IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MURGOR, LAIBUTA & NGENYE, JJ.A.)

CIVIL APPEAL NO E066 OF 2023

BETWEEN

MBEYU LELI and PASCAL JULO LELI.....APPELLANTS

(Suing as the legal representatives of the estate of* LELI JULO *(deceased)

AND

CORNESTONE CLEARING & FORWARDING LTD..RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (D. O. Chepkwony, J.) delivered on 18th February 2019

in

Mombasa Civil Appeal No.34 of 2012)

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JUDGMENT OF THE COURT

Mbeyu Leli and ***Pascal Julo Leli (Suing as the legal representatives of the estate of Leli Julo, (the Appellants)*** instituted *Civil Suit No. 107 of 2010* in the Senior Principal Magistrate's Court at Mariakani against ***the Respondent,***

Cornerstone

Clearing & Forwarding, seeking general damages under the Fatal Accidents Act and the Law Reform Act, together with special damages, costs and interest.

The Appellants' case was that, on or about 19th March 2009, the deceased, while lawfully walking as a pedestrian along the Nairobi–Mombasa Road at Maji ya Chumvi, was fatally injured when the Respondent's driver negligently and recklessly drove motor vehicle registration number KAT 846D–ZC2032, thereby knocking down the deceased.

The Respondent entered appearance and filed a statement of defence on 22nd October 2010 denying each and every allegation of negligence and all particulars of loss and damage as pleaded in the plaint. It further contended that it was a stranger to the alleged accident and, in the alternative, that if any such accident occurred, the same was wholly or substantially occasioned by the negligence of the deceased.

The matter proceeded to hearing at which the Appellant called four witnesses while the Respondent called one witness in support of its defence. Upon conclusion of the trial, the learned

trial magistrate dismissed the suit with costs to the Respondent having found that the Appellants had no *locus standi* to institute the proceedings on behalf of the deceased's estate as the grant of letters of administration *ad colligenda bona* did not grant them power to file the suit.

Aggrieved by the decision, the Appellants preferred an appeal to the High Court raising eight grounds of appeal which were that: the learned trial magistrate was in error in holding that the grant of letters of administration adduced by the Appellants did not confer authority to file the suit; in holding that the Respondent denied the Appellant's *locus standi*, yet it was expressly admitted in the defence; in disregarding a grant issued by the High Court when the court had no jurisdiction to do so; in failing to properly evaluate the evidence of the eye witness who testified that the Respondent's vehicle was being driven at an excessive speed and without headlights, and whose testimony remained unchallenged; in holding that the deceased was 50% liable for contributory negligence against the weight of the evidence; in wrongly relying on statements of drivers who did not testify, and on a sketch plan which was inconsistent with the driver's own statement; in failing to consider the Appellants' evidence and submissions, thereby arriving at an erroneous finding on liability; and in failing to distinguish between awards under the Fatal Accidents Act and the Law Reform Act.

Upon considering the record, the High Court identified the

main issue for determination to be whether the Appellants had the requisite *locus standi* to institute the suit before the trial court. The High Court concluded that a limited grant of letters of administration *ad colligenda bona* whose purpose was to strictly

collect and preserve the assets of the deceased's estate pending the issuance of a full or further grant does not confer authority to institute or defend proceedings in court; that the Appellants lacked capacity to bring claims under the Law Reform Act, which require a grant *ad litem* or a full grant. However, the court emphasized that this limitation does not bar claims under the Fatal Accidents Act, which can be maintained by a person acting for the benefit of the deceased's dependants even without a full grant.

Turning to the question of negligence, the High Court reviewed the evidence on record and found that the deceased was walking along the Nairobi– Mombasa highway when he was struck by the Respondent's vehicle, which was driven at a high speed and, according to eyewitness testimony, without headlights. Although the defence presented evidence showing that the headlights were functional, the court observed that the presence of skid marks that extended seven metres was an indication that the vehicle was being driven too fast. The court held that the driver owed a higher duty of care to pedestrians, and that the evidence did not show any sudden or reckless act by

the deceased.

Consequently, the High Court disagreed with the trial magistrate’s apportionment of liability at 50:50, having found it to be unjustified in view of the evidence. Instead, the court held the Respondent to be 80% liable for the

accident and apportioned 20% contributory negligence to the deceased.

