



REPUBLIC OF KENYA



**Ndungu v Musyimi (Civil Appeal E030 of 2023)
[2024] KEHC 9239 (KLR) (Civ) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9239 (KLR)

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

CIVIL

CIVIL APPEAL E030 OF 2023

S MBUNGI, J

JULY 30, 2024

**APPEAL AGAINST THE JUDGEMENT AND DECREE OF HON. K.G.
ODHIAMBO (RM) DELIVERED ON THE 23RD SEPTEMBER 2021
AT NAIROBI SMALL CLAIMS COURT SCCC NO. E103 OF 2021**

BETWEEN

PETER MUCHIRI NDUNGU APPELLANT

AND

RICHARD NDONGA MUSYIMI RESPONDENT

(Appeal against the Judgement and Decree of Hon. K.G. Odhiambo (RM) delivered on the 23rd September 2021 at Nairobi Small Claims Court SCCC No. E103 of 2021)

JUDGMENT

1. The Appellant being dissatisfied with the Judgement and Decree of Hon. K.G. Odhiambo (RM) delivered on the 23rd September 2021 at Nairobi Small Claims Court SCCC No. E103 of 2021 between Peter Muchiri Ndungu v Richard Ndonga Musyimi, filed the Memorandum of Appeal dated 17th January 2023; and the Record of Appeal dated 12th September 2023 and received in court on 21st November 2023 (filed with the leave of court granted on 22nd December 2022 in Misl. Civil Application No. E556 of 2021) (pg.5-40 of the Record of Appeal); seeking the following orders: -
 - a. The Appeal be allowed.
 - b. The whole judgement delivered on 23.09.21 against the Appellant be set aside ex debito justitiae.
 - c. The Costs of this Appeal be awarded to the appellant in any event.



- d. Such as further orders as may be necessary to avoid injustice be granted.
2. The Appeal was premised on the following grounds:-
 - i. The Learned Trial magistrate misdirected himself and erred both in fact and in law by holding that the Appellant's suit is barred by limitation and beyond salvage by extension of time.
 - ii. The Learned Trial Magistrate misdirected himself and erred both in fact and in law by holding that the Appellant still had to comply with the provisions of Section 27(2) of the Limitations of Action Act, Cap 22 despite the leave granted by Hon. P. M. Muholi to file suit out of time.
 - iii. The Learned Trial Magistrate misdirected himself in falling to consider the grounds upon which the leave to file suit out of time was granted.
 - iv. The Learned Trial Magistrate erred in law in sitting appeal on an order of a court of concurrent jurisdiction.
 - v. The Judgement of the Trial Magistrate violates the letter, spirit and intendment of the Law of *Limitation of Actions Act*, Cap 22, and renders the Act obtuse.

Background to the appeal

3. The Appellant vide a statement of claim dated 21st June 2021 before the trial magistrate court seeking compensation for loss or damage to property which occurred on or about 11th May 2018 valued at Kshs. 158,106/-.
4. The claim had been supported by a list of documents dated 16th August 2021, a bundle of documents (Pg. 41 – 55 of the record are all pleadings by the Appellant before the lower court).
5. The claim was opposed. The Respondent/Defendant entered appearance (pg.56) and filed their Response to Statement of Claim dated 30th July 2021(Pg.-57-60). They additionally filed a Notice of Preliminary Objection dated 31st July 2021(pg. 61).
6. In support of the Preliminary objection, the Respondent filed submissions and authorities (Pg. 62-65). The Appellant opposing the Preliminary objection filed submissions (Pg. 66-74).
7. The matter proceeded by way of viva voce evidence on 23rd August 2021 with the Appellant testifying in his case. The Respondent opted to file submissions (Pg. 95-98). The parties filed written submissions after the hearing. The Appellant's submissions (Pg. 75-80); the respondent's submissions(pg.81-85). The judgement was delivered on 23rd September 2021(Pg. 86-89). The decree thereof (pg. 90) The trial magistrate dismissed the Appellant's case as follows: "From the foregoing, the court does find that the claimant's suit is barred by limitation and beyond salvage by extension of time. The suit is dismissed with costs to the respondent." (pg.89)

Written Submissions At Appeal

8. The court directed that the appeal be canvassed by way of written submissions. The Appellant's written submissions drawn by KTK Advocates were dated 29th April 2024. The Respondent did not file submissions.



