



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO.160 OF 2004

BETWEEN

MEHUL NEMCHAND HARIA..... APPELLANT

AND

HOMBE SAW MILLS1ST RESPONDENT

JAMES MAINA WERU 2ND RESPONDENT

(Appeal from the Judgment of the High Court at Nairobi (M. Ang'awa, J.) dated 18th December, 2002

in

H.C.C.C. NO.4164 OF 1992)

JUDGEMENT OF THE COURT

1. MEHUL NEMCHAND HARIA, the appellant, is the son of Nemchand Velji Haria (the deceased). On 24th August 1989 along Karatina/Nairobi road the deceased was a passenger in motor vehicle registration number KMY 145 which collided with motor vehicle registration number KMQ 945 owned by **Hombe Saw Mills (the 1st respondent)** and driven at the material time by **James Maina Weru (the second respondent)**. The appellant alleged that the 2nd respondent negligently parked motor vehicle registration number KMQ 945 on the road and caused motor vehicle KMY 145 to collide with it. The appellant's father sustained severe injuries in the accident from which he later died. He lost normal expectation of life.

2. After the accident, the second respondent was charged in Karatina Traffic Case No.59 of 1991 with two counts of causing death by dangerous driving under S.46 of the Traffic Act, Cap 403 and with a third count of using a defective motor vehicle on the road contrary to Section 55(1) of the Traffic Act. He was found guilty as charged and convicted on all the three counts and sentenced to serve imprisonment for one year on the first two counts. He was fined Shs.1,000/= on the third count and in default to serve a jail term of three months.

3. In his capacity as the personal representative and administrator of his father's estate and for his own benefit and for the benefit of his siblings and mother *qua* dependants the appellant instituted suit No. H.C.C.C. 4164 of 1992 in the High Court at Nairobi against the 1st and 2nd Respondents. The suit was founded on the Fatal Accidents Act, Chapter 32 and the Law Reform Act, Chapter 26 of the Laws of Kenya. The appellant sought damages under both statutes.

4. The cause of action in the suit was the tort of negligence under common law. The appellant alleged that the 2nd respondent negligently parked motor vehicle Registration No. KMQ 945 on the said road and caused it to collide with motor vehicle registration No. KMY 145 in which the appellant's father was traveling. The appellant contended that the 1st respondent was vicariously liable for the negligence of the second respondent who was its servant and/or agent.

5. The reliefs prayed for in the plaint by the appellant were :

- a. *damages under the Fatal Accidents Act Chapter 32 Laws of Kenya and under the Law Reform Act for the benefit of the dependants of the deceased and for the benefit of the estate of the deceased;*
- b. *costs of this suit;*
- c. *interest on damages and costs;*
- d. *such further or other relief as this Honourable Court may deem fit to grant.*

6. The civil suit No.4164 of 1992 came up for hearing before Ang'awa J in the High Court at Nairobi. In her judgment delivered on 18.12.2002 the learned trial Judge assessed damages under the Law Reform Act at Shs.20,000/= and loss of dependency under the Fatal Accidents Act at Shs. 1,080,000/= and special damages at Shs.5,100/= making a grand total of Shs.1,105,100/=. She made a finding that the 1st respondent was 100% liable in negligence and further went on to hold that the 2nd respondent had been joined to the suit as a defendant after the expiry of the **period of limitation** and therefore **struck out the suit as it related to the 2nd respondent** against whom the limitation period had run out.

7. Of her own volition the learned trial Judge also **struck out the suit against the 1st Respondent** on the ground that the appellant had sued a firm of Saw Millers i.e. **Hombe Saw Mills**, which **was not a legal entity**, and whose partners had not been disclosed. Consequently, the appellant, as a claimant on his own behalf and on behalf of other dependants, walked away from the court remediless.

8. Aggrieved by the learned Judge's decision, the appellant lodged this appeal and put forward the following four grounds of appeal.

