



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NO 246 OF 2012**

**MOSES ONYANGO OKECH**

**(Suing as Legal representative**

**of the Estate of Boniface Omondi Onyango.....PLAINTIFF**

**VERSUS**

**ERNIE CAMPBELL CO LIMITED.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. In his Complaint dated and filed on 16<sup>th</sup> December 2008, the Plaintiff sought the following reliefs:-

- 1. Damages under the Fatal Accident and Law Reform Acts**
- 2. Special Damages of Kshs.**
- 3. Costs and interest thereon.**

2. His List and Witness Statements and List and Bundle of Documents were dated and filed on 9<sup>th</sup> July 2012. His Case Summary dated 18<sup>th</sup> July 2012 was filed on even date.

3. The Defendant filed its Statement of Defence dated 13<sup>th</sup> May 2009 on 14<sup>th</sup> May 2009. Its List and Bundle of Documents were both dated and filed on 15<sup>th</sup> October 2014.

4. An inquest enquiring into the death of Boniface Omondi Onyango (hereinafter referred to as “the deceased”) Inquest No 21 of 2003 was opened at the Chief Magistrate’s Court at Kibera. In his Ruling of 4<sup>th</sup> October 2014, Mr. Oduor RM concluded as follows:-

**“Whereas the deceased contributed in part to the accident, his age and status taken into account, the contractor acted negligently in filling up the pool with water while there was no security around it”.**

5. The civil case herein was partly heard by Onyancha J (as he then was) when he took the Plaintiff’s evidence, the evidence of Mark Odhiambo Okong’o (hereinafter referred to as “PW 2”) and Patrick Mutua Mwololo (hereinafter referred to as “PW 3”).

6. On 7<sup>th</sup> June 2018, counsel for both parties indicated that the matter could proceed from where it had reached. This court therefore took the evidence of John Mureu Mwachai (hereinafter referred to as “PW 4”) whereafter the Plaintiff closed his case. The Defence did not call any witnesses.

7. The Plaintiff’s undated Written Submissions were filed on 29<sup>th</sup> June 2018 while those of the Defendant’s were dated 30<sup>th</sup> July 2018 and filed on 31<sup>st</sup> July 2018.

8. When the matter came up on 27<sup>th</sup> September 2018, the parties requested the court to deliver its decision based on their respective Written

Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

### **THE PLAINTIFF'S CASE**

9. The Plaintiff's case was that on 21<sup>st</sup> October 2001, the deceased, then aged sixteen (16) years, was lawfully walking around the compound of Kenya College of Communication Technology – Mbagathi (hereinafter referred to as "KCCT") when he fell into a swimming pool as a result of which he sustained fatal injuries.

10. He contended that the Defendant was negligent for having caused or permitted the said swimming pool to remain unattended and failing to fence the pool.

11. He brought the suit pursuant to the Fatal Accidents Act Cap 32 (Laws of Kenya) for his own benefit and for the benefit of his wife who was the deceased's mother and for the deceased's brothers and sisters and under the Law Reform Act Cap 26 (Laws of Kenya).

12. He therefore urged this court to grant him the relief he had sought in his Plaint.

### **THE DEFENDANT'S CASE**

13. The Defendant denied that the deceased, was lawfully walking along KCCT grounds when he fell into a swimming pool. It stated that on the material date of 21<sup>st</sup> October 2001, it was constructing a swimming pool at KCCT- Mbagathi when the deceased trespassed into the said area and that despite warnings from the security guard to leave the area, the deceased did not do so and jumped into the swimming pool and drowned.

14. It also denied the particulars of negligence that had been itemised in the Plaint and averred that the deceased was himself negligent for having trespassed and attempting to swim in a pool that was under construction and exposing himself to a risk he knew or ought to have known to exist.

15. It further pointed out that the Plaintiff's suit was time barred and consequently, it asked this court to dismiss the same with costs to it.

### **LEGAL ANALYSIS**

16. As a Preliminary issue, this court found it prudent to address the question of whether or not the suit was statute barred.

17. It was evident from the Plaintiff's submissions that he initially filed suit in 2008 in the lower court and the case was subsequently moved to the High Court on 14<sup>th</sup> April 2012. The suit was thus filed seven (7) years after the incident occurred on 21<sup>st</sup> October 2001.

18. The Defendant submitted that the alleged cause of action was tortuous in nature and as a result, the same ought to have been filed within three (3) years as provided for under Section 4(2) of the Law of Limitations Act Cap 22 (Laws of Kenya).

19. It pointed out that no order seeking extension to file suit was exhibited and that when asked why he filed his suit seven (7) years after the incident, the Plaintiff had responded that it was because he had filed a case at Kibera. It also stated that although the Plaintiff obtained leave to file suit out of time, its only opportunity to challenge that leave was during trial.

20. It placed reliance on the provisions of Sections 27 (2) and 28(2) of the Limitation of Actions Act and on the case of **Civil Appeal No 233 of 1998 Crispin Ned Ngari & Another vs Churchill Odera** (unreported) where the Court of Appeal held that a submission under Limitations of Actions Act ought to have been taken during trial and not during the appeal therein. It was emphatic that the delay in the Plaintiff filing the suit herein was inordinate and unexplained. It was its contention that the Plaintiff did not explain the delay in filing suit between 2014 when the Ruling of the Inquest was delivered and 2006 when he obtained Letters of Administration.

21. Section 4(2) of the Limitations of Actions Act provides as follows:-

**“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued...”**

22. Section 27 of the Limitations of Actions Act provides that:-

**1. Section 4(2) does not afford a defence to an action founded on tort where-**

**a. the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and**

**b. the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and**

**c. the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and**

**d. the requirements of subsection (2) are fulfilled in relation to the cause of action.**

**2. The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which-**

**a. either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and**

**b. in either case, was a date not earlier than one year before the date on which the action was brought.**

23. Further Section 28 of the Limitations of Actions Act states that:

**1. An application for the leave of the court for the purposes of section 27 of this Act shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.**

**2. Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient—**

**a. to establish that cause of action, apart from any defence under section 4(2) of this Act; and**

**b. to fulfil the requirements of section 27(2) of this Act in relation to that cause of action.**

24. It was evident from the facts of this case that the Plaintiff did not seek leave to institute the suit herein in line with Section 27 (2) and Section 28 (2) and (b) of the Limitations of Actions Act. There was also no evidence that the material facts of this case were outside his knowledge.

25. On being Cross-examined, the Plaintiff stated that he brought the case after seven (7) years because the Ruling of the Inquest was given in 2004. He also stated that his advocate obtained leave before he filed suit on his behalf. His advocates did not address themselves to this issue despite the Defendant's advocates having raised the same in the Statement of Defence and as one of the issues to be determined by this court.

26. This court pored over all the documents, pleadings and proceedings in both the lower court files **CMCC No 7928 of 2008** and the file herein, **HCCC No 246 of 2012** and did not see any order granting the Plaintiff leave to file his suit out of time. Although the Defendant alluded to such leave, this court did not see the said order. In the absence of any evidence to the contrary, this court came to the firm conclusion that for all purposes and intent, the Plaintiff's suit was therefore statute barred. The court was left with no option but to dismiss the same.

27. To avoid determining this matter on a technical point of law and in the event that there was really an order to file suit out of time but the same was misplaced, this court went a step further to pronounce itself on both liability and quantum.

28. Notably, the Plaintiff was not present at the time of the incident. He could not therefore have stated that there was no watchman or any other person in the swimming pool area. PW 2 was also not present. He was at the gate with the Security Guard when he was told that a child had died at the swimming pool. It was only when he got there that he found that the child was the deceased herein.

29. PW 3 testified that on the material date he was swimming at the swimming pool with the deceased. He was in the children's pool while the deceased was at the main pool. The deceased had removed his clothes. He heard children screaming that the deceased had fallen into the pool. He admitted that the pool was under construction and said that they just went to the pool to swim.

30. PW 4 told this court that he was called to rescue the deceased and he was the one who pulled him out of the swimming pool. He testified that when he enquired from the children who were at the pool what had happened, they told him that the deceased had most probably got tired after he went to the deep end of the swimming pool.

31. In the event this court would have found that the suit was properly filed, it would have apportioned liability at 60% - 40% as against the deceased and the Defendant herein.

32. The apportionment of liability was premised on the ground that the deceased voluntarily went to the pool that was under construction and went to the deep end. His drowning pointed to the fact that he may not have been a good swimmer or if he was a good swimmer, there were other factors that did not point to the Defendant's negligence.

33. On its part, the Defendant was negligent for having the swimming pool that was still under construction unattended, it had not demonstrated that it had placed signs to warn people not to go into the swimming pool or fenced it to discourage people from swimming in the pool. It is for that reason this court would not have accepted thirty (30%) contribution on the part of the Defendant as it had proposed.

34. Turning to the issue of quantum, the Plaintiff had proposed settlement as follows:-

<b>Loss of expectation of life</b>	<b>Kshs 600,000/=</b>
<b>Pain and suffering</b>	<b>Kshs 600,000/=</b>
<b>Loss of dependency</b>	<b>Kshs 8,400,000/=</b>
<b>2/3 of 12 ×30,000×35</b>	
<b>Special damages</b>	<b><u>Kshs 208,531/=</u></b>

**Kshs 10,800,531/=**

He further submitted that the court should award a sum of Kshs 21,000,000/= as reasonable compensation for the loss of the deceased.

35. He relied on the cases of HCCC 1705 of 2002 Muli M. Kitolo & Another vs Tobias M. Kisule, HCCC 1597 of 2000 Musa Alulwa vs Hon A.G & Another, HCCC 3916 of 1994 George M. Njoroge vs Josphat Mwangi & Another, HCCC 19 of 1997 Mary Khayesi & Another vs Mwilu Malunga & Another and HCCC 3723 of 1990 Helen Muhonja Maina vs Peter K. Gituka. He did not analyse the cases to demonstrate how the same were relevant to his case.

36. On its part, the Defendant averred that special damages would not be awardable as none were pleaded. It proposed a sum of Kshs 10,000/= for pain and suffering, Kshs 100,000/= for loss of expectation of life and a global sum of Kshs 100,000/= as the deceased was aged eighteen (18) years and was a student at the time of the incident.

37. It relied on the cases of Nairobi HCCC No 2343 of 1993 Marko Mwenda vs Bernard Mugambi & Another, Sheikh Mushtaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others [1982 -88] 1 KAR 946 Nakuru and HCCC No 339 of 1998 Betty Ngatia vs Samuel Kinuthia Thuita

38. Having considered the parties submissions on the issue of quantum, it was the considered view that the Plaintiff's claim was clearly exaggerated. He had not pleaded special damages in the Plaintiff. He ought to have amended his Plaintiff to include the same. Although he tendered evidence of receipts in the sum of Kshs 208,531/= the same were not admissible as they were not supported in the Plaintiff. This court would not therefore have awarded him this sum.

39. His claim for loss of expectation of life at Kshs 600,000/= could not be awarded because no case law exists to support such an astronomical figure. The sum of Kshs 100,000/= that was proposed by the Defendant was more in line with the precedents in our jurisdiction. This could be seen from the case of HCCC No 3616 of 1994 George Mburu Njoroge vs Josephat Mwangi & Another (unreported) that the Plaintiff relied upon wherein in 2007 the court therein awarded a sum of Kshs 70,000/= for loss of expectation of life. Taking the inflationary trends into consideration, this court would have awarded a sum of Kshs 150,000/= for loss of expectation of life.

40. The claim of Kshs 600,000/= for pain and suffering that was proposed by the Plaintiff was clearly out of range. The sum of Kshs 10,000/= under this head as suggested by the Defendant was also low bearing in mind the inflationary trends. This court found a sum of Kshs 30,000/= to have been fair and reasonable considering that the deceased died almost immediately he started gasping for air.

41. In the case of George M Njoroge vs Josephat Mwangi & Another (Supra), the court therein awarded a sum of Kshs 10,000/= under this head in 2002. This was the same sum that was awarded in the case of Betty Ngatia vs Samuel Kinuthia Thuita (Supra) that was relied upon by the Defendant herein. The said case was decided in 1999.

42. This court also agreed with the Defendant that since the deceased was a student at the time of his death, he could only have been awarded a global sum as it was difficult to have projected and/or predicted how much he would have earned when he started working. As a form 3 student, it was not possible to make a projection as his career path could not be discerned.

43. This court therefore rejected the Plaintiff's claim for Kshs 10,800,531/= as the same was not justifiable and supported by any documentary evidence and found the principle in the cases of Marko Mwenda vs Bernard Mugambi & Another (Supra) and Betty Ngatia (Administrator of the Estate of Gladys Waithira Ngatia vs Samuel Kinuthia Thuita (Supra) that were relied upon by the Defendant to have been more realistic.

44. In the premises foregoing, this court was of the considered view that a sum of Kshs 468,000/= would have been reasonable compensation. The same is computed as follows:-

<b>Loss of expectation of life</b>	<b>Kshs 150,000/=</b>
<b>Pain &amp; Suffering</b>	<b>Kshs 30,000/=</b>
<b>Loss of dependency</b>	<b><u>Kshs 600,000/=</u></b>
	<b>Kshs 780,000/=</b>
<b>Less 40% contribution</b>	<b><u>Kshs 312,000/=</u></b>

**Kshs 468,000/=**

Plus costs and interest.

**DISPOSITION**

45. The above notwithstanding, this court's decision was that the Plaintiff's suit was incompetent, fatally defective and null and void *ab initio* for the reason that no proof was adduced to demonstrate that it was not statute barred. The same is hereby dismissed with costs to the Defendant.

46. It is so ordered.

**DATED and DELIVERED at NAIROBI this 11<sup>th</sup> day of December 2018**

**J. KAMAU**

**JUDGE**