Gateru & another (Suing as the Legal Administrators of the Estate of EK (Deceased)) v Regina & another (Civil Case 237 of 2019) [2024] KEMC 160 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEMC 160 (KLR)

REPUBLIC OF KENYA

IN THE NAKURU LAW COURTS

CIVIL CASE 237 OF 2019

PA NDEGE, SPM

APRIL 25, 2024

BETWEEN

HELLEN WANJIRU GATERU .... 1ST PLAINTIFF

CATHERINE GATERU .... 2ND PLAINTIFF

SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF EK (DECEASED)

AND

GICOVI NJOKI REGINA .... 1ST DEFENDANT

DENNIS MBAYA MUTEGI .... 2ND DEFENDANT

JUDGMENT

1. The plaintiffs herein have brought this suit against the defendants herein, Gicovi Njoki Regina and Dennis Mbaya Mutegi (hereinafter referred to as the 1st Defendant and 2nd Defendant, respectively), praying for damages under the Fatal Accident Act, Cap. 32 of Laws of Kenya, damages under the *Law Reform Act*, cap 26 of the Laws of Kenya, special damages of Kshs. 127,200/=, costs an interest.

2. It is the plaintiffs' case that on 21.01.2018 or thereabouts, the deceased was lawfully walking off the road along Ndondori – Lanet road at Githioro area when the 2nd Defendant either by himself, his authorized driver, servant and/or agent so negligently drove, managed and/or controlled motor vehicle registration number KCE 408C causing it to lose control, veered off the road and knock down the deceased whereby he sustained fatal injuries. The particulars of the negligence on the part of the 2nd Defendant were pleaded in paragraph 5 of the Plaint dated 18.01.2019. The plaintiffs therefore holds the 1st defendant vicariously liable as the registered owner of the motor vehicle, for the negligent acts and/or omissions of the 2nd Defendant and the defendants are therefore jointly held liable for the occurrence of the accident.

3. The defendants were served with the summons and pleading but failed to enter appearance. Interlocutory judgment was therefore accordingly entered against them. I however, for reasons to be explained hereinafter, find that this judgment is final as against the defendants for the liquidated claim for Kshs. 127,200/- special damages.

4. As required, the matter proceeded for formal proof with respect to claim for damages under the Fatal Accident Act and *Law Reform Act*. One of the plaintiff was the only witness for the plaintiff. She testified as PW1 and stated that she was told by her sister on 21.01.2018 that the accident herein had occurred and that the deceased had been killed. She then informed the court that she blamed the defendants for the accident. She produce several documents to prove the claim herein. The documents were as filed and were produced as PEXH. NOS 2 to 13, and included a police abstract which did not however apportion any blame for the accident as it confirmed that the matter was still pending under investigations. There was also no eye witness called to prove that the accident herein happened due to the defendant; negligence as pleaded.

5. Learned counsel for the plaintiff in his written submissions has summarized some of the issues for determination. To this Court's mind, failure by the Defendants to enter appearance or to file a defense does not necessarily mean that they admit the claim. In practice, there are instances when a party will file a defense and admit part of the claim therein. Admission in law requires a positive indicator, either express or by way of implication. This Court finds that the failure by the Defendants to enter appearance or file a defense only means that the matter will proceed for hearing as undefended or unopposed but it does not compel the Court to find in favor of the Plaintiffs. To draw a distinction between failure to file a defense and admission, this Court finds that the former results in entry of interlocutory judgment and the latter results in entry of judgment on admission. This Court thus does not find that failure by the Defendants to file a defense amounted to an admission of the claim against him. It only permitted the Court to enter interlocutory judgment against them with respect to the claim for pecuniary damages as per the provisions of Order 10 Rule 6 of the Civil Procedure Rules which has already been done.

   The issue herein is however whether or not the entry of the interlocutory judgment against the Defendants absolved the plaintiffs from the requirement of proving liability.