Determination

9. The principles which guide this court in an appeal from a trial court are now well settled. In *Selle And Another V Associated Motor Boat Company Ltd & Others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:-

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

10. Further in *David Kaburuka Gitau & Another v Nancy Ann Watbithi Gatw & Another Nyeri HCCA No. 43 of 2013*, the court opined:- ‘Is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on point of law and facts and come up with its findings and conclusions.’”

Issues for determination

11. The Appellant in his submissions identified the following issues for determination in the appeal:-
- a. Whether the Learned Trial magistrate had jurisdiction to review and overturn the ruling made by Hon. P.N. Muholi on 09.06.21.
 - b. Whether the Learned Trial Magistrate erred in Law by dismissing the Appellants suit in the Smalls Claims Court; and
 - c. Who bears the cost of the appeal.
12. The court finds that the issues placed before the court for determination in the appeal are as follows:-
- a. Whether the trial court arrived at the proper conclusion that the suit was statute-barred
 - b. Whether the trial court arrived at the proper finding that the appellant’s claim was time-barred by limitation and beyond salvage by extension of time.

(a). Whether the trial court arrived at the proper conclusion that the suit was statute-barred.

13. The Appellant submits that Hon. P.N. Muholi (PM) when granting leave to the Appellant to file a suit out of time, determined the issue of whether the Appellant’s suit was statute barred and that the learned trial Magistrate lacked the jurisdiction to review the finding of a court of concurrent jurisdiction. He submits that the issue of whether the Appellant’s suit was statute barred was resjudicata and could not be entertained by the trial court by dint of Section 7 of the *Civil Procedure Act* which provides that: -

“7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such



subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

14. The appellant defines Resjudicata as per the Black’s Law Dictionary (10th Edition) as “An issue that has been definitely settled by judicial decision.... The three essentials are (1) an earlier decision on the issue (2) a final judgment on the merits and (3) the involvement of same parties, or parties, parties in privity with the original parties”
15. The appellant submits that the trial court became functus officio in regards to filing the suit out of time, once the appellant complied with the directions to file the suit within the timelines set by the court.
16. He submits that the Respondent never filed an application to review the ruling of Hon. P. N. Muholi dated 9th June 2021, and thus the trial court had no jurisdiction to review the decision of Hon. P. N. Muholi (PM). To buttress his assertion the appellant relied on various authorities namely Njangu v s Wambugu and another (Nairobi HCCC No. 2340 OF 1991(unreported); Thairu Gachagua V Naftali Rithi Kinyua (2019) eKLR; Republic Vs Attorney General & Anor Exparte James Alfred Koroso (2013) eKLR; & Uhuru Highway Development Ltd v Central Bank of Kenya, Exchange Bank Ltd (1996) eKLR.
17. The appellant submits that the Trial court erred in finding his suit was statute barred by the Limitation Actions Act, since the court was functus officio on the said issue having rendered a decision on the same and the same having not been appealed against. The Appellant submits that his appeal be allowed and costs of the appeal granted relying on the Supreme Court decision in Jasbir Singh Rai & others v Tacarlochan Rai & Others (2014) eKLR.

Analysis

17. In the present appeal, the trial court heard the appellant’s case and upon considering the Respondent’s submissions on the issue of the appellant’s case having been time-barred, dismissed the suit (pg.87 of Record).
18. The application seeking leave was not in the record of appeal, but what the appellant relies on to assert that the trial court was functus officio in deciding the issue of whether the suit was Statute-barred was is the order issued by Hon. P.N. Muholi (Mrs.) (Pg.40 of the Record) and is duplicated below: -

“Republic of Kenya

In The Chief Magistrate Court at Nairobi

Milimani Commercial Courts

Misc. Application No. E794 of 2021

Peter Muchiri Ndungu.....plaintiff/applicant

Versus

Richard Ndonga Musyimidefendant /respondent

Order

Upon Reading the Notice of Motion Application dated 2nd Day of June 2021 presented by the Applicant and supported by the affidavit of Donald B. Kipkorir herein sworn on the same date,



And whereas this application coming up for hearing on 9th June 2021 before Hon. P. Muholi (Mr.) Principal Magistrate.

And upon reading the said Application together with supporting Affidavit and annexures thereto;

It is hereby ordered:

1. That leave be and is hereby granted to file suit out of time within 30 days from the date of this order.

Given under my hand and seal this court on the 9th Day of June 2021

Hon.p. Muholi (Mr)
Principal Magistrate”

19. Section 27 of the *Limitation of Actions ACT*, Cap 21 provides that: -

“27. Extension of limitation period in case of ignorance of material facts in actions for negligence, etc.

(1) Section 4(2) does not afford a defence to an action founded on tort where—

- (a) the action is for damages for negligence, nuisance, or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
- (b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
- (c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
- (d) the requirements of subsection (2) are fulfilled in relation to the cause of action.

(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—

- (a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and
- (b) in either case, was a date not earlier than one year before the date on which the action was brought.

(3) This section does not exclude or otherwise affect—



- (a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or
- (b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

20. An application for leave to file a suit out of time is provided under Section 28 of the [Limitation of Actions ACT](#), Cap 21 which provides that: -

“28. Application for leave of court under section 27

- (1) An application for the leave of the court for the purposes of section 27 of this Act shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.
- (2) Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient—
 - (a) to establish that cause of action, apart from any defence under section 4(2) of this Act; and
 - (b) to fulfil the requirements of section 27(2) of this Act in relation to that cause of action.
- (3) Where such an application is made after the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if the like evidence would in the absence of any evidence to the contrary, be sufficient—
 - (a) to establish that cause of action, apart from any defence under section 4(2) of this Act; and
 - (b) to fulfil the requirements of section 27(2) of this Act in relation to that cause of action, and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action



had occurred on such a date as (apart from section 27 of this Act) to afford a defence under section 4(2) of this Act.

- (4) In this section, “relevant action” in relation to an application for the leave of the court, means any action in connexion with which the leave sought by the application is required.
- (5) In this section and in section 27 of this Act “court”, in relation to an action, means the court in which the action has been or is intended to be brought”

21. The order granting leave to the appellant (Supra) was granted by the Chief Magistrate court at Milimani court upon the court considering the application filed by the appellant in that application.

“Section 28(5) of the *Limitation of Actions Act* provides that ” (5) In this section and in section 27 of this Act “court”, in relation to an action, means the court in which the action has been or is intended to be brought”
22. The statement of claim filed in the small claims court was dated 21st June 2021. The Order granting leave states that the application for leave by the appellant was dated 2nd June 2021 and the same was heard on 9th June 2021 and the order issued on an even date.
23. On 27th July 2021, the Counsel for the appellant informed the court that there was an application pending in court on an application to file a suit of time. The court directed that the appellant serves the application and the matter was set for mention on 4th August 2021.
24. On 4th August 2021, the Appellant’s counsel informed the court that a Preliminary objection was filed in Miscellaneous application E794/2021. HE informed the court that the application dated 2/6/2021 was allowed by Hon. Muholi and the appellant had been granted 30 days to file a suit.
25. The court directed that the said order be served upon the respondent and the claim Misc. E794 /2021 be availed to the court. There were directions also by the court that the Preliminary objection filed by the respondent be availed(pg.94).
26. The proceedings indicate that a ruling on the Preliminary objection was delivered on 16th August 2021(pg.95). The said ruling is not in the record for the court to make a comment on the same.
27. However, the record indicates that counsel for the Respondent sought for leave to appeal the said decision (Pg.95) and the court granted liberty to the parties to file an application for stay if they so wished. As to whether the appeal was filed or prosecuted there is no record.
28. Thereafter the matter proceeded for Viva voce evidence on 23rd August 2021.
29. Without having seen the ruling to the preliminary objection, the court cannot determine what the Respondent wished to appeal against or what the court ruled on the preliminary objection.
30. The trial court found that despite the leave having been granted to the appellant to file the suit out of time, the said order was provisional having been granted ex parte and a respondent could challenge the same on trial (See. Mary Wambui Kabugu V Kenya Bus Services Ltd CA 195/1995).
31. The order by the Hon. P. Muholi addressed the court on the grant of leave to file a suit of time but the same did not consider the merits. The consideration of the merits of the suit were left to the trial court to determine the merits of the suit.



32. By virtue of Section 28(5) of the *Limitation of Actions Act*,

“(5) In this section and in section 27 of this Act “court”, in relation to an action, means the court in which the action has been or is intended to be brought”

33. An application for leave to file a suit out of time ought to be brought before the court in which an action has been or is intended to be brought. The Appellant filed the application for leave in the Chief Magistrate’s court and not before the Small Claims Court before which the suit appealed from herein was filed.