2. *That the learned trial Judge totally erred in law and therefore misdirected herself in failing to appreciate that pursuant to the provisions of the Civil Procedure Act and Rules it is not necessary to sue the partners of a firm and that in the circumstances her holding that the First Defendant was not a legal entity is erroneous in law.*
3. *The learned trial Judge failed to appreciate that a firm can also institute proceedings without declaring or stating its partners, save and except if the firm is owned by one person and carries on business in a name other than that of the sole owner.*
4. *In the circumstances, the learned trial Judge erred in striking out the suit.*
5. *In the alternative, the learned trial Judge erred in law in assessing damages at Ksh.1,105,100/= in that she failed to appreciate the income and circumstances of the deceased and the degree of dependency and consequently the award is totally erroneous and is a misdirection*

9. The appellant prays in his memorandum of appeal that:

“(a) the appeal be allowed with costs and also the costs in the Superior Court (sic)

- b. *that judgment be entered in favour of the appellant/plaintiff in the sum of Ksh.1,105,100/= with interest thereon*
- c. *that the order of striking out of the suit be set aside*

d. *Such further order or relief as this Honourable Court deems fit and proper*”

10. The appeal came up for hearing before us on 13th February 2013. Mr. Rustam Hira, the learned counsel for the appellant, urged us to allow the appeal. He alluded to order 30 of the Civil Procedure Rules (formerly Order 29). It is important to state that the rules in Order 30 of the current Civil Procedure Rules (2010) are *in pari materia* with the Rules in the former Order 29.

11. The institution of the suit against the 1st respondent required compliance with the rules in Order 29 (now Order 30) of the Civil Procedure Rules. Mr. Hira contended that the 1st respondent, **Hombe Saw Mills**, was a legal entity and was sued as such. That proposition was not correct. There was no evidence to show that the 1st respondent was a legal entity and not a business firm. It certainly was not a limited liability company. Paragraph 2 of the plaint clearly stated:

“(2) the first defendant is a firm of Saw Millers carrying on business in Karatina in the Republic aforesaid. Summons herein will be served through the plaintiff’s advocate’s office.”

12. A party is bound by its pleadings. The plaintiff sued the 1st respondent as a firm. This is apparent from the reading of paragraph 2 of the plaint referred to above. It was not sued as a limited liability company contrary to Mr. Hira’s contention.

13. The issues raised in the appeal are three. Firstly, was the court correct in striking out the suit against the 1st respondent on the ground that the appellant had sued a firm instead of the individual partners of the firm? Secondly, was the learned trial Judge correct in striking out the suit against the second respondent on the ground that he was joined as a party to the suit after the expiry of the limitation period of three years from the date when the cause of action arose? Thirdly, was the court correct in raising these issues *suo moto* in its judgment without affording the parties an opportunity of being heard on them?

14. The institution of the suit (No.4164 of 1992) required to conform with Order 29 (now Order 30) of the Civil Procedure Rules. Rules 1, 3(1) & (2), 4, 5, 6 &7 of Order 29 (now Order 30) state:

r 1. Any two or more persons claiming or being liable as partners and carrying on business in Kenya may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the court may direct.

r 3 (1) Where persons are sued as partners in the name of the firm, the service of the summons shall be effected either –

- a. *upon any one or more of the partners; or*
- b. *at the principle place at which the partnership business is carried on within Kenya upon any person having, at the time of service, the control or management of the partnership business there; or*
- c. *as the Court may direct.*

r 3 2 such service shall be deemed good service upon the so sued, whether all or any of the within or without Kenya:

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within Kenya whom it is sought to make liable.

r 4 where a summons is issued to a firm, and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the

time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner.

r 5 where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

r 6 where a summons is served in the manner provided by rule 3, upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.

r 7 any person served as a partner under rule 3 but who denies that he was a partner or liable as such at any material time may enter an appearance stating therein that he does so as “a person served as a partner in the defendant firm, but who denies that he was a partner at any material time”; and such appearance as long as it stands shall be treated as an appearance for the firm.

15. It is clear from rule 1 of Order 29 (now Order 30) that where a firm has two or more partners, a suit can be instituted in the firm's name. If, however, the firm is a sole proprietorship, the rule does not apply and consequently a suit against a sole proprietorship must be in the name of the proprietor as opposed to the name of the firm. The proprietor may be described as trading in the name of the firm but this does not mean that the suit is against the firm as the name of the firm is merely descriptive. There are good reasons for requiring a suit against a firm owned by a sole proprietor to be instituted against the proprietor himself/herself and a suit where there are two or more partners in the firm to be instituted in the name of the firm itself. A firm can have as many partners as the law allows and some or all may be involved in the running of the business of the firm. It is precisely because the exercise of serving summonses on different partners in different places is expensive in terms of money and time and may also contribute to delay in prosecution and determination of a suit, and hence prevent its determination within a reasonable time that the rules require the suit to be instituted against the firm. The partners served with summonses are required to disclose their identities during appearance. But where a firm is a sole proprietorship, there are good and obvious reasons why the suit should be against the sole proprietor as an individual. These include the fact that a plaintiff does not have to deal with a name of an enterprise when its proprietor is an individual who bears personal liability as the firm itself has no legal personality.