6. The provisions of law with respect to judgments entered in default of appearance or in default of filing defense are found in Order 10 of the Civil Procedure Rules. From the onset, this Court has to make a distinction between judgments based on claims for liquidated sums and claims for pecuniary damages. The twin provisions on these items are Order 10 Rule 4 and Order 10 Rule 6 of the Civil Procedure Rules which provide as follows: -

   > Judgment upon a liquidated demand [Order 10 Rule 4]
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   > Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail to so appear, the Court shall on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of judgment, and costs.
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   > Interlocutory Judgment [Order 10 Rule 6]
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   > Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such

defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

7. The above provisions notwithstanding, the Court also observes that the rules make provision for hearing upon failure by a Defendant to appear as follows: -

    General rule where no appearance entered [Order 10, rule 9.]

    Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.

8. The Plaintiffs' claim is not only for pecuniary damages but also for negligence. This means that once interlocutory judgment was entered against the Defendants, the Court was still required to hear the Appellants on the aspect of liability for the claim on negligence. Where there is another claim in addition to that of pecuniary damages, the matter will have to be heard for a determination on that other claim as anticipated by Order 10 Rule 9.

9. This Court therefore does not accept that once interlocutory judgment has been entered, assessment of damages is the only thing left for the Court to do in cases of negligence claims. In my view, Order 10 Rule 6 applies in cases of pecuniary damages only. It does not apply where there is a further claim, other than for detention of goods with or without pecuniary damages. When there is some other aspect of the claim besides the claim for pecuniary damages, as a claim for negligence, the Court will have to consider such a claim on the merit and satisfy itself that the same has been proven through 'formal proof' proceedings before proceeding to assess damages. This is the course adopted in Mwatsau Vrs Maro (1967) EA 42, a case of pecuniary damages for breach of warranty of title which the Court (Harris J) found the registrar could not enter judgment in default of the defense.

10. The Court does not therefore find that the entry of interlocutory judgement absolved the plaintiffs from proving liability by way of hearing in Court. This Court thus finds that despite omission by the defendants enter appearance or to file a defense in the matter, the Court was still required to have the matter heard with respect to liability, in addition to the question of assessment of damages.

11. It appears that Counsel for the plaintiffs proceeded on the mistaken interpretation of the provisions of Order 10 Rule 6 that he was not required to call any evidence with respect to the aspect of liability for the claim of negligence. This judgment is an end product of formal proof.

12. The term formal proof has been considered by Emukule J in Samson S. Muitai & Another Vrs African Safari Club LTD & Another [2010] eKLR and approved by Havelock J in Rosaline Mary Kahumbu Vrs National Bank of Kenya Ltd [2014] eKLR as follows: -

> In the present circumstances however, the Defence was struck out and thus the Defendant does not have the opportunity or privilege to present its evidence and argument. In light of the absence of a Defence on the file, it follows logically, that the matter would proceed to formal proof. What therefore is hearing by formal proof? In the case of Samson S. Maitai & Another v African Safari Club Ltd & Another [2010] eKLR, Emukule, J observed thus;
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> > "....... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If

that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."

8. Can hearing therefore, by formal proof, be similar to a full hearing? According to the observations of Emukule, J, in a formal hearing, all rules of evidence and procedure are observed and the party to a suit has to adduce evidence sufficient to sustain the suit. In adducing this evidence, the party has to raise a presumption that whatever is claimed is true and this therefore goes to the merits of the case. The Court considering a full hearing, to determine the matter based on the evidence that is presented before it by parties. In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.

Whether the doctrine of res ipsa loquitor applied to the Plaintiffs' case.

13. I further find that the doctrine of res ipsa loquitor does not have a blanket application to all negligence claims. Evidence must first be laid as to how the accident happened before the court can decide whether the doctrine applies in those circumstances. There was no direct and admissible evidence adduced herein of how the accident happened. I thus fond no basis

Conclusion

14. The plaintiffs' claim on general damages be and is hereby dismissed for want of proof of negligence on the part of the defendants. They are however at liberty to proceed and execute for Kshs. 127,200/= special damages only, costs from the date of filing upto 09/12/2022, the date of the entry of judgment, and interest which are hereby granted.

DATED AND DELIVERED ON THIS 25TH DAY OF APRIL, 2024.

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

Appearances

Obura........Advocates for the Plaintiffs