34. The effect of the said application having been made in a different court rather than the one before which a claim is intended to be filed, violated the conditions under the *Limitation of Actions Act*, Section 28(5) and the resultant effect was that the suit filed by the Appellant was filed without any leave and the trial court having not exercised the discretion to grant the leave was well within its jurisdiction to consider whether or not the suit was time-barred.

35. Regardless, as rightly held by the Trial magistrate, in *Mary Wambui Kabugu V Kenya Bus Service Limited* [1997] eKLR, the Court of Appeal held that: -

“Now, when a judge of the superior court grants leaves ex parte, under the Limitation Act to institute proceedings which can be challenged at the trial, he in a way, does no more than a judge does when he for instance, grants an ex parte injunction, which can also be successfully challenged before another judge at its inter partes hearing. Furthermore, the question of a judge of the superior court sitting on appeal on the granting of an ex parte order under the Limitation Act by another judge of the superior court, does not in the particular circumstances, arise. Lord Denning, M. R., had this to say about it in *Cozens* at 801:

“Now I quite agree that in general, a party affected by an ex parte order can apply to discharge it. We applied this rule as of course in *R v. Morley (Valuation Officer) E.P. Peachy Property Corporation Ltd* recently, but the procedure under the Limitation Act 1963 is altogether exceptional. It says in terms that an application shall be made ex parte. This is a strong indication that the judge is to decide the application on hearing one side only. No provision is made for the defendant being heard, and I do not think that we should allow it to be done at this stage. It must be remembered that, even when the Judge grants leave, there is nothing final about it. It is merely provisional. The defendant will have every opportunity of challenging the facts and the law afterwards at the trial. The judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar. He is not in the least bound by the provisional view expressed by the judge in chambers who gave leave.”

36. The Trial Court had the jurisdiction to consider any subsequent objections made further by the respondent as relates to the leave that was granted, as a grant of leave to file a suit out of time was not a final order.



b). Whether the trial court arrived at the proper finding that the appellant's claim was time-barred by limitation and beyond salvage by extension of time.

37. The Trial Court found that extension of time applies only to claims made in tort and must relate to personal injuries arising from negligence, nuisance, or breach of duty and the Appellant's case related to a case for damages to his motor vehicle.
38. The damage to the motor vehicle as per the Police abstract had been occasioned in an accident on 11th May 2018 when a motor vehicle occurred at the Nyayo stadium roundabout when a matatu Registration Number KCN335Z failed to stop at a roundabout and rammed into his vehicle. He filed his suit dated 21st June 2021 which was 3 years 1 month 10 days after the accident.
39. Jurisdiction goes to the root of the matter and as was held in Owners of Motor Vessel 'Lilian S' vs Caltex Oil (K) Ltd (1989) KLR without jurisdiction this court or any other court can do nothing more than down its tools.
40. The Applicant's claim sought for compensation for damages to the appellant's motor vehicle arising from an accident, by dint of section 4(2) of the *Limitation of Actions Act*,
- “(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from such date”.
41. The claim by the appellant was filed after three years and the Appellant argued that he sought leave which was granted and the trial court had no right to revisit the issue.
42. A Claim for compensation for damage to a motor vehicle is not among the causes of action contemplated under sections 27 and 28 of the *Limitation of Actions Act* (Cap 22) Laws of Kenya. The extension of time is limited to the nature of claims for damages limited under section 27 of the Limitation of Action Act and no other.
43. The Appellant's claim related to a tort relating to damage to his motor vehicle arising from the alleged negligence by the Respondent. The trial court found that the Appellant's claim having been instituted beyond three years, the same was time-barred. I agree with the trial court's position that the suit was not related to a tort on personal injuries and the trial court had no jurisdiction to extend the timelines for filing the suit beyond the limitation period.
44. A court cannot act beyond the express provisions of the law and extend the period of filing suit out of time for which the law does not allow or where the requirements which are specifically set out have not been satisfied. The trial court arrived at the proper finding and there is no need to interfere with the same.
45. In the upshot, the appeal is found to be unmerited and the same is dismissed.
46. The Respondent did not file written submissions hence there will be no orders as to costs in this appeal.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF JULY 2024.

S. MBUNGI
JUDGE.



IN THE PRESENCE OF:

Court Assistant: Elizabeth Angong'a - present

Appellant: Absent

Respondent: Absent

Before Hon. S. Mbungi. J.

C/A Veronica

For Appellant- KTK Advocates

For Respondent- Kimondo Gachoka & Co. Advocates

