Case Number:	Civil Appeal 242 of 2017
Date Delivered:	04 Nov 2021
Case Class:	Civil
Court:	High Court at Mombasa
Case Action:	Judgment
Judge:	Dorah O. Chepkwony
Citation:	Clemence Mkangoma & another v T.S.S. Transporters Co. Ltd [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	H.Nyakweba
County:	Mombasa
Docket Number:	-
History Docket Number:	S.R.M.C.C No. 2223 of 2012
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 242 OF 2017

1. CLEMENCE MKANGOMA

2. PETER ONYANGO (Suing as administrators of and legal representatives of the

estate of FRANCIS OYUGI OBADHA (DECEASED).....APPELLANTS

-VERSUS-

T.S.S TRANSPORTERS CO. LTD.....RESPONDENT

(Being an appeal from the Judgment of Honourable H.Nyakweba delivered on 18th October 2017 in S.R.M.C.C No. 2223 of 2012)

JUDGMENT

1. The Appeal herein arises out of the Judgment in the **Senior Resident Magistrate's Court** at **Mombasa** vide **Civil Case No.2223 of 2012** where the Appellant's suit and the entire claim as against the Respondent was dismissed with costs to the Respondent for lack of proof on a balance of probabilities.

2. Aggrieved, the Appellants filed an appeal and set out the following as their **Grounds of Appeal** against the said Judgment;

a) That the learned Magistrate erred in law and in fact in dismissing the Plaintiffs' claim against the Defendant for lack of legal capacity to institute the suit by failing to consider the evidence adduced titled "Limited letters of administration ad litem" hereby arriving at the wrong decision.

b) That the learned Magistrate erred in law and in fact in holding that the Plaintiffs had no authority to bring this suit on behalf of the deceased's estate yet they had obtained Limited letters of administration ad litem for the sole purpose of instituting the suit. He thus overlooked the evidence on record, thus committing an injustice.

c) That the learned trial Magistrate erred in law and in fact by making a finding on the basis of the form of the document i.e P & A 47 connoting a grant ad colligenda bona at the expense of the document itself titled Limited grant of letters of administration ad litem and failing to consider the substance of the document thereof thus arriving at an unjust and unlawful decision.

d) That the learned trial Magistrate erred in law and in fact in making a finding that the Plaintiffs lacked locus on the basis of the document adduced in court thus failed to interpret the ambiguity in the said document in favour of the Plaintiffs, going against the well settled principle of law that where there is an ambiguity in such a document, the same should be interpreted to advance the Plaintiffs' rights rather than to extinguish them. He thus arrived at an inconsiderate decision.

e) That the learned trial Magistrate erred in law and in fact in making a finding that PW2 did not suffice to qualify as an eye witness yet the said witness was clear and candid as to the circumstances of what transpired during the accident. The trial Magistrate thus reached at a manifestly unjust decision.

f) That the learned trial Magistrate erred in law and in fact in making a finding that the evidence of PW2 was inadmissible yet the same formed part off a record of a public document. He thus arrived at an unlawful decision.

g) That the learned trial Magistrate erred in law and in fact in adopting wrong principles of law in assessing damages awarded to the Plaintiffs under the heads of damages for loss of dependency, loss of expectation of life and pain and suffering. He thus meted out an injustice.

h) That the trial Magistrate erred in law and in fact in awarding manifestly low awards on damages thus arriving at an unjust decision.

i) That the learned trial Magistrate failed to consider evidence on record, submissions by the Appellant and relied on extraneous matters arriving at a wholly unlawful and unjust decision.

Background

3. A brief background to the foregoing would however shed light to the discussions in this Judgment. The Appellants sued the Respondent in the suit before the subordinate court as a result of fatal injuries occasioned upon one **Francis Oyugi Obadha (**the deceased) following a road traffic accident on **19th December, 2011** at around the Cinemax area along Nyali-Reef road. The deceased was a riding **Motor Cycle Registration Number KMCP 694G Tornado** when he was allegedly hit by **Motor Vehicle Registration Number KAH 584M** make Mitsubishi Lorry owned by the Respondent. As a result of the said accident, the Appellants brought the suit in their legal capacity as the administrators of the deceased's estate claiming general damages under the **Law Reform Act** and the **Fatal Accidents Act** as well as special damages, costs and interests.

4. The Respondent, in its statement of defence dated **17th December, 2012** denied all the Appellants' claims and instead placed blame on the deceased for driving his motor cycle negligently and pleaded particulars of the negligence at paragraph four (4) of the defence.

A brief Summary of the Evidence

5. The 1st Appellant testified and called two other witnesses. She is the wife of the deceased and she produced the deceased's death certificate confirming that he had died of a road accident on **19th December, 2011**. She did not witness the accident and could not describe what had transpired at the particular time of the accident. Nonetheless, it was her evidence that she had begotten four (4) children with the deceased and they all depended on the deceased prior to his demise. She added that the deceased used to pay the house rent of Kshs.4,500.00 and school fees of Kshs.6,500.00 for two of the children. As to how much the deceased earned, she stated that although she knew the deceased was a mason, she could not tell how much he was earning. Also, she testified that they had incurred expenses for the burial of the deceased she specifically put at Kshs.40,000/= for transport. To support that claim she produced a transport agreement dated **5th January, 2012** as Exhibit 6. She also produced the mortuary agreement fees for Kshs.19,300/=and supported the claim by an invoice produced as Exhibit 7. Lastly, she produced a receipt for Kshs.10,100/= as Exhibit 8 being the amount paid to the advocates to obtain Letters of Administration.

6. **P.C Jonathan Martin** of Nyali Traffic Base testified as PW2. He confirmed that the accident happened on **19th December, 2011** and was reported to Nyali Traffic Base. As to how the accident occurred, he stated that while riding **Motorcycle Registration Number KMCP 694G,** the deceased overlapped a **lorry Registration Number KAH 584M** to the left and was run over by the lorry. He added that no one was charged for the accident and produced the police abstract as Exhibit 9. He further informed the court that there was a sketch plan in the police file although he did not produce the same as an exhibit to court.

7. **Hamisi Njumwa Kilelu** testified as PW3. His evidence was that on the material day, **19th December, 2011** at around 6.30pm, he was standing at Cinemax matatu stage when he heard a sound of a vehicle's bang and went to check on what had happened. He confirmed that it was an accident which had occurred about 100meters from where he was standing. He found a motor cycle on the pavement and a body of a person lying on a pool of blood thereon. When cross-examined, PW3 confirmed that he had only heard a bang but did not see how the accident happened save for confirming that there was a motor cycle and body lying on the pavement. That confirmed the closure of the Plaintiff/Appellant's case.

8. The Defendant/Respondent on the other hand called no witness although as confirmed by the record, it had filed two witnesses' statements for the driver and turnboy of the lorry at that material time and date respectively. However, as persuasive those statements could be, they could not form part of the evidence in the court record since their makers were never called to testify and be cross-examined as to the authenticity of the same.

9. The learned trial Magistrate analyzed the above evidence and came to the conclusion that the Appellant had not adduced sufficient evidence to establish negligence on the part of the Respondent and went on to dismiss the claim with costs.

10. When the appeal was placed before me on **27th February, 2015,** directions were issued that the appeal be canvassed by way of written submissions. The court record confirms that the parties dutifully complied with the appellants filing their submissions on **20th May, 2020** while the Respondent filed theirs on **22nd May, 2020**.

Appellants' Submissions

11. In their submission, the Appellants pointed out only four issues for determination. That is; *whether the trial Magistrate erred in law and in fact in dismissing the Plaintiffs' claim for lack of legal capacity; whether the trial Magistrate erred in making a finding that the evidence of PW2 was inadmissible; whether it was an error for the trial court to make a finding that PW3 did not qualify to be an eye witness; and lastly, who bears the costs of the Appeal*.

12. On whether the appellants had legal capacity to institute the suit, it is submitted that they had obtained a document titled **Limited Grant of Letters of Administration *Ad Litem*** although at some point it had been indicated as **Letters of Administration *Ad Colligenda Bona***. According to the Appellants, that ambiguity ought to have been interpreted in a manner that advances their rights but not to distinguish them. Reliance has been placed on **Section 72** of the **Interpretation and General Provisions Act (Cap 2),** which provides that where a document purports to be in a certain prescribed form it shall not be void by reason of deviation therefrom in so far as its substance is not affected or otherwise calculated to be misleading.

13. To buttress the submissions, reliance has been placed on excerpts from the cases of **Shabbir Ali Jusab –vs- Annar Osman Gamrai & Another [2009]eKLR** and **Microsoft Corporation –vs- Mistumi Computer Garage Ltd & Another [2001]KLR 470.** In the latter case, it was held that deviation from or lapse in form and procedure which do not go to the jurisdiction of the court or prejudice the adverse in fundamental respect ought not to be treated as nullifying the legal instruments thus affected.

14. The court was also invited to consider the finding in the Court of Appeal case of **County Government of Nyeri & Another –vs- Cecilia Wangechi Ndungu [2015]eKLR,** where the court observed that the interpretation of any document involves identifying the intentions of the drafter and that can only be achieved in having reference to the precise words used, the factual context and the aim or purpose. In that case, where **Limited Grant of Letters *Ad Colligenda Bona*** is tailored in a manner to allow for the institution of an action or, where the record expressly provides for that, then focus will shift to its contents and wording as opposed to its form. That argument is supported by among other cases, the case of **Julian Adoyo Ongunga & Another –vs- Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudaavi, Deceased) [2016] eKLR.**

15. Based on the foregoing, it is submitted that the on **7th June, 2012** the Appellants had petitioned for **Letters of Administration *Ad Litem*** for purposes of institution of a suit as is discerned from the contents of the grant thereof. Therefore, the grants which were later issued by the court should be construed to be for the purpose stated in the petition and in the grant itself, which is instituting a suit against the Respondent on behalf of the deceased's estate. The court is thus urged to be so guided.

16. On the second issue, which is whether the evidence of PW2, the police officer was admissible, it is the Appellant's submissions that the police officer was simply an expert witness and testified on the basis of the information contained in the police file and the police abstract he produced. Given that those documents are public documents, there is no basis of referring to them as hearsay or else inadmissible.

17. Lastly, as for whether the evidence by PW3 qualified as that of an expert witness, it is submitted that the he was candid and clear as to what had transpired and his evidence was not rebutted by the Respondent. According to the Appellants, the respondent called no witness and should therefore be found to be fully liable for the accident.

Respondent's Submissions

18. Firstly, the Respondent in its submissions differentiated the purpose of **Letters of Administration *Ad Litem*** and **Letters of Administration *Ad Colligenda Bona*.** The former are purposely obtained for filing suits on behalf of the deceased as provided under **Form 14** of the **Fifth Schedule** of the **Law of Succession Act** while the latter is specifically for the purpose of collecting and preserving the deceased's property where it is perishable or of precarious nature. Therefore **Letters of Administration *Ad***

Colligenda Bona cannot be used for purposes of filing a suit. And even if the court was to find in the contrary, then the Appellants would only have the power to file the suit but not to prosecute or receive proceeds of the same. In support of that line of argument, reliance has been placed on the cases of **Lydia Ntembi Kairanya & Another–vs- the Hon. AG [2009]eKLR**, **Morjarila –vs-Abdallah** and **John Komen –vs- Amos Kandie Eldoret H.C.C.C No. 20 of 1995.**

19. On whether the evidence of PW2 was admissible, it is submitted that he was not the investigating officer nor had he visited the scene therefore knew nothing of the police abstract he produced. In addition to that, it is submitted that PW2 was not the maker of the abstract and having no knowledge of the same was precluded under **Section 35(1)(2)** and **(3)** of the **Evidence Act** from producing it. In any event, the police abstract made no recommendation on who to blame for the accident and even assuming that the abstract had indicated that the Respondent was to blame for the accident, it would not have been conclusive proof of liability in the absence of supporting evidence. That notwithstanding, it is argued that PW2 had failed to produce the Sketch Plan of the accident which was vital taking into consideration that there was no other supporting evidence on liability. Therefore, according to the Respondent, the Appellants had not discharged the burden of proof on liability to the standard of "on a balance of probabilities" and as required under **Section 107** of the **Evidence Act**.

