IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, G.B.M. KARIUKI & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 269 OF 2008

BETWEEN

MARTHA NDIRO ODERO (suing as the administrator and

Personal representative of the estate of

WILLY PATRICK OCHIENG NDIRO (deceased)..... APPELLANT

AND

COME CONS AFRICA LIMITED ..... RESPONDENT

(Being an Appeal from the Judgment and decree of the High Court of Kenya at Nairobi (Ang'awa, J.) delivered 17th day of October 2006

in

H.C.C.C. NO.672 OF 2001)

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JUDGEMENT OF THE COURT

1. The appellant, **Maritha Ndiro Odero**, has instituted this appeal against the judgment of Ang'awa J delivered on 17th October 2006 in the High Court at Nairobi in Civil Suit No.672 of 2001.

BACKGROUND

2. The appellant brought the said suit in the High Court on 26th April 2001 against **Come-Cons Africa Limited**, the respondent in this appeal, claiming general and special damages under the Law Reform Act (Cap 26) and the Fatal Accidents Act (Cap 32) and costs thereof on account of the death of her son, Willy Patrick Ochieng Ndiro, (deceased) then aged 32 years, who was fatally injured when the car he was driving (registration No.KAK 946Z) collided with motor vehicle registration No. KAJ 437P which was owned by the respondent.

The appellant alleged that the driver of motor vehicle KAJ 437P at Ngong Road, Nairobi was wholly to blame for the accident and was at the material time the agent and/or servant of the respondent.

3. Before filing the suit in the High Court, the appellant had obtained on 22nd August 2000 a Limited Grant of Letters of Administration *ad colligenda bona* under Section 67(1) of the Law of Succession Act, Chapter 160, in Migori Senior Principal Magistrate in Cause No.275 of 2000.

4. When the suit came up for hearing before Ang'awa J, the appellant testified and called as a witness one Hanna Mundati who was a passenger in the car driven by the deceased. She also called police constable. Charles Andrew from Traffic office to produce the police abstract.

5. The respondent did not adduce any evidence.

6. In her decision titled "Ruling", the learned trial Judge dismissed the suit because -

(1) the learned Judge was not convinced that the appellant qua plaintiff in the suit was the mother of the deceased

(2) the Grant of Letters of Administration did not name two administrators. It named only one, to wit, the appellant.

(3) the Senior Principal Magistrate Court had no jurisdiction to issue the Grant of Letters of Administration.

7. The learned Judge then quantified damages and held that if the appellant had been successful in the suit, the Court would have awarded Shs.2,100,000/= under the Fatal Accidents Act to be apportioned equally among the three sons of the appellant's deceased's sons and Shs.60,000/= towards special damages. Curiously, she awarded nothing under the Law Reform Act.

APPEAL

8. The appellant was aggrieved by this decision, and consequently appealed against it. In her Memorandum of Appeal dated 17th December 2008 contained in the record of appeal lodged on 19th December 2008, the appellant proffered the following 7 grounds of appeal:

(1) That the learned trial Judge erred in law and in fact in finding that the appellant was not the mother of the deceased and therefore did not have the locus to file the case.

(2) That the learned Trial Judge erred in law and in fact in finding that the appellant as the mother of the deceased was aged 13 years old at the time she gave birth to the deceased when there was no material evidence to that effect.

(3) That the learned trial Judge erred in law and in fact in finding that where minors are involved in a suit and the same involves death then there must be two administrators in the suit.

(4) That the learned trial Judge erred in law and in fact in finding that the Migori subordinate court did not have jurisdiction to issue a limited grant ad colligenda bona to the appellant and therefore dismissing the claim under Law Reform Act.

(5) That the learned trial Judge erred in law and in fact in finding that the deceased widow take precedent in filing the claim under the Fatal Accident Act.

(6) That the learned trial Judge was prejudiced against and erred in making comments on her age and the previous dismissal on the case and making the appellant feel that justice had not been done or seen to be done.

(7) That the learned trial Judge erred in all the circumstances of the case in finding that the appellant had no locus and thereby dismissing her case.

9. The appellant prayed that the appeal be allowed and that the judgment of the High Court in Nbi H.C.C.C. No.672 of *2001 "be set aside and in its place judgment be entered for the appellant against the respondent as proposed in the plaint,"* and that *"the respondent be condemned to pay the appellant costs both in the High Court and in this Court."*

HEARING

10. The appeal came up for hearing before us on 6th May 2015. The appellant was represented by Miss Maina, advocate, who held brief for Mr. Chege Wainaina, the advocate on record for the appellant. The respondent although served, was not represented.

11. Miss Maina correctly focused on the three issues on which the appeal turned. First, she submitted that the Senior Principal Magistrate Court had jurisdiction to issue the Grant of Letters of Administration *ad colligenda bona* and secondly that the appellant had capacity to sue as she did. Thirdly, that the evidence before the court established liability against the respondent.

DETERMINATION

12. We have perused the record of appeal. We have also duly considered the submissions made by the learned counsel for appellant. As correctly pointed out by counsel, the appeal turns on the three issues crystallized by her. The first two issues namely, the jurisdiction of the Senior Principal Magistrate to issue the Grant and the capacity of the Appellant to sue are inter-related. With regard to the jurisdiction of the Senior Principal Magistrate court to make the Grant, the proviso to Section 47 of the Law of Succession Act, Cap 160 gives Resident Magistrates appointed by the Chief Justice jurisdiction to issue grants. Section 48 (1) of the said Act stipulates that a resident magistrate appointed as aforesaid has jurisdiction to entertain any application in succession proceedings other than an application for revocation or annulment of a grant and to determine any dispute under the Succession Act and to pronounce such decrees and make such orders as may be expedient in respect of any estate the gross value of which does not exceed shillings one hundred thousand. Proviso number (iii) to section 49 makes it clear that

> *"every resident magistrate shall have jurisdiction, in cases of apparent urgency, to make a temporary grant of representation limited to collection of assets situated within his area and payments of debts regardless of the last known place of residence of the deceased."*

13. The proviso to Section 48 of the Law of Succession Act makes it clear that it is only in places where both the High Court and resident magistrate's court are both available, that the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under the Act.

14. In this appeal, the grant made was a limited grant, to wit, *ad colligenda bona* which was obtained from the Senior Principal Magistrate at **Migori** where there was no High Court station at the material time. There is no evidence that the Senior Principal Magistrate who issued the limited grant had not been appointed to represent the High Court pursuant to Sections 47 and 48 of the Succession Act. There was no evidence before the learned Judge to suggest that the Senior Principal Magistrate acted without jurisdiction. In our view, the learned Judge misdirected herself in holding, as she did, that the Migori Senior Principal Magistrate had no jurisdiction to issue the limited grant. While it is hardly likely that the Migori Senior Principal Magistrate would purport to exercise powers he did not have, there is no evidence that the Chief Justice had not appointed the magistrate in Migori where there was no High Court station to represent the High Court for the purpose of giving service to Kenyans under the law of Succession Act, Chapter 160, in that area of the country.

15. Rule 36(1) of the Probate and Administration Rules allowed the Court to issue the limited grant *ad colligenda bona defuncti. The rule states*

> ***"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 defuncti of the estate of the deceased."

16. The limited grant in this case was issued pursuant to Rule 36(1)(supra). The object of the limited grant was collection of the assets of the estate of the deceased including the filing of suit to claim the deceased's properties. **Blacks Law Dictionary** defines a limited grant ad colligenda bona as -

"a special grant of letters of administration authorizing a person to collect and preserve a deceased's property."

17. Section 67(1) of the Law of Succession Act allows the issuance of a limited grant such as was issued in this case for the purpose of collection and preservation of assets of a deceased person (hence, Rule 36(1) (supra)) without the requirements attendant to the issuance of a full grant. Section 67 (1) of the Succession Act states -

"67(1) No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for the grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.

18. It is clear that the limited grant, unlike a full grant, could be issued to a single individual intent on filing suit for the estate of a deceased person, as was the case here. It is only where there are minor beneficiaries that at least two administrator would be required for a full grant to issue.

19. In this case, the limited grant gave capacity to the appellant to institute the suit. The issue of the value of the estate did not arise as the limited grant merely clothed the appellant with legal capacity to claim damages on behalf of the estate of the deceased as opposed to administering such estate.

In the latter case, the issue of the value of the estate would be relevant for the purpose of filing suit and/or determining whether the Magistrate would have pecuniary jurisdiction to issue a grant as set out in Section 48(1)(supra). That was not the case here.

20. No one raised the issue of jurisdiction. The Court of its own volition did so in its judgment. But it did not indicate the basis for the assertion or show by evidence that the Migori magistrate did not have jurisdiction. As the matter was prejudicial to the appellant's claim, the learned Judge should have afforded the appellant an opportunity to be heard on it. The Judge denied the appellant an opportunity to be heard on a matter the court was going to make a decision which was critical to the appellant's claim.

21. There was no material before the learned Judge to show or suggest that the appellant was masquerading as the deceased's mother. The learned Judge embarked into the realm of speculation and got it wrong. Courts of law arrive at decisions on the basis of facts distilled from relevant evidence to which law is applied. There is no place for the rule of the thumb in decision making exercise in courts of law.

22. In view of the above, it is our finding that the appellant had a valid grant and consequently had capacity to institute the suit as she did. That disposes of the second issue.

23. As regards the issue of liability, the burden of proof reposed on the appellant to prove it. She called as a witness the passenger who was in the car driven by her deceased son. Hannah Mundati (PW1) the passenger, testified that the accident occurred at 4.30 a.m.; that the motor vehicle driven by the respondent's agent and/or driver made a right turn at a feeder road, and headed to and joined the major road to wit Ngong Road without stopping at the junction; that the respondent's motor vehicle caused not only the deceased's vehicle to collide with it but also another vehicle to ram into the deceased's vehicle; that as a result, the front of the deceased's car collided with the side of the respondent's vehicle; that the deceased's car was also hit from behind, and that the deceased son sustained fatal injuries.

24. This evidence was not challenged. A death certificate was produced as an exhibit. It shows that the deceased died on 12th December 1998 at Ngong Road. It also shows that the cause of death was due to multiple injuries due to a motor vehicle accident. As there was no evidence to contradict the evidence adduced by the appellant, liability on the part of the respondent was, on the balance of probabilities, established. In short, the appellant discharged her burden of proof and as the respondent did not offer any evidence, the respondent could not haggle out of liability.

25. As regards the quantum of damages under the Fatal Accidents Act, the deceased, a military officer, was aged 32 years. All things being equal, he would have worked beyond the age of 60 years. But taking into account the vicissitudes of life, the multiplier of 20 years adopted by the learned Judge was not unreasonable. He was working with the Kenya Army and earning a monthly salary of Shs.15,345/= with a tax deduction of 1,284/= and therefore earned a net salary of Shs.14,000/=. He extended two thirds of the net salary on his three children. The learned Judge was correct in her computation of the sum of Shs.2,240,000/=. The special damages amounting to Shs.60,000/= was not disputed.

26. There was no reason assigned for the denial of damages under the Law Reform Act. That is what the estate of the deceased was entitled to for loss of life. The quantum under this head has conservatively remained low for obvious reasons. In the first place, life is so precious that it cannot be measured in monetary terms. In the secured place, huge awards under this head are likely to inject obvious danger. From the point of public interest, the awards have been kept low. In the 1970's, damages under the Law Reform Act vacillated between 20,000/= and 100,000/=. In the decade of 2001, the figure climbed to Shs.200,000/= as is evident from case-law in this branch. In **Nkudate V. Touring & Sporting Cars Ltd** [1979] KLR 199, Platt J gave a conventional award of £850 for loss of expectation of life of a child. This translated to Shs.170,000/= (as one pound sterling was taken to be Shs.20/=). The Court stated in the case

> ***"the plaintiff is entitled to damages for loss of expectation of life.***
>
> ***This is a conventional sum. It used to be between £400 and £500 (Benham v Gambling [1941] AC 157). It has been increased to K£850 by this court. According to Lord Denning MR in Lim Poh Choo v Camden and Islington Area Health Authority [1978] 3 WLR 895, 908, the conventional sum is £750. I indicated in argument that, as it was a conventional sum, it ought not to be increased by every turn of the inflationary screw. The two sides are the quest for a reasonable figure in view of the loss of purchasing power of money and, on the other hand, the danger of increases to the public.***

27. In our view, we think that there was no justification for denying the appellant damages under this head.

CONCLUSION

28. In the result, we set aside the judgment of the High Court. In its place we enter judgment for the appellant against the respondent in the sum of Shs.2,540,000/= together with costs of the suit in the High Court and in this appeal. The sum of Shs.2, 540,000/= shall be apportioned as follows –

(i) Special damages and damages under the Law Reform Act totaling to Shs.260,000/= shall go to the estate of the deceased together with interest at Court rates accruing thereon from the date of this judgment till payment in full and such sum go to the widow;

(ii) Damages under the Fatal Accidents Act amounting to Shs. 2,240,000/= shall be apportioned equally between the three children of the deceased, namely, Kelly Ndiro, Jean Ndiro and Ian Ndiro each taking one-third that is to say Shs.746,666/= and a proportionate part of the interest at court rates accruing thereon from the date of this judgment. In the result the apportionment shall be as follows:-

Plaintiff (widow) Shs.260,000/= plus interest

Kelly Ndiro Shs.746,666/= plus interest

Jean Ndiro Shs.746,666/= plus interest

Ian Ndiro Shs.746,666/= plus interest

(iii) The appellant shall be paid by the respondent the costs of the suit in the High Court and of this appeal.

Dated and made at Nairobi this *25th day of September 2015*.

H. M. OKWENGU

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JUDGE OF APPEAL

G.B.M. KARIUKI SC

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR