



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, OKWENGU & SICHALE, J.J.A.)

CIVIL APPEAL NO.256 OF 2010

BETWEEN

ESTHER WAIRIMU NDUNG’U.....1ST APPELLANT

MARY NYATHIRA NJOROGE.....2ND APPELLANT

ESTHER WAIRIMU NDUNGU (SUING AS NEXT FRIEND OF

J N N (MINOR).....3RD APPELLANT

AND

THE HONOURABLE THE ATTORNEY GENERAL.....1ST RESPONDENT

COMMISSIONER OF POLICE.....2ND RESPONDENT

SENIOR SERGEANT JAMES ONCHARI.....3RD RESPONDENT

PC ABDI BOLO.....4TH RESPONDENT

PC JONAH MUKUNGUSI.....5TH RESPONDENT

PC PATRICK NYONGESA.....6TH RESPONDENT

PC PHILIP ETYANG.....7TH RESPONDENT

PC MUTISYA NZIOKI.....8TH RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Wendoh, J.), dated 30th April, 2010 in H.C. Misc. Cause No.651 of 2005)

JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court (**Wendoh, J.**), delivered on 30th April, 2010.

The judgment was in regard to a suit lodged by way of originating summons under **Section 84** of the Constitution of Kenya, and the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) (Practice and Procedure Rules). The suit was brought by **Esther Wairimu Ndung'u** and **Mary Nyathira Njoroge** (hereinafter referred to as the 1st and 2nd appellants.)

2. The appellants who were widow and mother respectively, of one **Peter Ndung'u Njoroge** (hereinafter referred to as the deceased), brought the suit in their capacity as personal representative of the estate of the deceased, and for and on behalf of **J N N**, the minor son of the deceased. The suit was anchored on the contention that the deceased's fundamental rights under the Constitution were violated by the Hon. Attorney General, the Commissioner of Police, **Snr. Sgt. James Onchari, PC Abdi Bolo, PC Jonah Mukungusi, PC Patrick Nyongesa, PC Philip Etyang** and **PC Mutisya Nzioki**, (the 1st to 8th respondents respectively). The appellants sought determination of several questions concerning how the deceased met his death and whether he met his death as a result of criminal and or negligent conduct of one or more of the police officers at the Mutuini Police Base. Further, determination of whether the deceased's fundamental rights were violated, and if so, whether general and punitive damages should be awarded.

3. The originating summons was supported by an affidavit sworn by the 1st appellant who swore: that she saw the deceased lastly on the night of 29th January, 1999, at Mutuini Police Station; that the deceased was in good spirits; that the next morning, she found her husband lying face down in the cells in blood-soaked clothes; that she was later informed that the deceased had died as a result of banging himself against the wall; and that a post mortem examination revealed that the deceased suffered blunt trauma and brain *oedema*. Further, that a subsequent inquest carried out at Kibera Magistrate's Court resulted in a recommendation for further independent investigations with a view to establishing what role the police officers at Mutuini Police Station could have played in the deceased's death; that the investigations were taken over by one Chief Inspector Kioi, who merely recommended that the Officer Commanding the Police Post be subjected to internal disciplinary procedure.

4. The appellants maintained that the deceased's fundamental rights in particular, rights to protection from torture or inhuman treatment and right to life, were violated while he was at the police post, and that as a result of the deceased's death, his family lost the support of their sole breadwinner. Although served with the necessary documents, neither the Attorney General nor any of the respondents filed any response to the appellants' claim.

5. The salient parts of the judgment of the High Court was as follows:

“For the Applicants to approach this court for the enforcement of their rights, they must bring themselves within S.84(1). Under that section there are two categories of persons who can come to court to enforce their rights.

1. A person whose rights have been infringed;

2. Another person may move the court on behalf of a person who is detained.

In this case, the applicants have come to court alleging that the rights of the deceased were infringed. The deceased cannot be before the court nor is he detained. In my view the applicants lack the necessary capacity to approach this court to enforce any fundamental rights. They should demonstrate that their individual rights have been infringed.

The claim that the applicants seek to articulate before this court arises from allegations that the deceased died while in the police custody and died out of police brutality or negligence. Although the Attorney General did not reply or appear in this matter, in my view, the commendable way for the applicants to approach the court is to file a suit for damages in the civil court where they will file a plaint alleging negligence or acts of brutality, which would be subjected to proof through viva voce evidence, cross-examination or if the respondents did not reply, it would be

subject to formal proof. The applicants' individual rights have not been infringed to enable them come under the above enforcement section of the Constitution and this court finds that no constitutional issues have arisen and hence no cause of action is disclosed.

None of the applicant's rights to life was infringed under S.71 of the Constitution nor were their rights to liberty infringed under S.72(3)(b) of the Constitution; nor was any of them subject to torture, degrading or inhuman treatment under S.74 of the Constitution. The applicants' rights lie elsewhere in a civil court because this originating summons does not raise any constitutional issues. The same is therefore dismissed with each party bearing its own costs."

6. The appellants are aggrieved by that judgment and have filed a memorandum of appeal raising five grounds. In brief, the appellants faults the learned judge for finding that the appellants had no *locus standi* to enforce the constitutional rights of the deceased because only the victim of a constitutional violation under **Section 71(1)** or his representative in a case of a detained person, can enforce their fundamental right under **Section 84(1)** of the Constitution.

7. Mr. Kihang'a Mwangi who argued the appeal on behalf of the appellant contended that although the filing of the matter by way of originating summons deprived the court of jurisdiction, the learned judge ought to have delved deeper into the matter and ought to have directed her mind to **Order 39** of the Civil Procedure Rules and proceeded as if the originating summons were a plaint. This would have enabled the learned judge to determine the issue whether there was violation of a fundamental right of the deceased. Mr. Mwangi argued that the question was whether the death of the deceased was wrongful and whether constitutional issues arose therefrom. Counsel reiterated that a party should not suffer without a remedy and the court should have gone beyond technicality and considered the substantive merit of the originating summons.

8. Learned counsel Mr. Onyiso who appeared for all the respondents relied on written submissions that were filed on behalf of the respondent. In the written submissions, the respondents argued that the appellants not having taken out any letters of administration, they had no *locus standi* to file the suit on behalf of the estate of the deceased. Secondly, that under **Section 84(1)** of the retired Constitution, a suit for the enforcement of fundamental rights and freedom may only be maintained by the person whose rights had been infringed or an agent of such person, where such person was in detention. Therefore, the appellants had no *locus* to pursue a suit for enforcement of the fundamental rights and freedoms of someone who was not in detention.

9. As regards the alleged violations of the deceased's fundamental rights and freedoms, the respondent maintained that the alleged violations were unproven, as the appellants did not provide any direct evidence of the complicity of the respondents in the death of the deceased. In regard to damages, the Court was urged that the damages should not be so large as to be a windfall nor so small as to be nugatory, and that if at all damages were justified, Kshs.500,000/= would be sufficient. The Court was nonetheless urged to dismiss the suit.

10. As already stated, the appellants initiated their suit by way of an originating summons. Under **Order XXXVI** of the former edition of the Civil Procedure Rules, filing of suits by way of originating summons was reserved for cases specified therein. The specified cases include suits by executors or administrators of a deceased person or any heir or legal representative of a deceased person for determination without the administration of the estate, of questions relating to the rights or interests of persons having a claim in the estate, the ascertainment of any class of creditors, devisees, legatees or heirs; accounts by executors or trustees, payments of executors or trustees, or questions arising out of the administration of the estate.

11. The appellants who were beneficiaries of the estate of the deceased, did not seek determination of questions adverted to under **Order XXXVI** of the Civil Procedure Rules. The appellants sought determination of questions regarding the enforcement of constitutional rights. The appellants indicated in the heading of their suit that it was brought under **Section 84** of the Constitution (now retired) and **Rules 8, 9 and 11A and B** of the Constitution of Kenya (Protection of the Fundamental rights and Freedoms of the Individual) (Practice and Procedure Rules) 2001.

12. **Section 84** of the former edition of the Constitution stated as follows:

“84.(1) Subject to subsection (6), if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

2. The High Court shall have original jurisdiction-

a. to hear and determine an application made by a person in pursuance of subsection (1);

b. to determine any question arising in the case of a person which is referred to it in pursuance of sub-section (3).

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive).

3. If any proceedings in a subordinate court a question arises as to the contravention of any of the provisions of sections 70 to 83 (inclusive), the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous and vexatious.” (Emphasis added)

13. A reading of **Section 84(1)** clearly shows that proceeding under that section can only be brought by the person whose fundamental rights and freedoms are being contravened or threatened with contravention, and it is only where such person is detained that the suit can be brought on his behalf by another person. Thus the provision is intended for redress to prevent violation or threatened violation of rights of a living person either able to pursue his rights or unable to do so because he is in detention. The provision was not intended for pursuing rights of deceased persons. To this extent the appellants’ suit was incompetent.

14. We note that the appellants filed their suit on 6th May, 2005, and judgment was delivered on 30th April, 2010. This was before the Constitution of Kenya 2010 came into effect. The appellants did not therefore benefit from the wide *locus standi* that the Constitution has introduced under **Article 258** of the Constitution of Kenya 2010 that allows enforcement of the Constitution by any person acting in their own interest or on behalf of another person or in public interest. Regrettably, these provisions cannot be applied retrospectively and therefore, the appellants’ suit remains incompetent.

15. In regard to the Constitution of Kenya (Protection of the Fundamental rights and Freedoms of the Individual) (Practice and Procedure Rules) 2001, **Rule 8** of these rules deals with stay of proceedings where a reference has been made to the High Court. That is not the position herein and the rule was not applicable to the appellants’ suit. **Rule 9** that deals with contravention of fundamental rights and freedoms alleged otherwise than in the course of proceedings in a subordinate court or the High Court appears more relevant. In this regard, **Rule 11(a)** states as follows:

“Applications under Rule 5 and 9 of these rules shall be made by originating summons and the procedure laid down under Order XXXVI of the Civil Procedure Rules shall as far as practicable apply.”

16. Thus, in pursuing a suit for contravention of fundamental rights and freedoms a suit could be brought by way of originating summons guided by the rules provided under **Order XXXVI** of the Civil Procedure Rules. As already noted, the procedure of originating summons is rather restrictive. In ***Wakf Commissioners v Mohamed Bin Umeya Bin Abdulmaji bin Mwijabu, [1984] KLR 346***, this Court held as follows:

“1. Originating summons procedure is intended for settling simple matters without the expense of a full trial and not for serious complex issues.

2. Where complex issues are raised and disputed in an application made by way of originating summons the court should dismiss the summons and leave the parties to pursue their claims by way of an ordinary suit.”

17. It is because of this restriction that **Order 36 Rule 10**, allows the court at any stage of the proceedings where complex issues are being raised to have the proceedings continue as if the cause had been filed by way of a plaint and the affidavits filed to stand as pleadings. In this case, the court was not moved to exercise its powers under this rule. The questions raised by the appellants concerned complex issues dealing with violation of rights. They were not simple issues that were appropriate for disposal by way of originating summons. Moreover, the Constitution of Kenya (Protection of the Fundamental rights and Freedoms of the Individual) (Practice and Procedure Rules) 2001 was subsidiary legislation intended to provide the procedure for operationalizing **Section 84** of the Constitution (now retired). The rules being subsidiary legislation could not be used to give jurisdiction for filing suit where the Constitution had not given such jurisdiction.

18. In conclusion, having considered this appeal, we are satisfied that the appellants’ suit was incompetent and the learned judge did not err in dismissing the suit. Accordingly we find no merit in this appeal, and therefore dismiss it. In the circumstances of this case, we do not find it appropriate to make any orders as to costs.

Dated and Delivered at Nairobi this 24th day of March, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR