



**Fin Tea Company Ltd v Ngongodi & another (Suing as Administrators
of the Estate of Grace Wakesho Mwalalo - Deceased) (Civil Appeal
71 of 2020) [2023] KEHC 27610 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 27610 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 71 OF 2020
F WANGARI, J
OCTOBER 27, 2023**

BETWEEN

FIN TEA COMPANY LTD APPELLANT

AND

PETHUEL MWALALO NGONGODI 1ST RESPONDENT

JOEL MWALALO NGONGODI 2ND RESPONDENT

**SUING AS ADMINISTRATORS OF THE ESTATE OF GRACE WAKESHO
MWALALO - DECEASED**

*((Being an Appeal against the entire Judgement/Decree of Hon. G.O. Kiage Resident
Magistrate delivered on 13th May, 2020 in Mombasa CMCC No. 4668 of 2001))*

JUDGMENT

1. This is an appeal from the judgement of the Learned Resident Magistrate (as he then was) Hon. Gideon Kiage in Mombasa CMCC 4668 of 2001 given on May 13, 2020.
2. The Appellant raised three (3) grounds of appeal which were set out as follows: -
 - a. That the learned trial magistrate misdirected himself in law in finding that the Appellant's argument that the Plaintiff's was suit time-barred was raised later at trial notwithstanding case law stating that leave to file a suit out of time can only be challenged at trial;
 - b. That the learned trial magistrate erred in law and in fact in finding that the deceased was a passenger in the Defendant's motor vehicle notwithstanding that the registration number of vehicle involved in the accident was not proven;



- c. The learned trial magistrate erred in law and in fact in finding the Appellant liable for the accident on the basis of hearsay evidence as the Respondent's did not call any eyewitness
3. The Appellant thus prayed that the trial court's judgement dated 13th May, 2020 be reviewed and/or set aside and that the costs of the appeal be borne by the Respondent.
4. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
5. This was aptly stated in the cases of *Selle vs Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters vs Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

6. In *Livestock Research Organization v Okoko & another* (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling), Justice R. E. Aburili, J. held as follows;

In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In *Gitobu Manyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that

: “[A]n appeal to this Court from a trial by the High Court is by way of 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 allowances in this respect”

7. I have looked at the Appellant's grounds of appeal, the trial court's record including the impugned and the detailed written submissions filed by both parties. Upon consideration of the said submissions, it came to my attention that the Appellant had raised a pertinent issue on whether the trial court ought to have determined the case considering that the same was time barred. The Respondents had not addressed this issue in their written submissions and I thus directed parties to file further submissions on the issue of whether the suit was time barred.
8. Parties duly complied. The Appellant's further submissions are dated 11th April, 2023 while the Respondents submissions are dated 23rd May, 2023.

Analysis and Determination

9. I have considered the appeal lodged, the submissions filed both for and against, the authorities cited as well as the law and I discern the following issues for determination: -
 - a. Whether the Respondents' suit before the trial court was time-barred;



- b. If the answer to (a) is in the affirmative, whether the trial court erred in entering judgement for the Respondents
 - c. Who bears the cost?
10. On the first issue, it is not in dispute that the Respondents' suit was filed on 28th November, 2001 and as per the plaint dated 31st May, 2001, it was pleaded that the accident subject of the suit occurred on 28th April, 2001. Therefore, without any doubt, the suit was filed outside the three years period provided for by section 4 (2) of the Limitations of Actions Act. It states as follows: -

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:

11. However, the same Act at sections 27 and 28 highlights the circumstances where such failure can be sanctioned with the leave of court. Section 27 of the *Limitation of Actions Act* provides for extension of limitation period in case of ignorance of material facts in actions for negligence, etc. It reads: -

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- (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.
12. As per the law, a party who is caught up by limitation period is required to seek leave and that leave be granted. In this case, I note that on 4th October, 2001, the Respondents through originating summons dated 27th June, 2001 moved court seeking for extension of the period of limitation. The reasons for



the delay were said that the then Plaintiff she had been admitted for six (6) months and since she was in much pain, she had no time in pursuing the matter further. At paragraph 5 of the affidavit, she averred as follows: -

(5) That further, I was under the mistaken belief that I could not file suit immediately after my accident since I had not healed and therefore a complete assessment of general and special damages could not be done by this honourable court.

13. Though the application was exhibited, there is no evidence that the same was considered and the orders sought granted. Without such an order, the court cannot presume that it was granted. The proceedings before the trial court confirm that they first commenced on 7th July, 2003 before Honourable B. Thurania, Senior Resident Magistrate. Therefore, there being no evidence of grant of leave, I agree that the Appellant was entitled to raise the issue of limitation during trial. Even if the order had been granted, it is a fact that the application for extension or enlargement of time is *ex parte*. Therefore, the Appellant could not be estopped from raising it.

14. Though the initial Plaintiff had averred that she only instructed her counsel in March, 2001, this is contradicted by the demand letter dated 2nd November, 2000 (page 18 of the Record of Appeal. I have set out paragraph 5 of the Respondents' affidavit in support of the application for grant for leave. Can the same be considered a material fact which was outside the Respondents' knowledge? The court while considering the issue of leave to file suit out of time in *YH Wholesalers Limited v Kenya Revenue Authority* [2021] eKLR held as follows: -

“...Time bar limits the right to seek judicial redress. It serves an important purpose in that it prevents inordinate delays which may be detrimental to the interests of justice. An applicant for leave to file suit out of time must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable...”

15. The reason for the delay according to me is not plausible at all as the Respondents had counsel from the onset of the case. A demand letter was issued way back in November, 2000 and there was no justification why the suit was filed almost one (1) year later. Similarly, though the initial Plaintiff stated that she had been admitted, the admission period was only six (6) months. Therefore, full explanation for the delay was not given. I come to the inescapable conclusion that the suit was time barred and no leave to commence the same was granted. I thus return an affirmative finding on the first issue.

16. Having found as above, was the trial court correct in its finding that the limitation period was raised late in the day and entering judgement for the Respondents? I note that at paragraph 8 of the amended statement of defence dated 24th August, 2005, it was pleaded that the suit is time barred and the amended plaint was defective and thus, the Defendant reserved the right to apply for the same to be struck out. The issue of time was again raised during cross examination of PW1 (see page 248 of the Record of Appeal. The Appellant in its submissions before the trial court submitted on the issue of limitation (page 220 of the Record of Appeal.

17. In the trial court's judgement, it was indicated that this issue of limitation was raised after the conclusion of the hearing. As set out above, this is not entirely correct. The limitation issue was a jurisdictional one which went to the trial court's power to entertain the matter further. Though it is always good to raise jurisdictional issues at the earliest possible opportunity, it has



been held that such issues can even be raised on appeal. In *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR, the Court of Appeal held thus: -

“...Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal. So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception...”

18. As held above, it is best taken at inception but it is not a bar from raising it at any other time. It could even be raised by the court suo moto. This was addressed by the Supreme Court in *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR, when it held as follows: -

“...A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in *Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B”* [2008] 1 EA 367 stated thus: “What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...”

19. In *Anacleth Kalia Musau v Attorney General & 2 Others* [2020] eKLR, the Court of Appeal while addressing itself on the issue of limitation cited with approval the East Africa Court of Appeal decision in *In the Matter of Iga v Makerere University* [1972] E.A. 62 where it was held thus: -

“...The limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time-barred, the court cannot grant the remedy or relief...The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, and no grounds of exemption are shown in the plaint, the plaint must be rejected.” (Our emphasis). The learned Judge in this appeal, no doubt did not err when she determined whether, by operation of the law, she had to down tools for want of jurisdiction...”

20. The trial court therefore made an error in failing to hold that the suit was statute barred. This is an error capable of correction by this court and it does so by holding that the suit by the Respondents was time barred.

21. On the issue of costs, a careful reading of Section 27 indicates that it is considered trite law that costs follow the cause or event as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exist some other good reasons and or cause for not awarding costs to the successful party. Having allowed the appeal, it would be onerous to award costs to the Appellant and in the circumstances, I order that each party bears own costs.

22. Flowing from the above, I proceed to make the following disposition: -



- a. The appeal is hereby allowed on terms that the judgement delivered on 13th May, 2020 is set aside and or reviewed and that the further amended plaint dated July 19, 2016 is struck out for being filed out of time and without leave;
- b. Each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 27TH DAY OF OCTOBER, 2023.

F. WANGARI

JUDGE

In the presence of:

Mr. Mbithi Advocate for the Appellant

N/A for the Respondent

Barile, Court Assistant