20. As for whether PW3 qualified as an eye witness, it was argued that he did not give direct evidence and his testimony was nothing but hearsay of what he heard without shedding light on how the accident had occurred. Lastly, the respondent beseeched the court to dismiss the appeal with costs and uphold the finding of the trial Magistrate.

Analysis and Determination

21. This is a first appeal and this court is therefore called upon to re-evaluate

the evidence on record and arrive at its own conclusion while taking into consideration that it did not observe the demeanour of witnesses as they testified. (*See* **Selle & Another -vs- Associated Motor Boat Co. Ltd & Others [1968]E.A 123).**

22. I have carefully evaluated the Grounds of Appeal, the pleadings, evidence on record and the submissions by both parties. I find the issues falling for determination being as follows:-

a) Whether the Appellants had locus-standi to file the suit in the subordinate court.

b) Whether liability against the Respondent was proved.

c) If issue no (b) is answered in the positive then what would the appropriate award on damages to the Appellants.

a) Whether the Respondent had Locus-standi to file the suit in the subordinate Court.

23. The Appellants filed the claim in the lower court as legal representatives of the deceased who is the late husband of the 1st Appellant and brother to the 2nd Appellant. The 1st Appellant produced a **Limited Grant *Ad Colligenda Bona*** (Exhibit 1) in court as the document which gave them the authority to file the suit. The issue was not canvassed by the parties in their submissions before the trial court but the court took upon itself to determine the issue and made a finding that **Limited Grant *Ad Colligenda*** and **Limited Grant *Ad Litem*** are issued for totally different purposes. The trial court went on to indicate that where the Plaintiff has obtained **Limited Grant *Ad Colligenda Bona*** under **Section 67 (1)** of the **Law of the Succession Act** as the Appellant herein has done, then the grantee would not be entitled the *locus standi* to pursue claim for damages but his action will be limited to the acts for collection and preservation of the assets. The trial court invoked the decision of the court in the case of **Yohana Omumia (Suing on behalf of the Estate of Pius Were Abonyo) –vs- Mumias Sugar Company Limited [2010] eKLR.**

24. The Respondent echoed the position taken by the trial court while the Appellants were of the view that the court ought not to have laid emphasis on the form of the grants issued but rather it ought to have taken into account the intention of the Appellant as is in the precise words used and the aim as stated in both the petition and the grants issued.

25. The Appellants have included as part of the Appeal, the petition filed to obtain the **Limited Letters of Administration**. On its heading, it is indicated as a Petition for **Letters of Administration *Ad Litem*** although the same is expressed to be brought under **Section 67** of the **Law of Succession Act** which provides for **Limited Letters Of Administration *Ad Colligenda Bona***. The

relevant prayer in the petition was also expressed as seeking **Grant of Administration *Ad Litem*** to be issued for the purpose of filing a suit and in the affidavit in support of the petition, the suit intended to be filed was expressed to be a claim for damages owing to the fatal injuries suffered by the deceased on **19th December, 2011**. The mix-up came when the document issued to the Appellants dictated that they had been issued with **Letter of Administration *Ad Colligenda B*ona.**

26. From the onset, it is imperative that for one to have the necessary *locus standi* to bring a cause of action in respect to the estate of a deceased person then it is incumbent upon him/her to obtain **Grant Of Letters of Administration** in cases of an administrator or act in the capacity of an executor where one is named in the deceased's will as such. The grant may, however be a full grant or a limited grant. A limited grant is specifically for a particular purpose in relation to the estate of the deceased as opposed to full grant of representation which takes care of the entire administration of the estate of a deceased person.

27. Of concern and material to the facts of this particular case, are the **Limited Grant of Letters of Administration *Ad Litem*** and the **Limited Grant of Letters of Administration *Ad Colligenda Bona***. The former is provided for under **Form 14** of the **Fifth Schedule** of the **Law of Succession Act** and is only invoked when the estate of a deceased person is required to be represented in court proceedings while the latter is usually used in an emergency for purposes of dealing with the property of a deceased person which is subject to waste or danger and where there is no sufficient time to obtain a full grant. Nonetheless, I agree with the finding of the court in the case of **Julian Adoyo Ongunga & Another –vs- Francis Kiberenge Bondeva(supra),** that there are instances where such a Limited Grant of **Letters of Administration *Ad Colligenda Bona*** is tailored in a manner as to allow for the institution of an action or where the record expressly provides for such. In such cases, the focus will be on the contents and wording of the grant.

28. In this particular case, the record confirms that on **5th June, 2012**, the Appellants petitioned the court for an order that a **Grant of Administration *Ad Litem*** do issue limited for the purpose (of filing suit/defending a suit or representing suit). The petition was allowed on **2nd July, 2012** by **Hon. Edward Muriithi J.** and the said orders were never set aside. Therefore, even if the **Limited Grants** produced by the Appellants are indicated to be **Letters of Administration *Ad Colligenda Bona***, the orders allowing the Appellant's petition in effect converted the grant of **Letters of Administration *Ad Colligenda Bona*** to a grant limited to the prosecution of the case before the trial court. The orders remained valid and could not in any manner be revisited by the trial court, which in any event has no jurisdiction to do so. A similar view was adopted in the case of **Morjaria -vs- Abdalla [1984]KLR 490** where the court stated as follows:-

"Notwithstanding that the grant of letters of administration ad colligenda bona was not a form of grant appropriate for this case and that it did not follow Form 47 in the First Schedule to the Law of Succession Act as provided by rule 36 (2) of the Probate and Administration Rules, the grant was specifically limited to "the purpose only" of representing the appellant in this appeal and those words in themselves constituted a valid grant under rule 14 enabling the appellant's son and his step-mother to represent the appellant in this appeal."

29. In the upshot of the discussion above, it is this court's conclusion that the trial Magistrate was wrong in holding that the Appellants did not have the necessary legal capacity to bring the suit, subject of this appeal.

b) Whether liability against the Respondent was proved

30. The fact that the accident occurred on **19th December, 2011** involving the deceased's **Motor Cycle Registration Number KMCP 694G** make Tornado and the Respondent's **Motor Vehicle Registration Number KAH 584M** make Mistubish Lorry has not been displaced. It is also not in dispute that the deceased died as result of injuries sustained from the said accident. The evidence of PW1-PW3, the **Police Abstract** (Exhibit-9) and the death certificate all confirm this. What is in dispute is whether the deceased died as result of his own negligence or as a result of the negligence of the respondent's authorized driver or partly thereof.

31. Revisiting the evidence on record, Pw1 merely testified that she was only told of the accident and could not tell how the accident occurred. On cross-examination, she explained that she was unable to tell who was to blame for the accident. In my view, the evidence of PW1 did not establish or at the least prove negligence on the part of the Respondent as is stipulated in the particulars of negligence made in the Plaint.

32. PW2 was a police officer at Nyali Traffic Base and he confirmed that the accident happened as reported in the police abstract which he produced as Exhibit 9. He was not the investigating officer and on that basis the trial court termed his evidence as hearsay hence inadmissible. In my view, that finding by the trial court was wrong for the reason that police abstracts are public documents

which can be produced by any police officer serving in a police station where the case was reported notwithstanding whether he was an investigating officer or not.

33. It is in the public knowledge that public officers get transferred from their stations from time to time while public records remain. In this particular case, it has not been rebutted that the Investigating Officer had been transferred. Consequently, the courts usually take judicial notice of suits and any other officer serving Nyali Traffic Base where the accident was reported could testify and produce the Police Abstract.

34. As for whether or not the sketch plans were produced, this could not devour his evidence as adduced based on what was on record in the police file and reproduced in the Abstract. He could also not be blamed for failing to produce the sketch plans since that was a decision for the owner of the case, that is, the Plaintiffs/Appellants to make. Whether the Appellants wished to support their case by adducing sketch plans, this was entirely in their discretion. Had they wished to do so, they could have sought leave to call for that evidence. Since they chose not to, the blame cannot be directed to or placed upon the police witness.

35. Be that as it may, PW2 in explaining how the accident occurred, PW2 stated that the lorry and the motor cycle were headed in the same direction and the deceased overlapped to the left whereby he was run over by the lorry. He added that the case was pending under investigations. In my humble view, PW2's evidence did not build on the Appellants' case in establishing liability or negligence on the part of the Respondent.

36. Lastly, PW3 testified that he was standing about 100 meters from where the accident happened but did not see what transpired save for hearing the sound of a bang. That on going to check, he found the deceased and his motor cycle lying on the road pavement in a pool of blood. Similarly, he could not tell of how the accident had occurred so as to guide the court in establishing who could have been at fault. However at this juncture, I will answer the heated argument by the parties on whether PW3 was an eye witness. An eyewitness could best be described as a bystander who based on what he had observed during the specific incident gives an account of what he had perceived by his sense of sight. Undoubtedly, PW3 was a bystander not far from where the accident had occurred and as a witness of fact, he told the court of what he had perceived through his hearing and sight. His evidence was merely that he heard a bang sound and thereafter went on to check what had transpired. To me, since he never saw how the accident occurred, I see no basis why he should be referred to as an eyewitness in the circumstances of this case.

37. Nonetheless, can his evidence be said to shine light on the issue in dispute, which is whether the accident occurred as a result of negligence on part of the respondent" The answer is No. He did not witness the accident happened and therefore could not tell how or who had caused the accident; whether it was the deceased or the Respondent's driver who drove in a negligent manner.

38. The foregoing is the full extent of the evidence on negligence in this case, and from, I am unable to pin point any part of it that shows or demonstrates the allegations of negligence made at paragraph four (4) of the plaint and specifically that; *the Defendant and/or its authorized driver were driving* ***Motor Vehicle Registration Number KAH 584M*** *at an excessive speed, that they failed to stop, slow down, swerve or otherwise manage the lorry so as to avoid the accident, that the motor vehicle was driven without due care or attention to other road users and especially the deceased, that the motor vehicle was driven without any form of indication, the Defendant exposed the deceased to injuries which he knew or ought to have known and lastly that the motor vehicle was carelessly and dangerously driven in the circumstances*.

39. There is clearly no evidence to show that the accident happened in the manner described in the plaint and therefore this court cannot find negligence or liability against the Respondent unless there is material evidence in proof thereof. Neither can this court make a finding that the Appellant's claim had been proved for the reason that the Defendant/Respondent did not call any witness. This is so because the burden of proof in an action for claim of damages for negligence rests primarily on the Plaintiff, who, to maintain the said action, must show that the injuries complained of were as a result of the negligent act or omission by the Defendant/Respondent. On this subject, also adopted is the finding of the court in the case of **Susan Mumbi Waititu -vs- Kefala Greedhin NRB HCC 3321 of 1993,** where it was stated that:-

"The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that he who alleges has to prove. It is for the Plaintiff to prove her case on the balance of probability and the fact that the Defendant doesn't adduce any evidence is immaterial".

40. Having found that negligence was not proved in this particular case so as to attribute negligence on the Respondent, there is no basis of considering the damages which could have been awardable to the Appellants. In any event, the parties never submitted on

the issue of quantum and they seemed contended with the assessment by the trial court.

41. In the end, and for the reasons given above, the Appeal is found to be without merit and is dismissed in its entirely. I will however make no orders as to costs.

It is so ordered.

DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI on this 4TH day of NOVEMBER, 2021.

D. O. CHEPKWONY

JUDGE