUING AS THE REPRESENTATIVE OF THE ESTATE OF LELI JULO - DECEASED) ..... 1ST APPELLANT

PASCAL LELI ..... 2ND APPELLANT

(SUING AS THE REPRESENTATIVE OF THE ESTATE OF LELI JULO - DECEASED)

AND

CORNERSTONE CLEARING LIMITED ..... RESPONDENT

(Being an appeal from the Judgment and decree of the Hon. D. MACHAGE, Principal Magistrate in Mariakani Civil Case No.107 of 2010, Mbeyu Leli and Pascal Leli Julo Leli (Suing as the Legal Representatives of the Estate of Leli Julo – vs – cornerstone Clearing & Forwarding Ltd, delivered on the 14th February, 2021)

JUDGMENT

1. The appellant instituted a suit against the respondents claiming for general damages under the *Fatal Accidents Act* and the *Law Reform Act*, special damages, costs, and interest in Mariakani Civil Suit No 107 of 2010, Leli Julo vs Cornerstone Clearing & Forwarding.

2. The appellant pleaded that on or about March 19, 2009, the deceased was a lawful pedestrian along Nairobi-Mombasa road at Maji ya Chumvi, when the respondent driver recklessly drove Motor Vehicle Registration No KAT 846D-ZC2032 causing the same to hit the deceased and as a consequence the deceased sustained fatal injuries.

3. On the October 22, 2010, the respondent filed defence to the plaint dated September 13, 2010, in which it denied all the allegations and all particulars of negligence, de and special damages by the plaintiff and put the plaintiff to strict proof thereof. According to the defendant, it is a stranger to the allegations of the accident along Nairobi-Mombasa road at Maji ya Chumvi on March 19, 2009 but if they are proved or established, the same was caused and or substantially contributed to by the negligence of the deceased.

4. The case proceeded for hearing, whereby the plaintiff called four witnesses and the defendant called one witness. after the hearing, the court dismissed the suit with costs to the defendant on the ground that the appellant did not have *locus standi* to institute the civil suit for and on behalf on the estate of deceased.

5. Being dissatisfied with the Lower court's decision, the appellant preferred this appeal and filed the Memorandum of Appeal dated February 28, 2016 which sets out 8 grounds of appeal that:-

    i. That the learned trial Magistrate erred in law and in fact in holding that the grant of letters of administration produced by the plaintiff did not confer on the plaintiff a right to file suit.

    ii. That the learned trial Magistrate erred in law and in fact in holding that the defendant denied that the plaintiff had the locus to file suit when the same was admitted in defence particularly paragraph 1 thereof.

    iii. That the learned trial Magistrate erred in law and in fact in overruling a grant issued by the High Court when he did not have the jurisdiction to do so.

    iv. That the learned trial Magistrate erred in law and in dismissing the evidence of the eye witness specifically that the motor vehicle was driven without headlights and too fast on when there was no evidence to contradict the said witness.

    v. That the learned trial Magistrate erred in law and in fact in holding that the deceased was 50% liable in contributory negligence against the weight of evidence.

    vi. That the learned trial Magistrate erred in law and in fact in relying on the drivers who never testified before him and on a sketch map which was inconsistent with the driver's statement.

    vii. That the learned trial Magistrate erred in law and in fact in failing to give due regard to the plaintiff evidence and submissions and therefore arriving at an erroneous decision on liability.

    viii. That the learned trial Magistrate failed to distinguish between an award of damages under the fatal accident act and the law reform act.

    The appellant has urged the court to set aside the finding on locus standi and judgment be entered in his favour.

Submission by the Parties

6. The parties argued the appeal by way of written submission. In further exposition of the apple, both parties cited various authorities.

7. Counsel for the appellant, Mr Nyabena submitted that article 159 enjoins this honourbale court to deliver substantive justice without undue regard to technicalities and as a result, it is unfair to allow a tortfeasor to walk away and leave the dependants destitute.

8. Mr Nyabera also submitted tha the grant issued to the dependants clearly empowered the said administrators to file suit and it was therefore a misdirection of the subordinate court to overrule the superior court.

9. The counsel for the appellant submitted that the trial Magistrate relied on a High Court decision and ignored the doctrine of *stare decisis* by failing to rely on the case of *Marjaria vs Abdalla* [1984]eKLR, which was a Court of Appeal decision.

10. Counsel for the appellant also submitted that the trial Magistrate made a serious error in taking judicial notice that motor vehicles cannot be driven at 9pm without headlights on.

11. In conclusion, Mr Nyabera has submitted that there was absolutely no evidence to hold the deceased liable in contributory negligence since the respondent only pleaded allegations that were never substantiate through evidence.

12. Mr Omwega, counsel for the respondent has submitted that failure to take out a grant before filing a suit is not a legal technicality since it goes to the core of the section 67 of the *Succession Act* provided for a limited special grant of the purposes of collection, getting in and receiving the estate of the deceased and filing a suit is not one of the purposes provided for under the *Act*.

13. Mr Omwega has also argued that the mere fact that a party admits another party's capacity in a defence does not confer the party capacity upon that party. This is because the grant used was void *ab initio* and a nullity and not even an admission in a defence would validate it.

14. On the issue of quantum, Mr Omwega has submitted that the trial Magistrate did not commit any error in apportioning liability at 50-50 since the issue of headlights was confirmed to have been serviceable through a motor vehicle inspection.

Analysis and Determination

15. From the onset, as a first appellant court, this court as enjoined in law has the responsibility under section 78 of the *Civil Procedure Act*, to evaluate the trial court's evidence, analyze it, and come to my own conclusion, but in so doing, I must give allowance of the fact that I neither saw nor heard the witnesses. However, this court is not bound to follow the trial court's findings of fact if it appears that either it failed to take into account particulars circumstances or probabilities. (See the decision in the case of *Selle vs Associated Motor Boat Camp*).

16. This being a first appeal, I have carefully read through the grounds of appeal, the trial court's record of proceedings, submissions and cited authorities and legal provisions by the parties herein. I am of the view that the main issue that confronted the learned Magistrate and which this court has to determine in this appeal, before going into other issues is whether the appellant had the locus standi to file the suit it did before the trial court.

a. Whether the appellant had the locus standi to file the insant suit.

17. By *locus standi*, it means the capacity to file a suit. The appellants filed the suit as legal representatives of the deceased and on behalf of the defendants of the deceased. To do this, they required authority/ capacity which is accorded by a grant of administration and colligenda bona *Locus standi* is the cornerstone of any case. Before a party files a case, he or she must be certain that they are clothed with

the requisite capacity to sue and be sued. In the case Of *Bv Law Society of Kenya vs Commissioner of Lands and Others*, Nakuru High Court, Civil Case No 464 of 2000. It was held that:-

> " If a party has no *locus standi*, then the said party cannot bring a suit to court. The issue of *locus standi* goes to the root of any suit and the said issue of locus standi is a point of law which is capable of disposing of a matter preliminarily"

18. The issuance and purpose of a grant of letters of administration *ad colligend bona* is provided for under section 67 of the *Law of Succession Act*, cap 160 Laws of Kenya and procedure thereof is under rule 36 of the *Probate and Administration Rules*.

19. The rules expressly state that the purpose of such a limited grant is to enable the applicant to collect, give entry, receive the estate and do such acts as may be necessary for the preservation of the estate of the deceased until the grant is made. Set out in full, rule 36 provides:-

> (1) Where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration *ad colligenda bona defunct* of the estate of the deceased.
>
> (2) Every such grant shall be in form 47 and be expressly limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate and until a further grant is made".

20. The issue of *locus standi* raises a point of law that touches on the jurisdiction of the court, and it should be resolved at the earliest opportunity. This court has had an opportunity to go through the limited grant of letters of administration *ad colligenda bona* obtained by the plaintiff in this matter. it is noteworthy that, on the face of the said grant it is indicated as follows:-

> " .....limited to the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate, until further representation were granted by this court ...."

21. This court finds that the instituting a suit is not one of the special purposes indicated on the said grant.

22. Consequently, this court finds and holds that the said grant was specifically limited to collection and preservation of the deceased's estate until further representation is granted.

23. The Court of Appeal in the case of *Morjaria vs Abdalla* [1984] KLR 490 *intera lia* held:-

> " However, we do not think that the appointment of a person "*Ad Colligenda Bona*" can possibly include the right to stand in the shoes of the deceased for the purpose of instituting an action, or, indeed, an appeal, especially where there is a specific provision, paragraph 14 of the fifth schedule, designed for this purpose. The latin verb "colligere" means to collect, bring together or assemble, and we are satisfied that this form of grant is only to be used for the purpose we have indicated and not for purpose of representation in a suit or in an appeal".

24. For purposes of instituting a suit under the *Law Reform Act*, a party is required to have obtained an Ad Litem Grant under paragraph 14 of the fifth schedule before commencement of the suit. The appellants were not a legal representatives of the estate of the deceased, having obtained a limited grant

of letters of administration *Ad Colligenda Bona*. Such a grant is only useful for collecting, getting in, and receiving the estate of the deceased that may require preservation from waste. The grant did not entitle the appellant to file suit as a legal representative of the estate of the deceased. Therefore, in the premises, this court finds and holds that the appellants lacked capacity and/or locus to institute the present suit under the *Law Reform Act* and hence, to that extent, set aside the trial Magistrate's finding and holding.

25. In the circumstances, lack of grant of letters of administration ad litem only affect a claim under the *Law Reform Act*, which in the appellant's case is the claim for loss of expectation of life and pain and suffering. It has been held and the same has been quoted and cited in the case of *Tronistik Union International & Another vs Mrs Jane Mboya & Another* CA of Nairobi, Civil Appeal No 145 of 1990, where a bench of five Judges held that lack of grant of letters of administration does not stop a claimant from getting an award under the *Fatal Accidents Act*.

b. Whether the Respondent Was Negligent, And Therefore Liable.

26. On the issue of whether the respondent was negligent, and hence liable, it is trite law that he who alleges must prove. Under section 107 of the *Evidence Act*, it is provided that:-

    (1) Whoever desires any court to give judgments as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

    (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person".

27. PW3, who was the sole eyewitness of the accident that caused the demise of the appellant testified and stated that as they had almost finished crossing the Mombasa-Nairobi highway, after they confirmed there was no vehicle when a speeding vehicle, which did not have headlights, and was heading to Nairobi hit the deceased and killed him on the spot. It was also PW3's testimony that the driver of the vehicle was speeding, he did not hoot and only stopped 50 metres after hitting the deceased. PW3, Karani Mwabanga's evidence was controverted by the evidence of PW2/DW1, Sergent Jackson Musera who produced the police file in court and the certificate of examination and test of motor vehicle dated April 17, 2009, wherein it is stated that the vehicle's electrical systems and headlights were serviceable. On cross-examination, DW1 stated that there were skid marks, which stretched for 7 metres, which is evidence that the driver of the vehicle was speeding.

28. The trial court held that the driver of the motor vehicle was 50% liable for causing the accident since he had the opportunity to avoid hitting the deceased.

29. In my own analysis of the evidence adduced at trial, I find that the defendant's driver's duty to other road users ought to have, as should always be the case, higher than that of pedestrians walking ahead of him. there is no indication that the appellant (deceased) suddenly rushed to cross the road. In my view, a higher percentage of blame is on the respondent. For this, the corroborating evidence of PW2/DW1, Sergeant Jackson Musera especially on the sketch map drawn by PC Kingori, showing the skid marks, the totality of the evidence that the driver of motor vehicle KAT 846D-SZ2032 could have done more to avoid the accident, if at all, he was driving at lesser speed in the circumstances. Consequently, the finding of the trial court on contributory negligence is set aside and I proceed to hold the defendant 80% liable for the accident as against the deceased's 20%.

c) What Damages Are Awardable?

30. For an award of loss of dependency, under section 4 of the *Fatal Accidents Act*, it is stipulated that every action brought by virtue of the provisions of the *Act* shall be for the benefit of the wife, husband, parent and child of the deceased.

31. Since the issue of quantum was not challenged by the appellant, this court proceeds t uphold the trial court's finding on quantum less the award of pain and suffering at Kshs 15,000/= and Loss of Expectation of Life at Kshs 100,000/=. That leaves a total of Kshs 490,000/= general damaged under the *Fatal Accidents Act*.

32. In the upshot, the appeal is allowed and the following orders issue:-

    a. Judgment delivered on February 3, 2012 dismissing the appellant's suit be and is hereby set aside.

    b. Liability is apportioned at 20:80 in favour of the appellant/plaintiff.

    c. The appellant is awarded Kshs 490,000/= general damages as assessed by the trial court subject to 20% contribution which leaves Kshs 392,000/=. Judgment is accordingly entered for the appellant against the respondent for Kshs 392,000/=.

    It is so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT MOMBASA THIS 19TH DAY OF FEBRUARY, 2019.

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance for Appellant

Mr. Mutuku counsel holding brief for Mr. Omwenga counsel for Defendant

Court Assistant - Beja