



**Wekesa & another v Mwangi & another (Suing as the administrators  
of the Estate of James Kanene Mwangi - Deceased) (Civil Appeal  
43 of 2019) [2023] KECA 1150 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1150 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPEAL 43 OF 2019  
F SICHALE, FA OCHIENG & LA ACHODE, JJA  
SEPTEMBER 22, 2023**

**BETWEEN**

**ANALIK WEKESA ..... 1<sup>ST</sup> APPELLANT**

**DIOCESE OF LODWAR (THROUGH ITS REGISTERED  
TRUSTEES) ..... 2<sup>ND</sup> APPELLANT**

**AND**

**HELLEN WAIRIMU MWANGI ..... 1<sup>ST</sup> RESPONDENT**

**SIMON NJOROGE MWANGI ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF JAMES KANENE  
MWANGI - DECEASED**

*(Being an Appeal from the Judgment and Decree of the High Court of Kenya at  
Nakuru (Mulwa J), dated 27th October 2016 IN CIVIL APPEAL NO. 215 OF 2019)*

**JUDGMENT**

1. The appeal before us is a second appeal against the judgment of Mulwa J, dated 27<sup>th</sup> October 2016, in which the respondents herein had initially sued the appellants in the Chief Magistrate's Court at Nakuru claiming both special and general damages under the *Fatal Accidents Act* and the *Law Reform Act* as a result of a road traffic accident that occurred on 20<sup>th</sup> November 1996, in which the deceased was fatally injured. The matter was heard by Hon E. Tanui (then Resident Magistrate), who in a judgment delivered on 30<sup>th</sup> July 2007, entered judgment for the respondents against the appellants' jointly and severally in the sum of Kshs 500,000/=.



2. The appellants were aggrieved by the aforesaid findings and judgment whereupon they moved to the High Court on appeal and *vide* a judgment delivered on 27<sup>th</sup> October 2016, Mulwa J, found the appeal to be lacking in merit and dismissed the same in its entirety with costs to the respondents.
3. Unrelenting, the appellants have now filed this appeal that is before us *vide* a Notice of Appeal dated 4<sup>th</sup> November 2016 and a Memorandum of Appeal dated 18<sup>th</sup> June 2019, raising the following grounds of appeal:
  - i. “That the Honourable Lady Justice erred in law in finding that the grant of leave to file the suit out of time by the trial court was merited.
  - ii. That the Honourable Lady Justice erred in finding that a delay in appointment of an administrator in the Probate Cause was proper justification for being granted leave to file suit out of time contrary to the provisions of Section 27 of the Limitations of Actions Act.
  - iii. That the learned judge erred by finding that the submissions by the parties filed in the Trial Court were not part of the Record of Appeal before her and therefore she could not interrogate the basis under which the trial court granted leave to the respondents.
  - iv. That the learned judge erred in law in failing to interrogate the issue of grant of leave to file the suit out of time afresh and arrive at her own conclusion being a first appeal.
  - v. That the learned judge erred in law in failing to consider the issue of ownership on Motor Vehicle Registration Number xxxx which was an issue raised by the appellants.
  - vi. That the learned judge erred by delving into the issue of whether the respondents were rightful dependents within the meaning of Section 4 of the *Fatal Accidents Act* which was not an issue raised by the appellants.”
4. The brief facts in this appeal were as follows; the respondents had on 12<sup>th</sup> July 2007, instituted suit against the appellants on behalf of the Estate of James Kanene Mwangi (deceased), as a result of a road traffic accident that occurred on 20<sup>th</sup> November 1996, in which the deceased was fatally injured. The suit was filed 11 years from the date of the accident and outside the 3 years’ statutory limit period on a claim based on the tort of negligence as provided for in the *Limitations of Actions Act*, Cap 22 of the Laws of Kenya.
5. On 13<sup>th</sup> July 2007, leave was granted to the respondents to file the suit out time. The appellants filed their defense *inter alia* denying the respondents claim and challenged the grant of the said leave to file the suit out of time on the grounds that the same was not factually and legally properly obtained.
6. The issue was considered by the trial court which held that the granting of the said leave was proper as the respondents had to await the determination of the succession cause, wherein objection proceedings had been filed. The appellants were largely aggrieved by the aforesaid finding thus preferring an appeal before the High Court which appeal was dismissed by Mulwa, J on 27<sup>th</sup> October 2016, thus triggering the appeal that is now before us.
7. When the appeal came up before us for plenary hearing on 28<sup>th</sup> March 2023, Mr. Kisinga learned counsel appeared for the appellants whereas Mr. Karanja appeared for the respondents. Both parties sought to rely on their written submissions dated 5<sup>th</sup> December 2022 and 23<sup>rd</sup> January 2023 respectively which they briefly orally highlighted in Court.
8. It was submitted for the appellant that the learned judge erred in law in finding that there was no evidence before the court; that the appellants had challenged the grant of leave to file the suit 12 years



- after the occurrence of the accident and that had the court reconsidered the evidence tendered before it, it would have arrived at the correct finding in law. It was further contended that in the instant case, the appellants had challenged the grant of leave to file the suit out of time both through cross examination and in their written submissions.
9. It was also submitted that the Honourable court erred in law when it held that the delay in the appointment of an administrator was proper justification to grant leave to file suit; that in the instant case, the respondents did not prove that they were unaware of any material facts since they had access to a competent advocate from the year 1996 and that they had access to appropriate advice. Finally, that from the records, it was clear that the respondents were at all times aware of all material facts and that the demise of the deceased and the existence of a claim under the *Fatal Accidents Act* did not meet the requirements of Section 27 of the *Limitations of Actions Act*.
  10. Turning to the other ground of appeal, and as regards the ownership of motor vehicle registration number xxxx, the appellants sought to rely entirely on their written submissions filed in the High Court and did not address us on this issue.
  11. On the other hand, it was submitted for the respondents that on analysis of the factual evidence adduced by the respondents, there was a succession cause ongoing over the legal representation over the estate of the deceased herein in Nakuru High Court Succession Cause No. 85 of 1996, instituted by the petitioner (deceased) and that the respondents herein had filled objection proceedings over the issuance of Grant of Letters of Administration over the estate of the deceased and the court had a duty to determine the proper and rightful legal representative of the estate of the deceased, resulting in the delay of the institution of the suit against the appellants and that the estate of the deceased had every intention to sue the appellants herein for the fatal accident of the deceased.
  12. It was further submitted that the judgment over the legal representation of the estate of the deceased was delivered on 16th March 2007 and Letters of Administration over the deceased's estate issued on the same date to the respondents and that upon issuance of the same, the respondents herein without delay instituted the suit. It was thus submitted that the delay in bringing the suit was reasonable and as a result of the ongoing succession cause and that it was common knowledge that a deceased neither has the audience or capacity and their estate ought to be rightfully represented in order to seek redress.
  13. On the issue of ownership of motor vehicle registration Number xxxx, it was submitted that the appellants were seeking to introduce a new ground of appeal over ownership of the said vehicle and that they had failed to produce any documentary evidence or any relevant evidence otherwise to support their case in their first appeal at the High Court. Consequently, we were urged to dismiss the appellants appeal with costs to the respondents.
  14. We have carefully considered the record, the grounds of appeal, the rival submissions by the parties, the responses thereto, the cited authorities and the law.
  15. This being a second appeal, we are alive to our mandate as has been enunciated in a long line of cases decided by the Court. See *Maina v Mugiria* [1983] KLR 78, *Kenya Breweries Ltd v Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & another v Bernard Munene Ithiga* [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of *Martin v Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as law, and, it should not interfere with the decisions of the trial or first appellate court



unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law.

16. Having carefully perused the record and the rival pleadings by the parties, the following two main issues arise for our determination;
  - a. Whether the learned judge erred in law in finding that the grant of leave to file the suit out of time was merited.
  - b. Whether the learned judge erred in law in failing to consider ownership of motor vehicle registration No. xxxx.
17. Turning to the first issue, it is common ground that an accident occurred on 20<sup>th</sup> November 1996, in which the deceased was fatally injured. It is also common ground that the respondents instituted suit on behalf of the estate of the deceased on 12<sup>th</sup> July 2007 which was 11 years after the accident and outside the 3-year statutory limit period provided under Section 4 of the *Limitation of Actions Act* Cap 22 of the Laws of Kenya, having been issued with Grant of Letters of Administration on 16<sup>th</sup> March 2007. It is also common ground that on 13<sup>th</sup> June 2007, the respondents were granted leave to file the suit out of time.
18. It is also common ground that vide an application dated 26<sup>th</sup> September 2007, the appellants had sought to have the respondents suit struck out on the grounds that the cause of action was statute barred under the *Limitation of Actions Act* which application they later withdrew on 10<sup>th</sup> July 2008, “with no order as to costs to facilitate the disposal of the suit.”
19. It is trite law that pursuant to Section 4 (2) of the *Limitation of Actions Act* Cap 22 of the Laws of Kenya, no cause of action may be brought in tort after 3 years from the date of cause of action. That Section provides:

“

“ 4 An action founded on tort may not be brought after the end of three years  
(2) from the date on which the cause of action accrued.”

Section 27 of the Act further provides for Extension of limitation period in case of ignorance of material facts in actions for negligence etc., *inter alia* as follows:

  1. “Section 4 (2) does not afford a defence to an action founded on tort where:
    - a. the action is for damages for negligence, nuisance or breach of duty whether the duty exists by virtue of a contract or of written law independently of contract or written law; and
    - b. the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consists of or include damages in respect of personal injuries or any person; and
    - c. the court has, whether before or after the commencement of the action, granted leave for the purposes of this Section; and
    - d. the requirements of Subsection (2) are fulfilled in relation to the cause of action.”

Subsection 2 thereof further provides:



2. “The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge [actual or constructive] of the plaintiff until a date which-
  - (a). .....
  - (b) .....”

20. Section 30 (3) of the same Act further provides as follows as regards interpretation of Section 27, 28 and 29 of the Act.:

“ 30 Interpretation of sections 27, 28 and 29

3. Subject to subsection (4) of this section, for the purpose of sections 27, 28 and 29 of this Act, a fact shall be taken at any particular time, to have been outside the knowledge (factual or constructive) of a person, if, but only if:
  - a. He did not know that fact; and
  - b. in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose ascertaining it; and ” (Emphasis ours)

21. In the instant case there is no doubt that the respondents were well aware of the material facts as they were well aware that the deceased was involved in a fatal accident on 20<sup>th</sup> November 1996. Additionally, the respondents had taken steps to address the issue of legal representation in respect of the estate of the deceased vide Nakuru High Court Succession Cause No. 86 of 1996, where the respondents herein had filed objection proceedings against issuance of Letters of Administration in respect of the estate of the deceased to the then petitioner which proceedings took 12 years to conclude. As a matter of fact, and as the record will bear witness “a fatal accident claim benefit” was listed as part of the deceased’s estate in the Answer to the Petition that had been filed by the respondents in the succession cause proceedings.

22. The learned magistrate while considering the issue of whether the respondents claim was statute barred rendered herself as follows:

“Exemptions to this limitation period are to be found under Section 27 of the said Act. On 13/6/ 2007 the plaintiff was granted leave to bring this suit of time *vide* Nakuru CMCC No. 501 of 2007 (OS). The defendant challenges the granting of the said leave in the filed submissions. I have duly considered the submissions of the defendant and the pleadings herein and I make a finding that the grant of leave was proper. The plaintiffs had to await the determinations of the succession cause wherein objections had been filed. The suit is therefore properly before court.” (Emphasis ours).

23. We fully agree with the above sentiments expressed by the trial court for one sole reason; a person without Grant of representation in respect of the estate of a deceased person has no *locus standi* to file suit and an action brought by such a person is incompetent and null and void *in limine*.



24. Under the *Law Succession Act*, it is only a Personal Representative of a deceased person who has the power to file suit on behalf the Estate. Section 82(a) of provides:

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative.”

25. In the case of *Virginia Edith Wambui Otieno v Joash Ochieng Ougo & another* [1987] eKLR this Court stated:

“But an administrator is not entitled to bring an action as an administrator before he has taken out letters of Administration. If he does, the action is incompetent at the date of its inception...” (Emphasis supplied)

26. Again, in *Trouistik Union International & another v Jane Mbeyu & another* [1993] eKLR, this Court rendered itself thus:

“To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82 (a) of the *Law of Succession Act*. That section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, section 3, the interpretative section, provides an all- inclusive answer. It says “personal representative means executor or administrator of a deceased person”. It is common ground that the deceased in this case died intestate. Therefore, the only person who can answer the description of a personal representative, is the administrator of the estate of the deceased. The next enquiry must answer the question, who is an administrator within the true meaning and intendment of the Act” section 3 says “administrator means a person to whom a grant of letters of administration has been made under this Act”.

27. We think we have said enough to demonstrate that this ground of appeal is without merit and we accordingly dismiss the same in its entirety.

28. The learned judge was further faulted for failing to consider the issue of ownership of motor vehicle registration number xxxx. it is indeed true that the learned judge did not consider this issue yet it was one of the issues raised by the appellants in their Amended Memorandum of Appeal dated 14<sup>th</sup> November 2013. Be that as it may, we have perused the record and noted that this issue was not raised at the trial. Additionally, the respondents produced a police abstract which showed that the vehicle that caused the accident belonged to the 2<sup>nd</sup> appellant and that the same was being driven by the 1<sup>st</sup> appellant. No evidence was called in rebuttal by the appellants to counter these contentions.

29. In *Wellington Nganga Muthiora v Akamba Public Road Services Ltd & another*, (2010) eKLR this Court stated:

“Where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross- examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-



examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary”

30. We reiterate the above position and say no more regarding this issue. Accordingly, the only inevitable conclusion that we arrive at, is that the appellants appeal is without merit and the same is hereby dismissed with costs to the respondents.

Orders accordingly.

**DATED AND DELIVERED AT NAKURU THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023.**

**F. SICHALE**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**Signed**

**DEPUTY REGISTRAR**