As to damages, the court upheld the quantum awarded by the trial court save for the awards made under the Law Reform Act — Kshs. 15,000 for pain and suffering, and Kshs. 100,000 for loss of expectation of life — which were set aside since the Appellant lacked capacity to pursue them. The remaining award under the Fatal Accidents Act was Kshs. 490,000 which, after deducting 20% contribution, left a net award of Kshs. 392,000.

In conclusion, the High Court allowed the appeal, set aside part of the trial court's Judgment, and entered Judgment in favour of the Appellant for Kshs. 392,000 as general damages under the Fatal Accidents Act, together with the costs of the appeal and of the suit in the lower court. The court affirmed that, while a limited grant *ad colligenda bona* does not confer capacity to sue under the Law Reform Act, it does not bar dependants from pursuing claims for loss of dependency under the Fatal Accidents Act.

Still aggrieved, the Appellant has filed an appeal to this Court on grounds that: the learned Judge was in error in holding that the grant of letters of Administration issued to the Appellants did not authorize them to file suit, yet the grant issued specifically stated *"...wherever by Law to do so filing suit"*; in failing to

appreciate the decision of this Court in the case of ***Law Society of Kenya vs Commissioner of Lands and Morjaria Abdalla [1984] KLR 490***,where the wording

of the grant constituted a valid grant for filing suit; in failing to deal with the

issue of costs in the subordinate court and in the High Court; and in failing to award interest on the decretal sum.

Both parties filed written submissions. When the appeal came up for hearing on a virtual platform, learned counsel ***Mr. Nyabena*** appeared for the Appellant, but there was no appearance for the Respondent. Briefly highlighting their written submissions, counsel for the Appellants submitted that the limited grant of letters of administration issued to them on 23rd August 2010 in *High Court Succession Cause No. 172 of 2010* specifically empowered them, not only to collect and preserve the deceased's estate, but also to file a civil suit *"...whenever by law to do so."* Counsel contended that the High Court misdirected itself by giving a narrow and restrictive interpretation to the grant while ignoring the explicit words that allowed them to institute proceedings; that the High Court's finding amounted to a selective reading of the grant and a disregard of the spirit of ***Article 159(2)(d)*** of the ***Constitution***, which commands courts to administer justice without undue regard to procedural technicalities. It was their submission that the court should not have elevated form over substance or denied justice on a mere

technicality. The Appellants invoked the “Oxygen Principles” under ***Sections 1A, 1B,*** and ***3A*** of the ***Civil Procedure Act*** and urged this Court to lay emphasis on the provision of substantive justice.

In further support, the Appellants relied on this Court's decision in the case of ***Law Society of Kenya vs Commissioner of Lands and Morjaria Abdalla (supra)*** for the proposition that, even though a grant *ad colligenda bona* is ordinarily for collection and preservation, where it is expressly worded to include representation in a suit, it constitutes a valid grant conferring locus standi. It was argued that the learned Judge failed to follow this binding precedent contrary to the doctrine of *stare decisis*, and by disregarding the express authorization contained in their grant.

Counsel further submitted that the High Court, having found in their favour on liability, failed to address or award costs and interest; that, since the High Court reversed the trial court's finding on liability in their favour, the logical consequence was that the order on costs and interest should have been reinstated.

On interest, the Appellants argued that this was prayed for in the primary suit and initially awarded by the trial magistrate; that, therefore, once judgment was reinstated in their favour, interest should have been granted from the date of Judgment in the subordinate court until payment in full.

The Respondent, on its part, submitted that this Court, being seized of a second appeal, is confined to issues of law only and that, on a second appeal,

the court must resist the temptation to re-examine factual issues and confine itself strictly to questions of law unless it is shown that the lower courts acted on wrong principles or reached perverse findings. For this preposition, counsel cited ***Section 72(1)*** of the ***Civil Procedure Act*** and the decisions in ***Nkene Dairy Farmers Co-operative Society Ltd & Another vs Ngacha Ndeiya [2010] eKLR;*** and ***Tabitha Nduhi Kinyua vs Francis Mutua Mbuvi & Another [2014] eKLR.***

On the question of *locus standi*, the Respondent submitted that the High Court correctly found that the Appellants lacked the requisite capacity to file the primary suit; that the limited grant *ad colligenda bona* only empowered the Appellants to preserve and collect the deceased's estate and did not extend to instituting suits. It was argued that the requirement for a proper grant of letters of administration *ad litem* before commencing a claim under the Law Reform Act is not a procedural technicality, but a substantive legal requirement that goes to the jurisdiction of the court.

Counsel rejected the Appellants' reliance on ***Article 159(2)***

(d) of the Constitution, arguing that the provision is not a cure-all for failure to comply with mandatory procedural requirements. The Supreme Court decision in

Zacharia Okoth Obado vs Edward Akong'o Oyugi & Others,

[2014] KECA 784 (KLR) was relied upon for the proposition that ***Article 159*** of

the ***Constitution*** is not a panacea for all procedural defects, and that its application must be determined on a case-by-case basis; that, on this basis, the Appellants lacked *locus standi* to pursue claims under the Law Reform Act, and to dismiss the claims for awards of Kshs. 100,000 and Kshs. 15,000 respectively.

On the claims for costs and interest, it was submitted that, since the trial magistrate had dismissed the entire case, there was no judgment or award upon which costs and interest could be computed. The High Court's later award of Kshs. 392,000 arose after re-evaluation, and this amount had already been settled in full by cheque No. 081107 dated 27th September 2022. The Respondent asserted that no further interest accrued after the payment of that decretal sum and that, at the time of payment, there was no order for costs or interest. In the alternative, it was submitted, if this Court were inclined to allow the appeal on costs or interest, then such orders should only take effect from the date of this Court's judgment and not retrospectively.

This being a second appeal, the jurisdiction of this Court is limited to issues of law only. This Court will not ordinarily interfere with concurrent findings of fact by the two lower courts unless it is

demonstrated that such findings were based on no evidence, were founded on a misapprehension of the evidence, or that the courts acted on wrong principles in reaching their conclusions.

In the case of ***Kenya Breweries Ltd vs Godfrey Odoyo [2010] eKLR*****,** this Court reaffirmed the limits of its appellate jurisdiction in the following terms:

> ***"In a second appeal, however, such as the one before us, we have to resist the temptation of delving into matters of fact. This Court, on a second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters, they should not have considered, or failed to consider matters they should have considered, or that looking at the entire decision, it is perverse."***

On careful consideration of the Record and Memorandum of Appeal, and the submissions of counsel, the issues for determination crystallize into two central issues:

> *i) Whether the 1st appellate court misdirected itself on the interpretation and application of the law relating to locus standi and the legal effect of a limited grant ad colligenda bona; and*
>
> *ii) Whether the 1st appellate court was in error in failing to order payment of costs and interest, and whether such omission warrants interference by this Court.*

On the first issue, the Appellants contend that their grant issued on 23rd August 2010 by F. Azangalala, J. (as he then was) in *High Court Succession Cause No. 172 of 2010,* was expressly worded to include the authority "*wherever by law to do so, filing*

civil suit," and that, therefore, it was a valid grant conferring capacity to institute proceedings. They contend that the learned Judge failed to appreciate the express wording of the grant and misapplied the law by treating it as an ordinary grant *ad colligenda bona*.

On the other hand, the Respondent argued that the High Court correctly applied the law and that the requirement for a proper grant *ad litem* before instituting a suit is a mandatory substantive requirement, and not a mere procedural technicality curable by ***Article 159(2)(d)*** of the ***Constitution***, and that the authority to litigate cannot be implied or extended beyond the express limits of a grant *ad colligenda bona* which, by its nature, is restricted to collection and preservation of estate property.

Under ***Section 2*** of the ***Law Reform Act*** and ***Section 4*** of the ***Fatal Accidents Act***, a person entitled to bring a cause of action on behalf of the estate of a deceased person is the personal representative, that is, an executor or administrator of the estate. Such a person must first obtain an appropriate grant of representation in order to be clothed with the necessary *locus standi* to bring such suit. This position has long been affirmed by this Court in ***Virginia Edith***

Wamboi Otieno vs Joash Ochieng Ougo & Another [1982–88] 1 KAR and ***Trouistik***

Union International & Another vs Jane Mbeyu & Another, Civil Appeal No. 145 of

1990.

To institute proceedings on behalf of a deceased person, a party must obtain either a full grant or a limited grant, depending on the circumstances in question. A full grant of representation authorizes the holder to administer the

entire estate of the deceased, whereas a limited grant, as the name suggests, restricts the holder's authority to a specific purpose relating to the estate.

The legal foundation for limited grants is found in ***Section 54*** of the ***Law of Succession Act, Cap 160***, which provides:

> ***"A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act."***

The Law of Succession Act and the Probate and Administration Rules provide for several types of limited grants, each of which is tailored to a distinct purpose. Due to their limited nature, each form of limited grant is required to be applied for the purpose specified by the Act. The nature of the suit before the trial court necessitated the application of two limited grants.

The first is the Limited Grant of Letters of Administration *ad litem*, provided under ***Form 14*** of the ***Fifth Schedule*** to the Act. This form is ordinarily utilized to enable the estate of a deceased person to be represented in court proceedings. It authorizes the grantee to represent the deceased in a pending or prospective suit and remains valid until the suit is determined and fully

executed. The principle was articulated in the case of ***Greenway vs McKay [1911] 12 CLR 310*** where the court affirmed that a grant *ad litem* is specifically for purposes of litigation involving the estate.

The second form is the Limited Grant of Letters of Administration *ad colligenda bona* provided under ***Section 67*** of the Act and ***Rule 36 of the Probate and Administration Rules.*** Such a grant may be issued in circumstances that all for urgent action where it would be impracticable to await the issuance of a full grant. The purpose of this grant is expressly limited to collecting, getting in, and preserving the assets of the deceased's estate until a further or full grant can be made. ***Rule 36(2)*** specifically provides that:

> ***"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 until a further grant is made."***

Thus, a grant *ad colligenda bona* is ordinarily applied in emergency situations where property of the deceased's estate is in danger of being wasted or dissipated before a full grant can be obtained. The nature and scope of such a grant were discussed in ***Re Cohen [1975] VR 187*** where it was held that this form of limited grant is designed solely to protect the estate from waste or loss, and does not confer authority to litigate or represent the deceased in court proceedings.

In the case of ***Sheila Nkatha Muthee vs Alphonce Mwangemi Munga & others***

& Frank Helge Neugebauer ***[2016] KECA 577 (KLR),*** this Court held:

"The issuance and purpose of a grant of letters of administration ad colligenda bona (emphasis by underline) is provided under Section 67 of the Law of Succession Act Cap 160 Laws of Kenya and procedure thereof is under Rule 36 of the Probate and Administration Rules. The Rules expressly state that the purpose of such a limited grant is to enable the applicant to collect, give entry, receive the estate and do such acts as may be necessary for the preservation of the estate of the deceased until the grant is made. Set out in full Rule 36 provides:

(1) Where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration ad colligenda bona defunct of the estate of the deceased.

2. 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.

The limited grant ad colligenda bona does not give authority to the holder to file an action in court on behalf of a deceased and more so where the grant does not bear an endorsement to the effect that it is limited to the purpose of instituting a suit. (emphasis ours)"

In the instant case, although the Appellants' grant contained additional language empowering them to "filing civil suit," the learned Judge correctly found that the dominant purpose and legal character of the grant remained one of *ad colligenda bona*. The inclusion of the additional phrase did not, in itself,

transform the nature of the grant or confer upon the Appellants the status of legal representatives under the Law Reform Act.

In so far as the case of ***Law Society of Kenya vs Commissioner of Lands and Morjaria Abdalla (supra),*** and on which the Appellants rely, is concerned, it should be appreciated that what was in issue was a grant expressly made under ***Section 54*** and paragraph 14 of the Fifth Schedule, whose purpose was specifically to enable representation of the deceased in a pending appeal, and not the commencement of a suit. As a result, that decision cannot be extended to apply to a grant *ad colligenda bona* whose purpose is otherwise restricted by statute and did not authorise the holder to file an action in court on behalf of a deceased.

We would add further that ***Article 159(2)(d)*** of the ***Constitution*** cannot be invoked to cure a jurisdictional defect as was the case here. The absence of a valid grant is not a procedural technicality but a substantive legal deficiency that goes to the very root of the proceedings.

Given the foregoing, we find that there was no misdirection

in the learned Judge's interpretation of the legal effect of a limited grant *ad colligenda bona.* The Judge rightly concluded that the Appellants lacked *locus standi* to pursue claims under the Law Reform Act, even though they were properly before the court

under the Fatal Accidents Act, which position was elaborated by this Court in the case of ***Cherangany Hills Ltd & another vs Wanyama (Suing as the Administrator to the Estate of Brian Khisa Wanyama) [2025] KECA 1030 (KLR)*** thus:

> ***"We must underscore that the Law Reform Act and the Fatal Accidents Act address damages for wrongful death but with different focuses. The Law Reform Act allows the deceased's estate to claim damages for the deceased's pain and suffering between the time of injury and death, while the Fatal Accidents Act allows dependants of the deceased to claim for financial losses, including loss of dependency. Therefore, the Law Reform Act is for the estate of the deceased, while the Fatal Accidents Act is for the deceased's dependants, such as spouses, children, and parents. It is also important to emphasize that loss of dependency is a significant head of damage, quantifying the financial loss the dependants have experienced and will continue to experience in the future due to the deceased's death. The Law Reform Act covers the deceased's pain and suffering, loss of amenity, and pre- death financial losses."***

Concerning the next issue of whether the 1st appellate court was in error in failing to order costs and interest, and whether such omission warrants interference by this Court, the Appellants have faulted the High Court for failing to pronounce itself on

interest and costs after allowing the appeal and entering Judgment in their favour. They argue that, having succeeded in overturning the trial court’s dismissal and obtaining an award of damages, they were entitled, as a matter of course, to both costs and interest. They rely on the principle that costs follow the event unless the court, for good reason, orders otherwise. The

case of ***Supermarine Handling Services Ltd vs Kenya Revenue Authority [2010] eKLR*** was also cited for the proposition that costs are a matter of judicial discretion, but that such discretion must be exercised judiciously and on sound principles.

The Respondent, on the other hand, submitted that the trial court dismissed the suit in its entirety and, therefore, there was initially no judgment upon which costs and interest could accrue; that, although the High Court eventually awarded Kshs. 392,000, this amount was paid in full on 27th September 2022, and that there was no order on interest or costs at the time. The Respondent asserted that, if this Court were to interfere with that omission, any order on costs and interest should only take effect prospectively from the date of this Court's Judgment.

The general rule as provided under ***Section 27(1)*** of the ***Civil Procedure Act*** is that costs follow the event unless the court, for good reason, orders otherwise. ***Halsbury's Laws of England, 4th ed Re-Issue (2010), Vol. 10, para. 16*** reads that:

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice.”

The guiding principles applicable in costs were as stated by the Supreme Court in the case of ***Rai & 3 others vs Rai & 4 others*** ***[2014] KESC 31 (KLR)*** where it was held that costs follow the event with the discretion of the court exercised judiciously by stating:

> ***"[18] It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation….***
>
> ***Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this court in other cases."***

Likewise, as regards interest, ***Section 26(1)*** of the ***Civil***

Procedure Act vests the court with discretion to award interest on any principal sum adjudged both for the period before and after judgment, unless the court expressly directs otherwise. Where a successful litigant's monetary claim is allowed but no mention is made of interest, the omission may be corrected on appeal,

particularly where the record shows that interest had been specifically prayed for and assessed at the trial.

Although the trial magistrate's Judgment dismissed the suit, the court went on to observe that, had the claim succeeded, costs and interest would have been awarded. Upon appeal, the High Court reversed the trial court's decision, entered Judgment for the Appellants, and awarded general damages of Kshs. 490,000 under the Fatal Accidents Act, subject to 20% contribution. The learned Judge, however, did not pronounce herself on the question of costs or interest. In the absence of reasons to the contrary, and in view of the general principle that costs follow the event, we find this to have been an error on the the part of the High Court, and for which we have reason to interfere with the award on costs and interest. See ***Capital Fish Kenya Limited vs The Kenya Power & Lighting Company Limited*** ***[2016] KECA 56 (KLR).*** The Appellants, having partially succeeded in the High Court, were entitled to partial costs in the trial court and on first appeal, and to interest on the decretal sum from the date of the Judgment of the subordinate court until

payment in full.

In the result, the appeal partly succeeds and, consequently, we make the following orders:

i) The Appellants did not have locus standii to file the suit under the Law Reform Act in the trial magistrate's court;

ii) Pursuant to the award in the High Court, the Appellants will be entitled to interest from the date of the decree in the High Court until payment in full; and

iii) In view of the partial success of the Appellants' appeal in the High Court and in this Court, each party shall bear their own costs in the trial magistrates' court, in the High Court and in this Court.

It is so ordered.

Dated and delivered at Mombasa this 30th day of January, 2026.

A. K. MURGOR
.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.
.....
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA
.....
.. JUDGE OF APPEAL

I certify that this is a True copy of the

original Signed

DEPUTY REGISTRAR