REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CIVIL APPEAL NO. 11 OF 2015

PRISCILLA NJERI WAMITI …….…… 1ST APPELLANT

ALICE WANJIRU WAMITI ……..…….…… 2ND APPELLANT

PAULINE WAMAITHA WAMITI ……..…... 3RD APPELLANT

VERSUS

SHIKU JOHN COMPANY LTD ……..…....…… RESPONDENT

(***Being An Appeal From The Judgment Of The Chief Magistrate's Court At Nanyuki (Hon. W J Gichimu Principal Magistrate Nanyuki) Delivered On The 23rd July 2015***)

JUDGMENT

1. PRISCILLA NJERI WAMITI, ALICE NJERI WAMITI, AND PAULINE WAMAITHA WAMITI have filed this appeal against the dismissal of their case before the Nanyuki Chief Magistrate's court. Before that court the appellants filed a suit under **Fatal Accident Act Cap. 32,** for the benefit of the deceased's dependants, and the **Law Reform Act Cap 26** for the benefit of the deceased's Estate. The deceased was **George Wamiti Kiama** who died following a road accident whereby he was knocked off his bicycle by the lorry owned by **Shiku John Company Limited, the respondent.**

2. The evidence adduced on behalf of the appellants both oral before court and by adoption of a witness statement was that the deceased who was 70 years old was injured on 23rd April 2004 when the respondent's lorry Registration No. KPE 312 hit him while he was riding his bicycle and he died from those injuries on 20th May, 2004 whilst receiving treatment at the hospital. Evidence of Alice Wanjiru Wamiti was that the driver of the said lorry, namely John Gitau Kamau was charged in Traffic case No. 338 of 2004 before the Senior Resident Magistrates Court Nanyuki with the **offence of Causing death by dangerous driving Contrary to Section 46 of the Traffic Act, Cap 403.** The said driver,by the judgement in that Criminal Case exhibited before the trial court, was convicted as charged on 8th June 2004.

3. The respondent did not offer any evidence in its defence

4. The Learned Trial Magistrate by the judgment delivered on 23rd July 2015 dismissed the appellant's suit. That dismissal provoked this appeal. The appellant was presented the following grounds of appeal.

> ***a. THAT the Honourable Magistrate erred in fact and in Law in his finding that the Appellants had no capacity to prosecute the matter after filing.***

b. THAT the Honourable Magistrate erred in law and fact in holding that the plaintiff's had not proved negligence against the Respondent on a balance of probability.

c. THAT the Honourable Magistrate erred in Law in his finding that a previous conviction a Traffic Case were of no use in a Civil Case filed subsequent thereto based on the same facts.

d. THAT the Honourable Magistrate misdirected himself in law and facts by dismissing the Plaintiffs' suit with costs.

5. The Learned trial Magistrate dismissed the suit on two main grounds. On the first ground the trial court found that the appellants had failed to tender any evidence to prove negligence on the part of the respondent's driver. The Learned trial Magistrate in reaching that conclusion relied on the case of **KIEMA MUTUKU– V- KENYA CARGO HOLDING SERVICES LIMITED [1991] EKAR 258** where the court stated:

"***There is, as yet no liability without fault in the Legal System in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.***"

The trial court in relying on the above case, in its judgment, stated thus:

"In the instant case, the plaintiff (the appellant) did not call any witness who witnessed the said accident. Infact at the close of the plaintiff's case, the court had no idea how the accident occurred. My finding is that the plaintiffs have failed to tender any evidence to prove negligence on the part of the defendant (the respondent)

6. The second ground upon which the trial court dismissed the appellant's suit was that the appellant's had no capacity to prosecute the suit before that court. The trial court found that the Limited Grant of Letters of Administration Ad Litem issued to the appellant, on 16th June, 2005, only gave the appellants power to file suit but no to prosecute or receive proceeds on behalf of the Estate of the deceased. The Limited grant which was produced as an exhibit before court stated that it was "**limited to the purpose only for filing suit"** and until further representation were granted by the court. The learned trial Magistrate relied on the case. **LYDIA NTEMBI KAIRANYA & ANOTHER – VS – THE HON A G [2009] eKLR.** where the Judge stated as follows:

"***From what I have been saying therefore there is no dispute that the plaintiffs filed and have prosecuted this suit on the strength of a limited grant of letters of Administration Ad Litem issued to them jointly by this High Court….. it is not disputed that grant authorized the plaintiffs to file this suit. But that is as far as that limited grant of letters of administration Ad Litem can go. That grant does not contain authority of power to prosecute a filed suit. It did not contain the power to collect or receive proceeds of the suit should the plaintiffs be successful. There should have been included in the limited grant. … Though the plaintiffs prosecuted this suit therefore, they did it without legal power to do so and they lack legal power to collect or receive proceeds from, prosecution of this suit in the event of success…"***

7. The trial Magistrate stated that because the case of **LYDIA NTEMBI** (**supra**) was a high court decision he was bound by it. In making that finding the trial Magistrate stated this in his judgment.

"I therefore find that although the plaintiffs (the appellants) had the power to file suit, they lack the capacity to prosecute the same on the strength of the said Limited grant."

8. The above two issues are the ones this court is called upon to determine in this appeal.

9. On the first issue, whether the appellant had proved negligence against the respondent, solace is found **under Section 47A of the Evidence Act, Cap 80**.

"A *final judgment of a competent court in any criminal proceedings which declares any person*

to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."

10. By virtue of the provisions in the above Section and in view of the conviction of the respondent, and because the respondent did not appeal against his conviction on the traffic offence, he is presumed to be liable in negligence in respect to the fatal accident involving the deceased. This is what was held in the case.

CHRISTALINA ABAYO V PETER KIMARI KIHARA & ANOTHER [2017] eKLR where the court held.

"***I have already stated the manner the learned trial Magistrate determined the suit. With respect, I agree with the submissions of the appellant that the learned Senior Resident Magistrate erred when tying the provisions of Section 34 (1) and 47A of the Evidence Act. The two provisions address two totally different scenarios. The proceedings and Judgment of the traffic court which convicted the 2nd respondent can be used to presume liability for the respondents for negligence pursuant to provisions of Section 47A of the Evidence Act. The respondents failed to tender evidence to prove contributory evidence on the part of the appellant hence they are wholly liable. The order dismissing the suit must therefore be set aside."***

The court in the case

EVERLYNE SHIVACHI VS THARA TRADING LTD [BLOCK 2013]eKLR expressed itself thus while discussing **Section 47 A of Cap 80.**

"A final judgment of a competent court in any criminal proceedings which declares any person guilty of a criminal offence shall after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein whichever is the latest shall be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."

12. A convicted person is not precluded under **Section 47A of Cap 80** from pleading contributory negligence.

ROBINSON –VS - OLUOCH [1971]E A where the court of appeal stated:

"The ***respondent to this appeal was convicted by a competent court of careless driving in connection with the accident, the subject of this suit. Careless driving necessarily connotes some degree of negligence, and we think, without deciding the point, that in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident , was negligent. But that is a very different matter from saying, as Mr. Sharma would have us say, that a conviction of an offence involving negligent driving is conclusive evidence that the convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in subsequent civil proceedings. That is not what Section 47A states We are satisfied that it is quite proper for a person who has been convicted of an offence involving negligence in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident."***

13. In the case of the respondent it did not plead contributory negligence, nor did its driver adduce evidence in defence. For that reason the trial court erred to have failed to find the respondent responsible for the injuries suffered by the deceased because once the respondents driver was convicted in the criminal trial of causing death by dangerous driving it followed that in the civil suit it ought to have been found that the accident occurred as a consequence of the respondent's driver's negligence.

14. The appellant therefore succeeds in respect of the first issue identified above.

15. On the second issue, the appellants were issued with a limited grant of letters of administration Ad Litem. It was on the basis of that letters of administration that the appellants filed the civil suit seeking compensation for the death of the deceased. The case upon which the trial court relied upon to find that the appellants had no capacity to prosecute that suit, namely **LYDIA NTEMBI (supra**) which was a High Court decision, is at variance with the Court of appeals decision of 24th October 2013 in the case **JOEL MUGA OPIJA – V- EAST AFRICAN SEA FOOD LIMITED [2013] eKLR**. From that decision of the court of appeal it is clear that prior to **Legal Notice No. 39 of 2002** the Limited grants that were issued were as per Form 47 of the Forms in the Probate And Administration Rules (**herein after referred to as the Rules**). That Form 47 is granted as provided under **Rule 36 (2) of the Rules,** which Rule provide for special circumstances of urgency which urgency could not wait for court to make full grant and which provides:

> "***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."***

16. In the case of the limited grant issued to the appellant it was limited to filing suit but not to prosecute. Hence why the Learned Trial Magistrate, when considering the High court decision in the case **LYDIA NTEMBI (supra)** found that the appellants, by virtue of the limited grant issued to them had the power to file suit but "they lacked capacity to prosecute the same."

17. **Legal Notice 39 of 2002** however provided for issuance of letters of Administration AD Litem. The Form under which letters of Administration Ad Litem were to be issued is Form (90)B. Under that Form Limited Letters of Administration Ad Litem could be issued for the purpose of filing suit and until further representation were granted by the court.

18.In the case **JOEL MUGA OPIJA** (supra) The justices in that case were facing a ground of appeal very similar to the one before me. The ground of appeal they were considering was whether.

> **"The** ***Learned Judge of the Superior Court erred in law in holding that appellant herein had no locus standi to file the original suit by rejecting exhibit 5 (Limited Grant of Letters of Administration) When it was expressly endorsed thereon that the said grant was for filing suit.***",

The Judges of Court appeal made the following holding in respect of that ground

> "***We will consider the issue of status first. The main reason why the learned Judge sustained the respondent's arguments on this issue is that the form used and its contents limited the Appellants to "collect, get and receive" the estate and doing such things as may be necessary for the preservation of the same until further presentation be granted. She rightly in our view considered that as a very limited grant which did not authorize the respondent to institute or defend any claims on behalf of the estate of the Deceased. Mr. Okoth responds to that by submitting that at the relevant time when the accident happened that Form P & A 47 was the form used for purposes of instituting and defending claims such as was made in this case. He says that the separate forms now in use came into use much later. The accident took place on 16th June, 2001. That is not in dispute. The deceased died on that same day according to the evidence which includes Certificate of Death produced as exhibit. Section 67 (1) of the Law of Succession was clear that no presentation, other than a limited grant for collection and presentation of assets, could be made until there had been published Notice of the application for the Grant. Form 47 used here was undoubtedly that for limited grant and ideally was not a suitable Form for grant that would authorize a person to sue or to defence a suit on behalf of the estate of a Deceased person. However, Rule 70 of the Probate and Administration Rules states:***
>
> ***"The Forms set out in the First Schedule with such adaptations additions and amendments as may be necessary, shall, when appropriate be used in all proceedings under these rules.***

Provided that the Chief Justice may by Notice in the Gazette vary the forms and prescribe such other or additional forms as he thinks fit."

A look at the first schedule indicates that Form 47 is one of such forms which could be used with variations as appropriate. Thus before the Chief Justice gazette a varied form, applicants could use Form 47 as appropriate for all proceedings under the rules. This continued till Legal Notice No. 39 was introduced under the Probate and Administration (Amendment of the fifth schedule Rules) 2003, and a proper form was introduced. This was long after the death of the Deceased and indeed after the Appellant had applied for Letters of Administration under the old provisions.

We think that had the attention of the Learned Judge of the High Court been drawn to the above, and to the fact that the Learned Magistrate had in a ruling allowed the use of form for filing the case, she would have come to the same conclusion she came to in her judgment. We are persuaded that that ground was well taken."

That decision of the Court of appeal in my view sufficiently respondents to Appellants' ground of appeal on locus standi. A party can where the Limited Grant so authorizes file suit or defend suit on behalf of a deceased person. This is so since Legal Notice No. 39 of 2002 authorised the limited letters of administration Ad Litem to file suit. The appellants had obtained Limited Letters of administration Ad Litem. That letter as per Legal Notice No. 39 of 2002 authorized appellant to file their suit.

19. The appellant in view of the above finding also succeed in the second issue.

20. 20. The appellant having succeeded in all the grounds of appeal and since the respondent did not cross appeal on the assessment damages of the trial court this court shall enter judgement as per that assessment of that court in this court's view the said assessment cannot be faulted.

21. In the end the appellants appeal succeeds and the cost of the appeal are awarded to the appellant. There shall therefore be judgment for the appellant against the respondent as follows:

(a)Ksh. 100,000 for pain and suffering

(b) Ksh. 120,000 for loss of expectation of life,

(c) Ksh. 96,000 for loss of dependency; and

(d) Ksh. 5,400 in special damages.

There shall be interest at court rate on awards under (a) (b) and (c) from 23rd July 2015 until payment in full. There shall be interest at court rate on the award under (d) from the date the trial court's suit was filed until payment in full

DATED AND DELIVERED AT NANYUKI THIS 30th DAY OF MARCH 2017.

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Ndungu

1st Appellant: Priscilla Njeri Wamiti .....

2nd Appellant: Alice Wanjiru Wamiti .....

3rd Appellant Pauline Wamaitha Wamiti .....

For Appellant: .....

For the Respondent: ….....

Language: ….....

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE