



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 138 OF 2017

(Formerly Nairobi HCCA NO 43 OF 2015)

**HANNAH MUTHONI KARIUKI (Suing as administratrix
of the estate of the late James Kiruge Ngige).....APPELLANT**

VERSUS

JAMES MWANGI MUGURO.....1ST RESPONDENT

MARGARET MUTHONI.....2ND RESPONDENT

AND

DAVID KIBIRU WARORUA.....3RD RESPONDENT

**(Sued as legal representatives of the
estate of the late John Warorua Thiru)**

(Being an appeal from the Ruling delivered by the Hon. Mr. G.H. Oduor (SPM)

at Limuru on the 28/01/2015 in SPMCC No. 76 of 2011)

JUDGMENT

1. The first and second and third Respondents in this appeal were 1st to 3rd Defendants, respectively in the court below. By a Plaint dated 1/04/2011, the Appellant herein sued the 2nd and 3rd Respondents herein in their capacity as the legal representatives of the estate of the late **John Warorua Thiru** (deceased), claiming compensation for the fatal injuries sustained by the deceased **James Kiruge Ngige** on 1st February, 2010. It was averred that the 1st Respondent so negligently drove the motor vehicle registration number **KBH 887R** owned by the late **John Warorua Thiru**, that he caused the same to lose control and to violently knock down the deceased, causing him fatal injuries. Negligence was specifically pleaded against the 1st Respondent. It was also averred that he was the agent or servant of deceased owner of the accident vehicle, who was therefore vicariously liable for the accident .
2. The Defendants filed their Defence statement wherein they denied any liability for the accident. In addition, the 2nd and 3rd Respondents herein filed a Notice of preliminary objection on grounds *inter alia* that as the 2nd and 3rd Defendants they lacked capacity to be sued as the legal representatives of the estate of **John Warorua Thiru** . And that the whole suit as filed against the said respondents was a non-starter and should be dismissed with costs.
3. The preliminary objection was heard and ruling thereon delivered on 14th September, 2012 by **Ireru RM**, upholding the preliminary objection. Consequently the Appellant filed an application dated 17th April, 2013 seeking review of the said ruling which dismissed the Appellant's suit, and an order for reinstatement thereof. The said application was heard and determined *vide* a ruling dated 28/1/15. The court dismissed the application for review.
4. The Appellant, dissatisfied with the said second ruling has preferred the present appeal. In her Memorandum of Appeal, she has listed

eight grounds of appeal the essence of which is captured in the first and 8th grounds which state:

“1. That the Learned Magistrate erred in law and in fact by finding that the discovery of existence of a limited grant issued to Margaret Muthoni (the 2nd Respondent) was not new evidence and yet the said respondent concealed and suppressed that fact in denying her capacity as the administratrix of the estate of the late John Warorua in her defence and subsequently dishonestly raising a preliminary objection based on lack of capacity to be sued as such an administratrix.

.....

8) That the learned Magistrate erred in failing to find that there was an error on the face of the order given on 14.09.12 which dismissed the entire suit yet only a preliminary objection had been raised limited to the legal capacity of the 2nd Respondents and not the 1st Respondent. In any event there was an error in dismissing the suit instead of striking out” sic

5. The court directed that the appeal be disposed of by way of written submissions. The appellant through her advocate submitted that the main issues for determination were whether the 2nd Respondent had the necessary capacity to be sued and whether the dismissal of the suit was proper. It was submitted that the 2nd Respondent having taken out a special limited grant of letters of administration in respect of the estate of the deceased was either inter-meddling or its legal representative. In support of this proposition, counsel cited the case of **Agripina Mary Aya vs Nyambura (Widow of the deceased John Njuguna Kigaragari) Nairobi, Civil Appeal No. 11 Of 1981**. Counsel submitted that this evidence (on existence of limited grant) was not available to them at the time of the hearing of the preliminary objection hence the application for review brought under Order 45rule 1(1) of the Civil Procedure Rules.

6. Counsel placed reliance on the case of **Mzee Wanjie & 93 others vs A.K. Saikwa & 3 others (1982-88)1 KAR 462**. It was emphasized on this score that the existence of a limited grant amounted to new and important evidence, and that the 2nd Respondent as the widow of the deceased had the duty to take out letters of administration. Counsel further submitted that the preliminary objection related only to the capacity of the 2nd Respondent and not the 1st Respondent in the lower court suit and as such, the ruling did not affect the capacity of the said 1st Defendant to be sued. In support of this position, counsel cited the case of **Peter Ondoro vs Andrew Hayanga & others, Nairobi HCCC No. 2975 of 1995**.

