



**Mbogo (Suing as the administrator to the Estate of the Late John Gachau Mbugua) v Kenya School of Monetary Studies (Civil Appeal 708 of 2016) [2024] KEHC 468 (KLR) (Civ) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 468 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 708 OF 2016**

**JN NJAGI, J**

**JANUARY 25, 2024**

**BETWEEN**

**FRANCIS MBUGUA MBOGO ..... APPELLANT**

**SUING AS THE ADMINISTRATOR TO THE ESTATE OF THE LATE JOHN GACHAU MBUGUA**

**AND**

**KENYA SCHOOL OF MONETARY STUDIES ..... RESPONDENT**

*(Being an Appeal from the judgment and decree of Hon. Obura (Mrs), Principal Magistrate, in Milimani Chief Magistrate's Court Civil Suit No. 3534 of 2011 dated 19th October 2016)*

**JUDGMENT**

1. The Appellant herein was a brother to the deceased in this matter. He brought suit against the Respondent herein vide a plaint dated 19<sup>th</sup> August 2011 in which he pleaded that the deceased was employed by the Respondent as a swimming pool attendant. That on the 18<sup>th</sup> July 2009 the deceased was on duty when he drowned and died while fulfilling his duties as per his employment. The Plaintiff averred that the accident was solely caused by the Defendant/Respondent and or agents who had negligently failed to maintain a safe system of work for the deceased to operate on.
2. The Appellant/Plaintiff thereupon claimed general damages and special damages under the *Fatal Accidents Act* and *Law Reform Act* on behalf of the beneficiaries of the estate of the deceased.
3. The Respondent who was the Defendant at the lower court denied the claim vide a statement of defence dated 3<sup>rd</sup> April 2012. They denied that the deceased was employed as a swimming pool attendant. In the alternative, they pleaded that even if the deceased was an employee of the Defendant



he lost his life while engaged in activities totally unrelated to his work. They denied that their servants, employees or agents were guilty of negligence in failing to maintain a safe swimming pool environment. They averred that if any loss or damage were ever suffered by the Plaintiff, the same were due to or generally attributed on the part of the deceased.

4. The trial Magistrate upon hearing the case dismissed the claim on the ground that the Appellant/Plaintiff did not prove negligence on the part of the Respondent/Defendant. That the evidence adduced in the case showed that the deceased was employed by the Respondent as a casual worker and went to swim on his own. That the Respondent had showed that they had taken reasonable steps to ensure safety of swimmers by engaging a qualified life guard. That deceased knew how to swim and as such owed himself a duty of care. That the Appellant failed to adduce evidence to link the drowning incident with the negligence of the Defendant/Respondent. The magistrate accordingly dismissed the suit.
5. In the alternative, the trial court assessed the damages as follows had the case been proved:
  - Pain and suffering ..... Ksh.50,000/=
  - Loss of expectation of life ..... Ksh.100,000/=
  - Lost years ..... Ksh.840,000/=
  - Special damages .....Ksh.9,500/=
6. The appellant was aggrieved by the dismissal of the suit and lodged the instant appeal. The grounds of appeal are that:
  - a. The learned magistrate erred in dismissing the plaintiff's case.
  - b. The learned magistrate erred in law and fact in holding that the plaintiff did not prove negligence on the part of the defendant/applicant as a result of which the deceased drowned.
  - c. The learned magistrate erred in holding that the plaintiff's account of the incident giving rise to the suit made out no case of negligence against the respondent.
  - d. The learned magistrate erred in law and fact in ignoring the complete pleadings by the plaintiff in his case thereby leading to wrong decision.
  - e. The learned magistrate erred in law and fact by holding that the negligence of the respondent was not proved when a good swimmer drowned in the pool.
  - f. The learned magistrate erred in law in a conclusion that was contrary to the evidence before her and the law.
  - g. The learned magistrate erred in law and fact in relying on a retracted pleading to hold that the plaintiff did not prove his case.
  - h. The learned magistrate erred in not considering the submissions and authorities submitted on behalf of the plaintiff.
7. The Appellant urged the court to allow the appeal and enter judgment in damages as assessed by the trial magistrate.



### **The Evidence in the case**

8. The Appellant, Francis Mbugua Mbogo, PW1, testified that the deceased worked for the respondent as a stone mason. He stated that the deceased never worked as a pool attendant and that the pleadings indicating that the deceased was a pool attendant were incorrect as they were prepared in a hurry.
9. The Appellant called one witness in the case, Dr. Peter N. Ndegwa, PW2, who testified that the death was caused by asphyxia due to drowning.
10. The defence called two witnesses in the case- the head of security, David Njoroge, DW1 and a casual worker for the respondent/defendant, Joseph Gichuhi, DW2.
11. It was the evidence of DW1 that he received a distress call over the incident and rushed to the swimming pool. He found the pool attendant trying to resuscitate the deceased. They put the deceased in his private vehicle and rushed him to a nearby nursing home. He was pronounced dead on arrival.
12. The casual worker for the defendant, DW2, told the court that he and the deceased were working as casuels in the maintenance department of the Defendant. That on the material day during lunch break, he and the deceased went for a swim at the Defendant's swimming pool. They reported to the swimming pool attendant who questioned them whether they knew how to swim. He, DW2, said that he did not and wanted to learn how to swim. The deceased said that he was a good swimmer. They proceeded to the swimming pool and the deceased started to swim. The swimming pool attendant started to give him, DW2, lessons on how to swim. The deceased continued to swim and to compete with two young men who had joined him. The swimming pool attendant kept on checking on them. Then suddenly he realized that he could not see the deceased. He shouted to the young man who was swimming with him, asking him where the deceased was. He heard the swimming pool attendant telling the young man to bring out the deceased out of the water. The young man brought out the deceased out of the water. The swimming pool attendant started to resuscitate him. He was rushed to a nearby nursing home but was pronounced dead.
13. The appeal was canvassed by way of written submissions.

### **Appellant's submissions**

14. Counsel for the Appellant submitted that the plaint before the Magistrate's court had erroneously indicated that the deceased was a swimming pool attendant. That the Plaintiff, PW1, stated in his evidence in court that the deceased was a stone mason and that on the fateful day, he had gone swimming at the Defendant's swimming pool in the company of friends. Counsel argued that since the trial Magistrate made a finding that the deceased was a stone mason, it was irrelevant that the plaint had indicated that the deceased was a swimming pool attendant.
15. The Appellant submitted that the swimmers had informed the Respondent's lifeguard of their presence. It was submitted that the deceased was not a good swimmer but the Defendant did not ensure that the lifeguard was on standby as the lifeguard appeared when the deceased was already at the bottom of the swimming pool. It was submitted that whether the deceased was a stone mason or swimming pool Attendant, the Defendant was still under duty to provide safe conditions at the swimming pool. It was submitted that the judgment of the lower court breached the neighborhood principles established in the case of *Donoghue v Stevenson*.
16. It was the Appellant's argument that the lifeguard was never called to testify. That this indicated that the Respondent had not provided safe condition for swimmers. Counsel for the Appellant submitted



that the Respondent's swimming pool attendant was negligent by failing to get into the pool to save the deceased but instead asked students to rescue the deceased.

17. The Appellant submitted that the proof required in civil cases is merely on a balance of probability. That negligence was established by failure of the lifeguard to come out and save the deceased. The Appellant submitted that he had proved his case to the required standard.

### **Respondent's Submissions**

18. The Respondent identified two main issues for determination; whether the trial court erred in finding that the Defendant was not liable for the alleged negligence and whether on preponderance of the evidence placed before it, the court erred in holding that the Appellant did not establish a case for negligence against the Respondent.
19. On the 1<sup>st</sup> issue it was submitted that a case of negligence exists where it is proven that the Defendant owed the Plaintiff duty of care. The said duty of care has to be breached leading to the injury/loss suffered by the Plaintiff. In support of this argument, reliance was placed in *Christine Kalama v. Jane Wanja Njeru* (2019) eKLR which also quoted *Caparo Industries v. Dickman* {1990} 1 ALL ER 568 and *Chun Pui v Lee Chuen Tal* {1988} RTR 298 which highlighted the determinants of negligence as follows:

“The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused.”
20. The Respondent argued that duty of care is more of a factual connotation than a legal one. That the Respondent maintained a swimming pool as part of its facilities and so it had a duty to ensure that it was in good condition so as to avert risks to accidents for swimmers. That no evidence was adduced to show that the pool was not in good condition.
21. It was submitted that there was no evidence of either acts or omissions on the part of the Respondent which led to the accident. The respondent argued that it took positive measures to ensure the safety of pool users in that it had employed a qualified pool attendant and a security officer and had thus discharged its duty of care. It was submitted that the trial court had not erred in its findings on negligence.
22. On the second issue, the Respondent submitted that a party is bound by its pleadings as was stated in the Supreme Court decision of *Raila Amollo Odinga & Another v. IEBC & 2 others* (2017) eKLR and *IEBC & Another v. Stephen Mutinda Mule & 3 others* (2014) eKLR. Counsel submitted that as per the Appellant's pleadings, the deceased was employed as a pool attendant but was never provided with the necessary training and a safe environment. The appellant had particularized the element of negligence portraying the deceased as a pool attendant. However, that in a total turn-around from his pleadings, the Appellant testified that the deceased was a stone mason. It was submitted that the testimony of the Plaintiff added no evidentiary value in proving the plaintiff's case as framed in the plaint.
23. The Respondent submitted that the Appellant's evidence was hearsay on what the Plaintiff was informed by a friend. That the evidence was inadmissible. In support of this assertion, reliance was placed in *Benjamin Mwenda Muketha (suing as the legal representative of Mercy Nkirote) v. Abdikadir Sheikh & 2 others* (2018) eKLR where the evidence of the witness was that he heard of how the deceased met his death in a radio broadcast and the court held that the evidence was heresy which could not be used to prove the truth of how the deceased met his death.



It was submitted that the Appellant failed to meet the standard of proof and therefore the trial court was right in dismissing the case. Counsel for the Respondent urged the court to affirm the decision of the trial Court.

### **Analysis and Determination**

24. It is the duty of this court, as the first Appellate court, to examine matters of both law and fact and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing its own conclusions from that analysis and bearing in mind that the court did not have an opportunity to hear the witnesses first hand - see the Court of Appeal case in *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR.

25. I have considered the pleadings, the evidence adduced before the trial court and submissions filed herein. The issue for determination is whether the trial court erred on its finding on liability.

26. The law on owners of premises on the issue of liability is found in the *Occupier's Liability Act* Cap 34. Section 3 of the *Act* covers the extent of Occupier's Duty under Section 3(2) which states as follows:

“For purposes of this Act the common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.”

27. Section 3(3) states that: -

“The circumstances relevant for the present purpose includes the degree of care and of want of care, which would ordinarily be looked for in such a visitor.”

28. Section 3(4) states: -

“In determining whether the occupier of the premises has discharged the common duty of care to a visitor regard is to be had to all the circumstances so that (for example)<sup>a</sup>. Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability unless in all the circumstances it was enough to enable the visitor to be reasonably safe....”

29. Section 3(5) states:

“The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor. The question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another.”

30. Evidently, the above section imposes a duty of care on the occupier of premises save in instances where a permissible exemption is in place. In *Jumuia Hotel v. SN & JCO (Suing as the Legal Representatives in the Estate of CAN – Deceased) & another* [2021] eKLR the hotel was found liable in light of the *Occupiers Liability Act* and liability as apportioned at 50:50 by the trial court upheld. The court stated:

“43. As the duty of care is imposed by statute, I find that once the deceased had visited the hotel, she was entitled to the common duty of care. The evidential burden shifted to the hotel, to prove that it had discharged the obligation to see that the visitor was reasonably safe in using the premises.



44. I find that the Appellant failed to demonstrate that it had discharged its common duty of care to the deceased”.
31. Pursuant to the provisions of Section 107 (1) of the *Evidence Act*;
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
32. The case for the Appellant before the trial court as particularized in the plaint was that the deceased was a swimming pool attendant. The particulars of negligence against the respondent were:
- a. Failure to maintain the swimming pool in a good and safe condition
  - b. Failure to inform the deceased of the danger thereof subjecting him to danger which the defendant knew or ought to have known.
  - c. Failure to provide first aid facilities to the deceased in time or at all.
  - d. Failure to give the deceased necessary training and/or skills in line with his duties in time or at all.
33. In his evidence the Appellant did not adduce any evidence that the Respondent was a swimming pool attendant nor that the respondent had failed to give him necessary skills as a swimming pool attendant. There was no evidence that the respondent had failed to maintain the swimming pool in a good and safe condition.
34. The Appellant instead of proving what was pleaded in the plaint took a different turn and adopted evidence that the deceased was a stone mason and his swimming at the Respondent’s swimming pool was not related to his work.
35. It is trite law that a party is bound by its pleadings. In *Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 others* (*supra*), the Court of Appeal cited the Malawi Supreme Court of Appeal in *Malawi Railways Ltd v. Nyasulu* [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled, “*The Present Importance of Pleadings*”, whereof the author stated as follows;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered



to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

36. In the same case, i.e, Stephen Mutinda Mule case, the Judges also cited with approval the Nigerian case of *Adetoun Oladeji (Nig) Ltd v. Nigeria Breweries PLC* S.C. 91/2002, where Judge Pius Aderemi J.S.C. expressed himself as follows;

“.... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

37. The Appellant herein did not amend his plaint to align it with the evidence that the deceased was employed by the Respondent as a stone mason and neither did he amend the particulars of negligence against the Respondent. It was not permitted for the Appellant to adopt evidence that was not pleaded. Failure to amend was fatal to his case. In the premises, the claim was for dismissal for want of pleadings.
38. There was no appeal on the possible award had the claim succeeded. I will therefore not delve into that.
39. The upshot is that the appeal herein has no merit and is in the premises dismissed with costs to the Respondent.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY 2024**

**J. N. NJAGI**

**JUDGE**

In the presence of:-

Mr. Omino for Appellant

Miss Gathoni for Respondent

Court Assistant – Amina

30 days Right of Appeal.

