



REPUBLIC OF KENYA
IN THE HIGH OF KENYA AT MACHAKOS

CIVIL APPEAL 52 OF 1991

**PATRICK KISEKI MUTISYA(suing as the personal representative to the estate of
NZOMO MUTISYA(deceased).....PLAINTIFF**

VERSUS

1. K.B SHAGHANI & SONS LIMITED.....DEFENDANT

2. DAVID MWANZA NZIOKA.....DEFENDANT

AND

WAKULIMA TRANSPORTERS (A FIRM).....THIRD PARTY

RULING

This suit was filed on 22nd April, 1991, almost 21 years ago. In the plaint dated 2nd April, 1991, the plaintiff sued the defendants jointly and severally seeking general and special damages as well as costs of the suit.

The genesis of the suit was the alleged fatal accident that occurred on 25th June, 1989 near Small World Resort Club, Athi River along Mombasa-Nairobi involving **Nzomo Mutisya**, “deceased” and motor vehicle registration number KYL 313 allegedly owned by the defendant and at the material time being driven by the 2nd defendant. It was alleged that on the material day, as the 2nd defendant drove the vehicle in question in the course of his employment with the 1st defendant, he did so negligently such that he lost control and violently collided with motor vehicle registration number KZF that was then lawfully being driven by the deceased. As a consequence, the deceased sustained serious bodily injuries that resulted to his death. As required in this kind of suit, the particulars of negligence were duly given as well as those of special damages.

When summons to enter appearance were served on the defendants, they jointly entered appearance on 21st May, 1991 and subsequently filed a joint statement of defence on 31st May, 1991. They denied that the accident was caused as pleaded by the plaintiff. To them the accident was caused or substantially contributed to by the driver of KXP 832 and the deceased. Particulars of negligence attributed to both these drivers were given. Particulars of special damages pleaded were similarly denied. On 2nd September, 1991, the plaint was amended, the effect of which was to change the status or capacity in which the plaintiff had mounted the suit. Initially he had sued “**as next friend to Nzomo Mutisya – deceased**”. This came about after he had obtained a grant of letters of administration intestate to the estate of the deceased.

Thereafter for one reason or another, the case could not proceed to hearing until 18th May, 2012. In between, there were successful 3rd party proceedings that were brought on board the third party summons for directions, application for dismissal of the suit for want of prosecution by the third party and discovery. Anyhow when the suit was eventually listed for hearing before me as aforesaid, **Mr. A.B. Shah**, learned counsel for the defendant had on 30th April, 2012 filed a notice of Preliminary Objection. In that notice, the defendants took the position that the suit as originally filed was a nullity. A nullity that could not be remedied. Secondly, the suit as amended was also a nullity as no letters of Administration were taken out before it was filed and thirdly, it was impossible to get witnesses 23 years after the date of the accident. The defendants urged me to attend to the Preliminary Objections aforesaid first. In anticipation that perhaps their request will be upheld by court, they had filed their skeletal submissions and list of authorities that morning.

Mr. Kimeu, learned counsel for the plaintiff did not oppose the request, I acceded to the same. Subsequently filed written submissions limited of course to the Preliminary Objections.

I have carefully considered the Preliminary Objection, rival written submissions on record and the authorities cited by counsel in support of their respective positions on the preliminary objections. As I understand it, the grounds in support of the preliminary objection are basically two fold, filing the suit in the capacity of next friend and secondly, filing suit without first obtaining a grant of letters of administration. The impossibility of getting witnesses 23 years after the accident that led to the suit cannot and can never be a preliminary point of law. That may perhaps be a ground for the dismissal of the suit for want of prosecution. Indeed, I note that such an application was filed on 17th February, 2005, by **Messrs Guram & Company Advocates**, who had come on record on behalf of the Third Party. From the record, it appears that application was never prosecuted. It still remains pending. The 6 or so authorities cited by the defendant in support of this ground of preliminary objection seem to agree with my position aforesaid.

With regard to the 1st issue, the defendants are saying that the suit is a nullity because the plaintiff had taken out the suit as next friend to the deceased. That being the case, a next friend can only sue on behalf of a minor for which he must file his consent to so act. However, no such consent was annexed. However, it is common ground that this is a fatal accident claim. It does not involve a minor. A person died as a result of the accident. In the premises a suit filed by a next friend for a deceased person is a nullity. It is only a personal representative of the estate of the deceased who can sue and be sued on behalf of such estate. Thinking that he was bringing the action under Order 32 of the Civil Procedure Act which deals with suits by or against minors and persons of unsound mind, the plaintiff duly filed with the plaint, consent to act as next friend contrary to the position held by the defendants. In effect therefore the suit was not anchored on the Law Reform Act nor Fatal accidents Act. This is even self-evident in the plaint itself. There is no reference at all to the Law Reform Act nor Fatal Accident Act so that much as the suit should have been mounted on the aforesaid acts, the Plaintiff treated it as a non-fatal ordinary running down suit. This omission rendered the suit a nullity.

The suit was also rendered a nullity on the ground that assuming that it was a fatal accidents claim, and which it is, the plaintiff had not obtained a grant of Letters of Administration intestate with regard to the estate of the deceased before he mounted this suit on his behalf. This fact is conceded to by the plaintiff in his submissions. Indeed even the record attests to that fact. That was the reason why the plaintiff found it necessary to amend the plaint. The plaintiff's, then counsel, **Mr. Matata** on 30th May, 1997 stated before **Mwera, J-**

“The suit is brought on behalf of a deceased person. I have filed for a grant of letters of administration at Nairobi. This may be ready in 2 months time. Mention 30/7/97.”

Again on 14th May, 1999 when the case came before **Mwera, J** it is recorded thus-

“...I have obtained grant (original shown to Court issued on 27/4/99). Hearing now to proceed.”

From the foregoing, it is quite apparent that the plaintiff instituted the suit without having obtained the necessary grant beforehand. No doubt this renders the suit a nullity.

The plaintiff on the other hand takes the view that suit is not a nullity on those two fronts since by subsequent amendment to the plaint those defects were cured. The position of the defendants is however, that a nullity is a nullity and no amount of amendments can cure those omissions.

I entirely agree with the position taken by the defendants. In the case of **Macfoy vs United Africa Ltd [1961]3 ALL E.R. 1169 Lord Denning** said at **Page 1172-**

“... if an act is void then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

That is the position precisely obtaining in this case. The subsequent amendment of the plaint cannot reverse the initial harm done to the suit. The plaintiff when he initiated the suit, had no capacity to sue. It is settled law that a person cannot sue on behalf of the estate of the deceased unless he has first obtained a grant of letters of Administration either limited or full. In the case of **Virginia Edith Wambui Otieno vs Joash Ochieng Ougo [1982-88] 1 KAR 1049**, the court of Appeal observed-

“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. The doctrine of the relation back of an administrator’s title, on obtaining a grant of letters of administration, to the date of the intestate’s death, cannot be invoked so as to render the action incompetent...”

This doctrine is as old as **Wankford vs Wankford [1702]** where **Powys, J** said ***“but an administrator cannot act before letters of administration are granted to him”***.

What emerges in these authorities is that if a person brings action before a grant is issued to him, the action is incompetent as at the date of its inception. There is no doctrine of relation back. So that the action as commenced by the amended plaint was incompetent at its inception. Ofcourse, had there been the doctrine of relation back, it may perhaps salvaged the plaintiff’s claim following the amendment. Sadly, it does not exist here. Since the suit was incompetent at inception, it could not be cured or repaired by the subsequent amendment.

The Plaintiff has advanced the argument that-

“The court allowed the matter to be filed first before letters of Administration had been issued ... court allowed the grant to be obtained after the suit had been filed and therefore the suit cannot be a nullity...”

I must observe straight away that such submissions have no legal basis at all. I am even surprised; a lawyer can actually advance such submissions. First, there is no record that the court allowed the plaintiff to file suit before obtaining the grant. The court does not determine whether a suit should be filed or not. The matter of the grant came before **Mwera, J** long after the suit had been filed. That was on 30th May, 1997, when **Mr. Matata**, the then learned counsel for the plaintiff owned up that he had filed the suit without the plaintiff first obtaining the grant. Secondly, a court is a neutral arbiter.

It cannot be accused of acquiescing to anything by a litigant. Thirdly, there can be no acquiescence to an illegality whether by court or a litigant. It is for all these reasons that I find that grounds (I) and (II) of the Preliminary Objection were well taken. I will accordingly strike out the suit for being incompetent and a nullity with costs to the defendant.

RULING DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day JULY, 2012.

ASIKE-MAKHANDIA

JUDGE