



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 351 OF 1999

IMELDA MURAMBA JUMA PLAINTIFF

VERSUS

BONIFACE MUINDI & ANOTHER DEFENDANT

RULING

The cause of action arose from an alleged accident on the 13th April, 1998, involving Motor Vehicle Registration No. **KUH 379**. It is further alleged that the deceased **John Baptista Aswani**, was a fare paying passenger in the said motor vehicle and, as a result of the accident the deceased sustained fatal injuries. The 1st Defendant is sued as the driver of the said motor vehicle and the 2nd Defendant as the registered owner of the said same. The Plaintiff has brought this suit as one of the legal representative of the Estate of the deceased on her behalf and on behalf of the other dependants under the Fatal Accident Act and the Law Reform Act.

On the 11th of November, 2004 the Defendant filed a Notice of Intention to raise a point of law to be determined before hearing of the suit. The point for determination is –

“Whether a Plaintiff a co-legal representative of the Estate of the late *John Baptista Aswani* can solely originate and/or maintain these proceedings on behalf of the deceased’s Estate.”

The Defendants contend that since the Grant of Letters of Administration issued on the 21st October, 1998 was issued to two people, one of them cannot bring the suit alone as to do so would be to vary the grant. That although the letter of authority has been filed the same was filed after the institution of the suit, therefore the proceedings are defective and bad in Law.

The Plaintiff opposes the Preliminary Objection on the grounds that the defence admitted the description of the parties. The plaintiff further relies on order 1 Rule 9 where one or more Plaintiffs can sue. The Plaintiff contends that there is no dispute between her and her co- administrator. One has given authority to the other to sue.

I have considered the pleadings, submissions made by counsels, & case law cited.

The following facts are not disputed -

1. **That a Grant of Letters of Administration was issued to the Plaintiff herein together with one Mary Makanda Aswani.**
2. **That the suit herein was filed on the 23rd of February, 1999.**
3. **That the defence was filed on 12th April, 1999.**
4. **That authority letter was filed on the 30th May 1998.**

S.82 of the Law of Succession Chapter 160 of the Laws of Kenya empowers legal representatives of a deceased person to enforce, by suit or otherwise causes of action that survive the deceased or arise out of his death for the Estate.

The Section does not impose the requirement that both in the case of 2 or more administrators must bring the cause of action. However O1 rule 12 (1) & (2) give the procedures to be followed where there are two plaintiffs in a cause.

Order 1 rule 12(1) & (2) of the Civil Procedure Rules provides:-

“12(1) where there are more Plaintiffs than one, any one of more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more Defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceedings.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

The authorities cited by the defence counsel are distinguishable from the current case as they all involved executors/administrators who had disputes as between themselves.

The 2nd representative in this suit has signed an authority letter dated 30th May, 2008 granting the Plaintiff authority to sue on her behalf due her advanced age.

The question for the court’s consideration is whether the plaintiff’s act of filing suit alone and the late filing of the Authority letter render the suit defective.

The said rule above quoted allows one Plaintiff to authorize another and to do so will not be to defect the powers donated by Section 82 of Cap 160 as submitted by counsel for the Defendants herein. In my view, it is for purposes of allowing matters to proceed, where it is not possible or it will cause hardship, delay or inconvenience if all Plaintiffs were to be involved directly in a suit.

I find that the filing of the authority letter was an attempt by the plaintiff to comply with the law. In the notable case of MICROSOFT CORPORATION LTD & ANOTHER vs. MITSUMI COMPUTER GARAGE (2001) KLR 470 Ringera J (as he then was) said in part

“where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit.

Deviation from lapses of form & procedure which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated to as nullifying the legal instrument thus affected. In those instances the court should rise to its higher calling to do justice by saving the proceedings in issue.

Rules of procedure are the hand maiden of justice and not mistresses of justice. They should not be elevated to a fetish. That is to facilitate the administration of justice in a fair, orderly and

predictable manner not to fetter or choke it”

In the case of *MACHIRA VS NDANJERU (1982-88) KLR 1062* Apaloo JA stated

“At all times it seems to me that the appellant is merely standing on bare technicalities. Nobody has a vested right in procedures. And a court, must at least in the present day strive to do substantive justice to the parties undeterred by technical procedure rules.”

Guided by the above authorizes, I am persuaded that in this matter I should not consider the technicalities raised. Upholding the preliminary objection will be treating the plaintiffs pleading before the court as a nullity, thus shutting out the deceased estate from pursuing their claim. Admitting the claim on the other hand will not prejudice the defendants’ case. This in my view this is a proper case for the court to rise to “its higher calling” to do substantive justice by saving the proceedings. I therefore decline to uphold the preliminary objection and dismiss the same. Costs in the cause.

Dated and delivered this 2nd July, 2009.

ALI- ARONI

JUDGE