7. Lastly, counsel submitted that Appellant’s suit did not have a 3rd defendant as stated by the trial court and there was an apparent error on the face of the order given on 28/1/2015 which dismissed the whole suit instead of the case against the 2nd and 3rd Respondents.

8. For the respondents, it was submitted that the fact that the 2nd Respondent had taken out a special limited grant did not constitute new and important evidence and that the appellant failed to exercise due diligence. Reliance was placed on the case of **Pancras T. Swai vs Kenya Breweries Limited (2014) eKLR**. Counsel emphasized that the grant taken out by the 2nd Respondent was a special limited grant of letters of administration that did not establish capacity for the 2nd Respondent to be sued on behalf of the estate of her husband. Counsel relied on several cases in support of this proposition, including **Morjarila v Abdallah (1984) KLR 490**. It was argued that the 2nd Respondent does not fall within the category of inter-meddlers as no evidence was tendered by the Appellant to prove the said allegation. Counsel urged the court to dismiss the appeal with costs.

9. Further, counsel defended the ruling of the lower court on the preliminary objection and review application. The Respondents further argued that the Appellant’s claim against the 1st Respondent who was an agent of the deceased owner of the accident vehicle cannot be sustained in the absence of his representatives. The case of **T. Joel Motanya v Swan Carriers Ltd (2015) eKLR** was cited on circumstances where vicarious liability attaches on a principal for his agent’s actions. Counsel further contended that the Appellant having unsuccessfully pursued a review of the first ruling on the preliminary objection, she cannot succeed in the instant appeal. Counsel relied on the case of **Paul Misori Orago v City Council of Nairobi (2017) eKLR and Ryce Motors Limited v Jonathan Kiprono Ruto & Another (2016) eKLR**.

10. The court has considered the material canvassed in respect of this appeal. The duty of the first Appellate court is to re-evaluate the evidence in the court below and to draw its own conclusions thereon, but always bearing in mind it did not have the opportunity to see or hear witnesses testify. see **Peters v Sunday Post Ltd (1958) EA 424; Sele and Another v Associated Motor Board Co. Ltd & Others (1968) EA123; Williams Diamonds Ltd v Brown [1970] EA1**. An appellate will not ordinarily interfere with a finding of fact by the trial court unless such finding was based on no evidence or was based on a misapprehension of the evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did (see **Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982 – 1958] 1 KAR 278**).

11. The Respondents have correctly asserted that the present appeal is confined to the ruling in the lower court rejecting an application for the review of its earlier decision, and not an appeal on that earlier decision. This distinction is important as it did seem that some of the submissions by both parties hark back to the initial ruling in respect of which a revision was sought and for which no appeal could be brought.

12. The proper perimeters of an appeal from a ruling on a review application were set out by the Court of Appeal in **Paul Misori Orago v City Council of Nairobi [2017] e KLR**. The Court observed that:

“As has previously been held by this court, appeals and reviews are separate and distinct vehicles. An Appeal serves a different purpose from a review. In the case of Pancras T. Swai v Kenya Breweries Ltd [2014] eKLR this Court upheld the decision of Benet J in Abasi Belinda v Fredrick Kangwamu & Another [1963] EA 557 in which it rendered itself thus:

“..... a point which may be a good ground of appeal may not be a good ground for an application for review and an

erroneous view of evidence or of law is not a ground for review though it may be a good ground of appeal...”

But can a party who has unsuccessfully pursued a review of judgment be allowed to lodge an appeal against the same judgment? We think not, and it is indeed undesirable. Instead, should he be unhappy with the outcome of the review, the recourse available to him is an appeal against the ruling on review (see Ryce Motors Ltd v Johnathan Kiprono Ruto & Another [2016] e KLR which cemented the proposition that an appeal may be against a ruling in review. As a result, and in view of the judgment herein having been reviewed, the Appellant’s right of appeal against judgment was extinguished or spent.”

13. Similarly, in this case the Appellant’s right to appeal the ruling in respect of the preliminary objection in the lower court is already extinguished and the present appeal only relates to the ruling delivered with regard to the application for review.

14. The key grounds upon which the review application in the lower court was premised were *inter alia* that:

“b. It has now become apparent to the Applicant that the 2nd Respondent (MARGARET MUTHONI) is indeed the legal representative of the said estate.

c. The 2nd Respondent capacity as the legal representative of the estate of John Warorua Thiru was concealed to the Applicant at the time of dismissal of the suit.

d. That there is an apparent error on the face of the records as the suit was only dismissed against the 2nd and 3rd Defendants and not the 1st Defendant and hence the said suit cannot be said to be wholly dismissed” (sic).

15. Annexed to the supporting affidavit of the Applicant was a copy of the **Special Limited Grant of Letters of Administration** in favour of **Margaret Muthoni Warorua** dated 21st March 2011 issued in **Nairobi P&A Cause No.561 of 2011**.

16. The application for review was brought under Order 45 Rule 1 and 2 of the Civil Procedure Rules. Order 45 Rule 1(1) of the Civil Procedure Rule provides as follows:

“1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.” (emphasis added)

17. The new and important matter upon which the review application was brought in the lower court is stated to be the discovery of the limited grant to the 1st Respondent, while the error on record was stated to be the apparent dismissal of the entire suit, rather than as against the 2nd and 3rd Respondents only.

18. In his ruling the trial magistrate considered the above provisions of the Civil Procedure Rules and the facts of the case before concluding that the grant in question did not qualify as a new and important matter, for the reason that the grant was for the limited purpose of enabling the withdrawal of some monies from the deceased’s account with the bank. It is not explicit from the ruling however whether the error on record alleged had been established. Nonetheless, an order was made for the amendment of the suit dismissal order. This appeal turns on the determination whether these two findings were well founded.

19. The Appellant had averred in the suit filed on 14/4/11 that **Margaret Muthoni** (2nd Respondent) and her son **David Kibiru Warorua** (3rd Respondent) were sued in their capacities as the legal representatives of **John Warorua Thiru**, as intermeddlers in the said deceased’s estate hence administrators *de son tort* or as persons obligated to take out letters of administration. These averments were denied in the defence statement. In her affidavit sworn in support of the application for review, the Appellant deponed at paragraph 7, 8 and 9 that the 2nd and 3rd Respondents had concealed the existence of the limited grant and that the **“true capacity of MARGARET MUTHONI was unknown”** to her and her advocates at the time of the dismissal of the suit.

20. It appears from the descriptive averments in the plaint that the Appellant was uncertain as to the basis upon which the 2nd and 3rd Respondents were deemed to be representatives of the estate of the deceased **John Warorua Thiru**. Paragraph 3 of the plaint appears to allude to their direct and implied capacity as administrators of the estate of the deceased. Evidently therefore, the question of their capacity was live in the Appellant’s mind at the time of filing the suit. Nonetheless, by the time the preliminary objection was argued a year later, the Appellant had not made any steps to clarify the true factual or legal premise allowing the said 2nd and 3rd Defendants to be sued on behalf of the estate of the deceased. The ambiguity apparently persisted and is evident in the submissions made at the oral argument of the preliminary objection.

21. In these circumstances, it is not possible to say that the Appellant had exercised due diligence in a bid to discover the true locus of the capacity of 2nd and 3rd Respondents as the representatives of the estate of the deceased owner of the accident vehicle. The discovery of the

limited grant could, with due diligence have been made well before the filing of the suit and indeed it behooved upon the Appellant to establish the capacity of the 2nd and 3rd Respondents before enjoining them as defendants. Moreover, the Limited grant was made to the 2nd Respondent only.

22. Before this court, the Appellant rested her hopes on the decision in **Agripina Mary Aya**. In that case however, the Plaintiff's advocate had made several efforts to establish the legal capacity of the Defendant before filing the suit and eventually applied to the court under Order XXXIII r 4(1) Civil Procedure Rules (now Order 24 r 4) seeking that the widow of the deceased defendant be made a party to the suit as the legal representative of her deceased husband based on her intermeddling in his estate. The application was dismissed in the High Court.

23. On appeal, the Court of Appeal restated the efforts made by the Appellant's advocate in establishing the identity of the legal representative of the deceased's estate.

24. Citing Section 38 of the Probate and Administration Act (repealed) whose current equivalent is Section 14 of the Fifth Schedule of the Law of Succession Act, the Court of Appeal observed that:

“Here Nyambura (widow) was nominated by the Appellant as a suitable person to be a party to the suit representing the deceased. The evidence was that Nyambura was an administratrix *de son tort* by reason of intermeddling with the deceased's estate... having regard to the mandatory requirements of Order 23 rule 4 (1) and to the wide powers conferred by Section 38 of the Probate and Administration Act, we think that Nyambura should have been joined to be the legal representative of the deceased and made a party for the purposes of that litigation only, so that the trial of the suit should proceed. Such a person would then be a “legal representative” within the meaning of that term in Section 2 of the Civil Procedure Act.”

24. In the instant case, no application had been made to the court in terms of Order 24 rule 4 of the Civil Procedure Rules and Section 14 of the Fifth schedule to the Law of Succession Act, the latter which provides that:

“When it is necessary that the representative 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 commence 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 caused into complete execution.”

25. I notice that one of the orders sought on this appeal is for the court to cause the public trustee to be made a party as a defendant in the lower court suit as a representative of the estate of the Deceased **John Warorua Thiru**. The Appellant ought to have made that application before the lower court in good time. An appeal is not the appropriate forum for seeking such an order. Suffice to say that the lower court's finding that the matter of the limited grant was not new cannot be faulted in the circumstances of this case.

26. The parties have submitted somewhat extensively on the question whether the existence of the limited grant in this case was an important matter. In other words, whether the evidence of the existence of the limited grant to the 2nd Respondent was capable of influencing the outcome of the preliminary objection had it been tendered at the appropriate time, and therefore a good ground for reviewing the orders dismissing the suit. In this regard, the court has to consider the law and the wording of the grant. On the face of it, the grant in question was a special limited grant given under Section 54 of the Law of Succession Act which states that:

“A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any forms described in the Fifth Schedule.”

27. The special limited grant is in favour of the 2nd Respondent and is expressly **“limited to the purposes only for withdrawal of KShs.400,000/- from Family Finance Bank A/c No. and until further representation is granted...”**

The 3rd Respondent was not mentioned in the grant. The above wording of the limited grant is clearly consistent with the provisions of Section 54 of the Law of Succession Act and Rule 36(1) of the Probate and Administration Rules. The limited grant in question was essentially a *Grant ad colligenda bona* as stipulated in Section 54 and 67 of the Law of Succession Act. The purpose of a *grant ad colligenda bona* is the collection, getting in and receiving the estate and doing such acts as are necessary to preserve the estate.

28. Ordinarily, the appointment of a person as an administrator *ad colligenda bona* does not clothe such person with the authority to take the place of the Deceased for purposes of instituting a suit or appeal or being sued. However, where a party relies on a grant of letters of administration *ad colligenda bona* which expressly allows him to step into the place of a Deceased as his representative in a suit, the court will consider the said grant as a valid grant for the stated purpose. see **Morjarila v Abdallah [1984] KLR 490, Peter Owade Ogwang v Jared Obiero Ouya [2014] e KLR and Martha Ndiro Otero** [suing as the administrator and personal representative of the estate of **Willy Patrick Ochiengo Ndiro (deceased) v Comecons Africa Ltd [2015] e KLR**.

29. The wording of the limited grant in this case is clear; the purpose of the grant was limited to authorizing the 2nd Respondent to withdraw the sum of KShs.400,000/= from the account of the deceased, and no more. The court below reached a similar conclusion and found that the existence of the limited grant did not qualify as an important matter. The finding cannot be faulted.

30. Regarding the question of the alleged error on the face of the record or order, I find the submissions on both sides and the lower court's ruling on the review application rather confusing. The pleadings in the lower court file reflect three Defendants, the 1st being the alleged driver of the accident vehicle, **James Mwangi Muguro**. The 2nd and 3rd Defendants were **Margaret Muthoni Warorua, David Kibiru**

Warorua both sued as the legal representatives of the Deceased **John Warorua Thiru**, the owner of the accident vehicle. The preliminary objection was against the 2nd and 3rd Defendants. The ruling delivered on 4/09/12 reflects this position and the final orders of the court must be read to be in respect of the 2nd and 3rd Defendants.

31. The suit against the 1st Respondent remains, regardless. Negligence was pleaded against him personally, and vicariously against the representatives of the Deceased owner of the accident vehicle. There is no merit in the Respondents argument that the suit against the 1st Respondent could not be sustained without his co-defendants.

32. The suit against the 2nd and 3rd Defendants did not go to hearing and was determined on the basis of a preliminary objection. The correct order of disposition was the striking out of the suit against the 2nd and 3rd Defendants, rather than an order dismissing the suit. On that score, I find merit in ground 8 of the appeal. The court hereby sets aside the said dismissal order and substitutes therefor an order striking out the suit against the 2nd and 3rd Defendants in the court below, with costs. In the result the appeal herein has only succeeded in respect of the final orders. The Respondents are awarded 75% of the costs of this appeal.

DELIVERED, AND SIGNED AT KIAMBU THIS 12TH DAY OF OCTOBER, 2018.

C. MEOLI

JUDGE

In the Presence of:

Mr. Kingangi holding brief for Mr. Ngari for Appellant

Respondent – No appearance

Court clerk - Kevin