



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL CASE NO. 342 OF 2011

PETER GITONGA MASHIRA.....PLAINTIFF

VERSUS

JOSEPH NGEMU MBITA.....1ST DEFENDANT

SAID MBARAK SAID.....2ND DEFENDANT

RULING

The plaintiff filed a suit against the defendants for damages following injuries and material damage suffered as a result of a road traffic accident, that took place on 9th October, 2009 along Thika -Garissa road. He blamed the accident on the negligence of the first defendant who was the driver of motor vehicle registration No. KXC 359 owned by the 2nd defendant. This motor vehicle was in collision with motor vehicle registration No. KAS 950 H which was owned and driven by the plaintiff at the time of the accident.

This suit was filed on 15th August, 2011. After service of summons to enter appearance the 1st defendant through Kinyanjui Njuguna & Co. Advocates filed a memorandum of appearance and statement of defence on 23rd August, 2011.

The record shows that the matter was listed severally for pre-trial directions but it would appear there was no compliance with Order 11 of the Civil Procedure Rules. On 18th February, 2016 the 1st defendant filed an application by way of Notice of Motion under Order 24 , Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking orders to strike out the suit against the 1st defendant and costs be granted to the applicant.

The reasons set out on the face of the application are that the 1st defendant died on 17th December, 2010 and the suit was filed on 16th August, 2011. The 1st defendant having died before the suit was filed the suit is a nonstarter and should be struck out. There is a supporting affidavit sworn by one Sheila O. Obiayo an advocate of this court who annexed the death certificate relating to the 1st defendant.

There is a replying affidavit sworn by the plaintiff in opposition to the application which depones that the court was only informed of the death of the 1st defendant on 18th February, 2016 when this matter was scheduled for hearing.

It is also deponed that counsel on record for the 1st defendant were all along aware of this fact but did

not notify the court, or the plaintiff's advocate and therefore the allegation that the suit is an abuse of court process is misconceived.

The plaintiff depones further that the cause of action can survive the death of a defendant and its legal representative may be substituted in his place. It is his prayer therefore that the court substitutes the 1st defendant with its legal representative considering that, when the suit was filed he did not know that the 1st defendant had passed away, which information was only availed on 18th February, 2016.

When the plaintiff filed the suit against the two defendants, the 1st defendant was not alive. It is clear from the death certificate that he had passed on several months earlier. Any claim could only be raised against his estate represented by his personal representative(s). There is no evidence that as at the time the suit was filed anyone had taken out letters of administration for his estate. Even at the time of wiring this ruling, there is no evidence that anyone is possessed of such authority.

It is true therefore that the suit was filed against a non-existing person in the name of the 1st defendant. The plaintiff's cause of action however, survived the death of the 1st defendant but it could only be registered against his estate.

The application to strike the suit against the 1st defendant does not disclose when the advocates knew or were made aware of his death. The fact is that they entered appearance and filed a defence on his behalf. It took them four and a half years to inform the court and the plaintiff's advocate that the 1st defendant had died.

It is clear that the plaintiff cannot proceed against the 1st defendant for reasons set out above. An application to take out letters of administration ought to have been filed within one year from the date of his death. This was not done. Again a complicated legal predicament comes to light. The plaintiff's cause of action is based on tort. More than three years have elapsed since the cause of action accrued.

Even if substitution were to be allowed, the plaintiff's suit against the personal representative of the 1st defendant is time barred under the Limitation of Actions Act. The foregoing being the case, I find it difficult to uphold the plaintiff's suit against the 1st defendant. However, the advocates for the 1st defendant cannot escape blame. They must have received instructions from a living person. This is because they entered appearance and filed a defence. They ought to have known whether or not the 1st defendant was alive. The logical conclusion is that they assumed he was alive and held onto that belief until four and half years later, only to disclose this to the court.

The foregoing notwithstanding, the application must succeed. The plaintiff's suit against the 1st defendant is hereby struck out. The plaintiff shall now proceed against the 2nd defendant who was the owner of the motor vehicle registration No. KXC 359 driven by 1st defendant at the time of the accident.

The advocate for the 1st defendant represented a party who had passed on. There was a legitimate expectation on the part of the plaintiff that he was proceeding against a living person on whose behalf a Memorandum of Appearance and Statement of Defence had been filed, without any disclosure that he had died. The only person(s) who could have known that he had died are the advocates on record.

For that conduct, they must be penalised in terms of costs incurred by the plaintiff and accordingly I make the following orders. The plaintiff's suit against the 1st defendant is hereby struck out. The plaintiff shall have the costs occasioned by this application. The costs shall be paid by the firm of Kinyanjui, Njuguna & Co. Advocates.

Dated, signed and delivered at Nairobi this 2nd Day of March, 2017

A. MBOGHOLI MSAGHA

JUDGE