



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 147 OF 2012

JOEL ATUTI OGETO (Suing as the Legal

Representative of the Estate of the Late

BISMARCK ONYARI ABERE.....APPELLANT

VERSUS

1. REHEMA JUMWA MWALIMU

2. JUSTUS KANOTI OKINYI.....RESPONDENTS

(An appeal against the ruling and order of Hon. Mr. Gacheru, Principal Magistrate

delivered on 17th August, 2012, in Mombasa CMCC No. 1080 of 2010)

JUDGMENT

1. The appellant was the plaintiff in the case before the lower court. He filed a suit under the Fatal Accidents Act and the Law Reform Act on his own behalf as the brother-in-law and personal representative of the estate of the late Bismark Anyari Abere and on behalf of his dependants. The allegation was that the accident that caused Bismark Anyari's death was caused by the 2nd defendant (2nd respondent) who was employed as a Driver by the 1st defendant (1st respondent). The respondents through a Notice of Preliminary Objection before the lower court dated 18th November, 2011 sought the following orders:-

(i) That the plaintiff has no locus standi as per the provisions of Section 54 and the 5th schedule of Cap 160 Laws of Kenya; and

(ii) That in the circumstances the suit herein cannot stand and should be struck out with costs to the defendant (sic).

2. The Hon. Magistrate considered the written submissions filed by the Counsel for the parties and upheld the preliminary objection for the reason that the appellant obtained limited letters of administration Ad colligenda bona instead of a limited grant of letters of administration under the provisions of Section 54 of Cap 160, Laws of Kenya, in order to file the suit. The Hon. Magistrate found the suit fatally defective and struck it out with no order as to costs.

3. The appellant being dissatisfied with the said ruling filed a memorandum of appeal on 29th August, 2012 raising the following grounds of appeal:-

(i) That the Learned Magistrate erred in law and in fact in that he misapprehended the issues before him and thereby arrived at the wrong decision;

(ii) That the Learned Magistrate erred in law and in fact in that he failed to consider the issues before him;

(iii) That the Learned Magistrate erred in fact and in law in failing to follow the *ratio decidendi* in **Troustick Union International & another vs Mrs. Jane Mbeyu & another**, Nairobi Civil Appeal No. 145 of 1990;

(iv) That the Learned Magistrate erred in fact and in law in failing to acknowledge the fact that he lacked jurisdiction to entertain a challenge on a grant issued by this Honourable court; and

(v) That the Learned Magistrate erred in law and in fact in failing to appreciate the submissions made by the appellant.

4. The appellant therefore prays for the following orders:-

(i) That the ruling made on 17th August, 2012 be set aside;

(ii) That in the alternative, this Honourable Court takes up the submissions of the parties, and/or reassesses the evidence and issues a ruling thereon;

(iii) That in the alternative, this Honourable Court does order that the suit in the lower court be stayed pending the formalization of the letters of administration;

(iv) That the application be heard afresh before a different Magistrate; and

(v) That the costs of this appeal be borne by the respondent.

5. The appellant's Counsel filed her written submissions on 3rd January, 2017 and the respondent's Counsel filed his on 9th February, 2017. Ms. Mango, Learned Counsel for the appellant submitted that her client was granted limited letters of administration Ad colligenda bona and filed a suit thereafter. She indicated that the suit was dismissed due to the issue of a defective grant. She relied on the submissions she made in the lower court which she filed in her further supplementary record of appeal. She stated that the authorities she relied on, in the lower court were included in her written submissions.

6. She further submitted that a claim under the Fatal Accidents Act was still sustainable and did not require letters of administration as was held in the case of **Berly Betha Malowa Were vs Kenya Ports Authority**, HCCC No. 246 of 2009. It was argued for the appellant that the issue of a defective grant was a procedural technicality, more so for benefits under the Law Reform Act and she urged the court to invoke the provisions of Sections 1A, 1B and 3 of the Civil Procedure Act which provide for sustaining of suits.

7. In distinguishing the case of **Rajesh Pranjivan Chudasama vs Sailesh Pranjivan Chudasama** [2014] eKLR, cited in the respondent's written submissions from the present case, Counsel argued that the case therein involved a succession matter and the said decision is not applicable to a claim under the Law Reform Act and Fatal Accidents Act. She stated that the authority of **Morjaria vs Abdalla** [1984] KLR 490 is an authority that deals with the issue of a contract.

8. With regard to another case cited in the written submissions filed by the respondent's Counsel of **Hassan A. Dera vs. Soni Fuel Injection Co. Ltd.** [2006] eKLR, Ms Mango stated that it addressed the issue of failure to take out letters of administration or limited grant in a succession cause.

9. Ms. Adwar, Learned Counsel for the respondents submitted that the authority of **Rajesh Pranjivan Chudasama vs. Sailesh Paranjivan Chudasama** (supra) dealt with the issue of locus standi. It was argued that in the present case, Hon. Gacheru in his ruling held that the appellant had no locus standi to file the suit based on a defective grant. She added that another court was of a similar view in the case of **Hassan A. Dera vs Soni Fuel Injection Co. Ltd** (supra).

10. She argued that in the case of **Morjaria vs. Abdalla** (supra) the court held that an Ad colligenda bona could not be equated to a limited grant for purposes of filing a suit and if it is so used, it renders the suit defective from inception. She relied on the provisions of Section 67(1) of the Law of Succession Act and Rules 36 and 37 of the Probate and Administration Rules to fortify her submissions.

11. Counsel for the respondent argued that the grant that was issued to the applicant was specifically for collection of the deceased's property but not for filing of a suit. She prayed for the appeal to be dismissed and for the 5th schedule of the Law of Succession Act to be upheld.

ANALYSIS AND DETERMINATION

The issue for determination is if letters of administration are a mandatory requirement in the filing of suits under the Fatal Accidents Act and the Law Reform Act.

12. The plaint herein was filed on 27th April, 2010. The appellant in paragraph 1 thereof states that he has brought the action under the Fatal Accidents Act and the Law Reform Act on her (sic) behalf as the brother-in-law of and personal representative of the estate of the late Bismark Onyari Arebe (deceased) and on behalf of his dependants.

13. In the Law of Succession Act, the term "**personal representative**" is interpreted to mean the Executor or Administrator, as the case may be, of a deceased person. Section 79 of the said Act provides as follows with regard to a personal representative:-

"The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of the grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative."

14. Section 82 (a) of the said Act provides that:-

"Personal representatives shall, subject only to limitation imposed by their grant, have powers to enforce, by suit or otherwise, all

causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative.”

15. In reference to the Section 2(1) of the Law Reform Act, it provides as here under:-

“ Subject to the provisions of this section, on the death of any person after the commencement of this Act, all the causes of action subsisting against or vested in him shall survive against, or as the case may be, for the benefit of, his estate.....”
(emphasis added).

16. Section 2(3) of the Law Reform Act makes it abundantly clear that proceedings under the said Act must be brought by a personal representative of the deceased's estate. The provisions state that:-

“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.” (emphasis added).

17. In the present instance, it is quite apparent that the appellant brought an action under the Law Reform Act before he took out letters of administration in respect to the deceased's estate. As such, the deceased's legal chose in action had not vested in the appellant when he filed the plaint under the Law Reform Act. For the said reason, the cause of action was null and void *ab initio* in so far as the claim under the Law Reform Act is concerned. Although Ms Mango prayed for the suit in the lower court to be stayed pending the formalization of the letters of administration, such orders cannot be granted as letters of administration cannot be backdated to reflect that they were issued before the filing of the suit in the lower court. The applicant cannot hide behind the cloak of procedural technicalities in a matter where he failed to comply with provisions of the law. I decline to invoke the provisions of Article 159(d) of the Constitution in his favour.

18. In a full bench of the Court of Appeal in the case of **Trovistick Union International and Ingrid Ursula Heinz vs Jane Mbeyu and Another**, Civil Appeal No. 145 of 1990, the Court held that in an action brought under the Law Reform Act, it was necessary to take out letters of administration before filing of a suit. The said decision overruled a 3 Judge bench decision of the Court of Appeal in the case of **Roman Karl Hintz vs. Mwang'ombe Mwakina** [1984] eKLR, where the court held that it was not necessary for a personal representative to take out letters of administration before filing a suit under the Law Reform Act.

19. On the issue of the subsistence of the claim under the Fatal Accidents Act, Section 4 thereof 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 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.” (emphasis added).

20. The above provisions must be read together with the provisions of Section 7 of the Fatal Accidents Act which provides as follows:-

“If at any time, in any case intended and provided for by this Act, there is no executor or administrator of the person deceased, or if no action is brought by the executor or administrator within six months after the death of the deceased person, then and in every such case an action may be brought by and in the name or the names of all or any of the persons for whose benefit the action would have been brought, if it would have been brought by and in the name of the executor or administrator, and every action so brought shall be for the benefit of the same person or persons as if it were brought by and in the name of the executor or administrator.” (emphasis added)

21. As was argued by Ms. Mango, institution of a claim under the Fatal Accidents Act does not require letters of administration. This court's finding however is that such suits must be instituted by a person or persons who have the legal capacity to do so. In this case the action was instituted by the brother-in-law of the deceased. Going by the provisions of Section 7 of the Fatal Accidents Act, where no letters of administration have been taken, an action can only be filed **in the name or the names of all or any of the persons for whose benefit the action would have been brought**. In the present case therefore, a claim under the Fatal Accidents Act could only have been brought by either the wife/wives, parent/parents or child/children of the deceased who stand to directly benefit from any damages that may be awarded.

22. I have considered the submissions filed as well as the highlights made thereof, the authorities cited and the applicable law. I am in agreement with the submissions by Counsel for the respondent that the case filed by the appellant in the lower court was fatally defective. This court's finding therefore is that the action brought by the appellant under the Fatal Accidents Act was incompetent by virtue of the fact that he did not have the *locus standi* to institute the suit.

23. As earlier stated, the claim made under the Law Reform Act was equally incompetent for the reason that letters of administration for the deceased's estate had not been taken out as at the time the suit was filed. I therefore hold that the appeal is without merit and it is hereby struck out. I uphold the ruling of the Hon. S. Gacheru, Principal Magistrate, delivered on 17th August, 2012. Costs of this appeal and the case

in the lower court are awarded to the defendants/respondents. Interest is also awarded to the defendants/respondents.

DELIVERED, DATED and SIGNED at MOMBASA on this 11th day of May, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Oledi holding brief for Ms Mango for the appellant

No appearance for the respondents

Mr. Oliver Musundi - Court Assistant