16. There is no evidence to show whether the 1st respondent is a firm with two or more partners as it was required to be by rule 1 of Order 29 for the suit to be filed against it. What legal implications did this have on the validity of the suit?

17. The fact that the firm was sued presupposes that the firm had two or more partners, yet it is not clear from the record who were served with summonses to enter appearance and whether, as seems to be the case, only one partner was served, and why particulars of the person served were never furnished.

18. However, a firm of advocates (Kimani & Michuki) did enter appearance for the firm itself. Then as now Rule 3(1) of Order 29 (now Order 30) of the old rules, required that where a firm is sued, the partners are deemed to be the persons sued and rule 5 of the said order requires the partners to appear individually in their own names and where they appear through an advocate the memorandum of appearance must disclose the names of the individuals/partners represented. One does not have far to seek to see that this requirement was designed to disclose the identities of the persons who may eventually be held accountable should the plaintiff succeed in the suit not least because a firm is not a legal entity and has no legal personality.

19. The erstwhile advocates for the plaintiff in the suit in the High Court do not appear to have been alive to the provisions of the rules in Order 29 (now Order 30) of the Civil Procedure Rules. The responsibility of ensuring that a suit against a firm would hold reposed on the appellant. The rules were designed to protect claimants such as the appellant so that they do not end up chasing a mirage in the shape of a firm-

name when individual partners who may be liable exist. The rules in Order 29, (now Order 30) were made in public interest. Their breach by the party intended to be protected by them should not, in our view, render the suit bad in law. However, the High court ought to have directed amendment of the plaint to ensure its compliance with the rules always remembering that rules of procedure are intended to serve as the handmaidens of justice, not to defeat it (**see Iron & Steelwares Ltd v. C.W. Martyrs & Co. [1956] 23 EACA 175 (CA-U) at page 177**). Applying this reasoning, it was wrong, in our view, for the trial court to strike out the suit without granting the appellant an opportunity to regularize it. Moreover, if the appellant is eventually unable to reap the fruits of his judgment due to his own failure to adhere to the rules of procedure laid down in Order 29 (now Order 30) he has only himself to blame.

20. Two authorities were cited by Mr. Rustam Hira in his presentation of the appeal. They did not support his case. The first was **the Law of Civil Procedure in India & Pakistan by S.C. Sarkar (at pg 739)**. It emphasizes that only where any two or more persons claiming or being liable as partners and carrying on business may sue or be sued in the name of the firm. In the second, **Ram Rakha's case (1959) EA 981**, the defendants were named individually and described jointly in the words "*all formerly trading as Colonial Printing Works*." They were not sued in the firm name. In that case judgment was against the partnership formerly known as "*Colonial Printing Works*" and against the 2nd and 4th defendants in their personal capacity for the sum indicated. In **Paul Nelson V. Holm LRK Vol. XVII (parts 1 & II) 1936-1937 – pg 6** the High Court correctly held that the plaintiff as a sole proprietor of the Kenya Manufacturing Company could sue in his own name.

21. The decision of the learned trial Judge in striking out the suit against the first respondent at that extremely late stage of the proceedings when the issue had not been raised by any party, militated against fairness and justice.

22. As regards the striking out of the second respondent on the ground that he was joined after the **period of limitation had run out under the Limitation of Actions Act**, and after the parties had already **recorded a consent on quantum** on 5.12.2002 following which **consent judgment was entered** subject to liability being proved militated against fairness and accepted practice.

23. The appellant called Menul N. Shah as PWI who testified and was cross-examined. No question was put to him in connection with defense of the limitation of time. The first time the issue of limitation arose was in the judgment of the learned trial Judge. The defendants did not plead it in their defence and it did not feature in evidence. It was raised *suo moto* by the court in the judgment.

24. In our view, where, before trial a party has not pleaded the procedural bar of limitation as a defence and has instead fought the suit on merit, it is not open to the Court to raise or introduce it. An attempt by a party to amend the plaint to introduce it at that late stage when it becomes obvious that he is likely to lose the case on merits ought to be frowned at. In our view, the invocation by the High court of the defence of the limitation in favour of the 2nd respondent was prejudicial to the appellant and amounted to wrong exercise of judicial discretion on the part of the trial Judge. It was not open to the court to invoke in absence of pleading, the defence of limitation. Where, as here, the parties had closed their respective cases and were awaiting delivery of judgment, the Court could not abandon its role as an impartial arbiter and play the role of an advocate for one of the parties. This flies in the face of rules of fairness in litigation. In the instant case, the Court literary descended to the level of counsel for the respondents in whose favour it introduced, of its own volition, defence of limitation. It is for this reason that we state that judicial discretion was wrongly exercised. And this is a classical case of wrong exercise of judicial discretion.

25. The duty of the court was to apply the law correctly and to do justice to the parties. The parties were entitled to a fair hearing. The matter before the court involved private citizens. The appellant alleged violation of personal rights by the respondents who negligently caused the death of the deceased. The parties agreed on the quantum of damages. The court was called upon to make a finding and determination whether, on the basis of the pleadings and evidence presented by the parties, liability in tort, to wit, negligence, attached to the respondents.

26. Determination of liability on the facts and evidence presented to the court did not extend to or encompass exploration of whether the suit was time-barred and whether the respondents had been properly sued. The parties did not bring in those issues before the court. The respondents did not raise objection in the manner in which they had been sued. In its statement of defence, the 1st respondent denied the alleged negligence in the accident on 24.08.1989 but did not allege that the suit was time barred. The 1st respondent only denied that it was vicariously liable for the negligence of the 2nd respondent. The plaintiff adduced evidence and produced the proceedings in Traffic Case No.59 of 1991 at Karatina Resident Magistrate Court in which the 2nd respondent was found guilty in two counts of causing death by dangerous driving and using defective motor vehicle on the road on the material date. That evidence was not challenged by the respondents none of whom adduced evidence. In absence of any pleading putting up the defence of limitation, the trial Judge was not right in introducing it in her judgment! It is not clear what prompted the learned trial Judge to do so. The record of appeal unfortunately, does not include either memorandum of appearance or statement of defence of the 2nd respondent although he had legal representation. That was a serious omission on the part of the appellant's counsel. In the premises, the court erred in raising the issue in the judgment. A Court must always bear in mind that while its duty is to do justice, it is not the advocate for any of the parties and as such cannot participate in either defending the suit or in assisting the claimant in a manner that goes beyond the purview of its judicial role, namely to do justice to the parties. A Court, we reiterate, must remain always an impartial arbiter.

27. In our view, the evidence before the learned trial Judge of the Superior Court established, on the balance of probabilities, liability against the defendants at 100%. The trial Judge was correct in so holding. Parties agreed on damages by consent as recorded by the learned trial Judge on the 5th December 2002.

28. The dependants of the deceased under the Fatal Accidents Act are the appellant and his 2 siblings namely Punil Nemchand Haria and Samir Nemchand Haria aged 34 years, 24 years and 27 years respectively at the time of filing suit and the deceased's wife namely Kanchand Nemchand Haria aged 52 years at the time of filing the suit and the mother of the deceased, Raniben Velji Haria aged 84 years at the time of filing suit, if she be now living.

29. In the result,

1. We set aside the order of the High court dismissing the suit.
2. We set aside the findings and the orders of the learned trial Judge striking out the suit against the 1st and 2nd respondents.
3. We enter judgment in favour of the appellant on liability at 100%.
4. We order that payment be made by the defendants jointly and severally of the damages set out in the consent order dated 05.12.2002 to the appellant (on his own behalf and on behalf of the other dependants)
5. We direct that the damages in the consent order dated 05.12.2002 be apportioned by the High court among the dependants referred to in paragraph 27 above if all the dependants who are *sui juris* do not agree and consent to apportionment among themselves without the need for intervention by the Court.
6. The respondents shall bear the costs of this appeal and of the suit in the High court.

Dated and delivered at Nairobi this 21st day of June 2013.

J. W. MWERA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR