



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 107 OF 2016

**THABU KALUME NGETE (Suing as the legal Representative of the
Estate of CHARO KATANA MASHA-DECEASED)...APPELLANT**

VERSUS

ROBINSON INVESTMENT LIMITED.....RESPONDENT

J U D G M E N T

1. Thabu Kalume Ngete is the widow of the late Charo Katana Masha who died on 24th April 2011 while the deceased was engaged in his duties at the Respondent's behest. That he was stabbed by one of the rowdy revelers during rugby events for East Africa at Nakuru Athletics Club on the left side of the chest, a stab that went direct to his heart leading to his death.

2. It was her view that the employer was to blame and by a plaint dated 8th February, 2016 she filed a suit against the respondent seeking general and special damages, costs and interest for alleged breach of contract.

3. The respondent filed its defence dated 17th May, 2016 on 19th May, 2016 seeking the Appellant's suit against it to be dismissed with costs. The respondent denied the Appellant's claim in toto and in particular averred that the deceased herein sustained fatal injuries whilst on a frolic of his own and on a drinking spree which later resulted into a fight outside Nakuru Athletic Club and that it is in no way liable for the said event and the outcome.

4. Before the hearing and determination of the suit, the Appellant vide a Chamber Summons Application dated 11th August, 2016 sought the following orders: -

a. THAT the Honourable court be pleased to extend the limitation period hereof to enable the plaintiff (presumably Plaintiff) filed herein claiming damages for Fatal Injuries sustained by CHARO KATANA MASHA (Deceased) on 24th April, 2011 whilst working for the defendant herein as operation manager thereto be sustained in the suit herein.

b. THAT the said leave should act retrospectively and be deemed to have been given as required and the suit properly filed.

5. The Application was premised on the grounds that the cause of action arose on 24th April, 2011 and the period of limitation within which to file suit of three (3) years has since expired and that leave of this Honourable Court is required in order to sustain the already filed suit herein. That the late filing of this suit was not deliberate or ill intended but was occasioned by the fact that the appellant and the respondent were in agreement to have the suit settled out of court but the Respondent reneged therefrom necessitating filing of the suit. The appellant claimed that her suit is genuine and with high likelihood of success.

6. The Respondent in opposition of the Appellant's Application and in urging the court to dismiss the same with costs filed Grounds of Opposition dated 15th August, 2016 premised on following;

i. The application is fatally defective, bad in law, mischievous frivolous, incompetent and cannot be entertained by this court.

ii. The application lacks merit and has been brought as an afterthought by the plaintiff herein.

iii. The inordinate delay by the plaintiff in filing this suit on time is unexplainable and the said application cannot find favour with this court as it is contra the mandatory provisions of the Limitation of Actions Act Cap 22 Laws of Kenya.

iv. The plaintiff has failed to prove as by the Law required that any material facts relating to the alleged cause of action were or included facts of a decisive character which were at all times outside the plaintiff's knowledge (actual or constructive) thus the plaintiff's application has fallen short of the statutory requirements and should be disallowed.

v. The plaintiff's allegation that the delay in filing this suit was a result of the defendant's promise to compensate the plaintiff is not a valid reason under the limitation of actions act for this court to grant leave to file the suit out of time.

vi. In any event, this suit ought to have been filed within 12 months of the Deceased's death on 24.4.2011, as per the mandatory requirements of section 29(4) of the Limitation of Action. The entire suit is thus clearly defective and ought to be struck out.

7. The learned Magistrate upon hearing the parties, delivered his Ruling on 27th September, 2016 dismissing the appellant's Application.

8. In dismissing the said Application the trial court was guided by the decision of *Radido J in Maria Machocho vs Total Kenya Limited [2013] eKLR* where the learned judge observed that **the court neither has the statutory jurisdiction nor discretion to grant leave or extend time in causes of action based on breach of contract of service or actions arising out the Employment Act, 2007.**

9. That Ruling provoked the appeal dated 10th October, 2016, was provoked by that ruling on the grounds that: -

1. The learned trial magistrate erred and misdirected himself in law by referring himself to a wrong authority.

2. The learned trial magistrate erred and misdirected himself by referring to six years' period whereas the period in question was 3 years.

3. The learned trial magistrate erred and misdirected himself by not appreciating that section 90 of the Employment Act only amended Section 4 (1) of a limitation of actions act cap 22 and did not amend section 4(2) of the said act.

4. The learned trial magistrate erred and misdirected himself by not appreciating that under section 4(2) of Cap 22, he had powers to extend time as this is allowed under section 27 of the said act as this cause of action falls under Negligence as the victim suffered fatal injuries.

5. The learned trial Magistrate erred and misdirecting himself by treating this claim herein as if it was purely under employment and claim of accrued benefits of the claimant whereas it was under negligence which falls under the law of tort whereby extension of time is allowed upon the requirements proved and this is what the magistrate should have considered.

10. The appellant thus sought the following orders:

1. That Ruling of the Honourable Court dated 27th September, 2016 be reviewed and or set aside.

2. That the said Ruling be substituted with an order that the appellant had satisfied the requirements of extension of time.

3. That this Honourable Court extends the said time and order that the case in the lower court do proceed to full hearing and determination thereto.

4. That the Respondent do bear the costs of this Appeal.

11. On 25th February, 2021 the parties took directions to canvass the Appeal by way of written submissions.

APPELLANT'S WRITTEN SUBMISSIONS

12. The appellant submitted that the deceased in this matter died on 24th April, 2011 at the respondent's place of work. Consequently, negotiations commenced and the respondent was to pay her an agreed sum of Kshs. 1, 632,000/- as compensation. However, the respondent purportedly paid her a sum of Kshs.200,000/= as final dues.

13. The Appellant stated that she was discontented with the purported payment and immediately went to the Labour Office to complain That the Labour Officer upon receipt of her complaint wrote a letter to the Respondent demanding payment of the balance on or before the 8th of April 2012. The respondent did not comply necessitating her to instruct the firm of Gekanana & Co. Advocates on 7th November, 2012 to institute legal proceedings against the Respondent and this suit was duly filed on 8th February, 2016.

14. It was submitted that the respondent cannot be allowed to make a false impression that it will fully compensate the Appellant only for it to renege and state that the Appellant's suit is time barred. The appellant contended that this is pure fraud and this court should allow her file suit against the respondent out of time.

15. The appellant argued that though the Employment Act Section 90 gave a limitation time of three (3) years, the Limitation of Actions Act allows the extension of time at part III in cases of disability, acknowledgement, part payment, fraud, mistake and ignorance of material facts.

16. It was the Appellant's position that the deceased herein was under an employment contract and, and Section 90 of the Employment Act

did not apply to him. That the applicable law was Section 4(1) of the Limitation of Actions Act. That the court has unfettered discretion to allow the application to extend time under Section 12 (3) (viii) of Employment and Labour Relations Act. For this proposition the appellant relied on the case of Maurice Oduor Oketch Verses Chequered Flag Limited [2013] eKLR.

17. The Appellant also relied on United Arab Emirates vs Abdelghafar & Others 1995 IRLR 243, Sayers vs Clarke Walker (a firm) [2002]EWCA CIV 645 & Nicholas Kiptoo Arap Korir Salat vs Independent Electoral And Boundaries Commission & 7 Others [2014]EKLR where the courts outlined the principles to be observed in exercising the discretion to extend time.

18. The Appellant urged this court to allow the Appeal.

RESPONDENT'S SUBMISSIONS

19. The respondent submitted on the following issues: -

i. Whether the court can extend the limitation period in a claim based on contract;

ii. Whether the appellant has demonstrated any justifiable reason for failing to institute suit within the stipulated time.

20. On the first issue, the Respondent argued that section 90 of the Employment Act stipulates that a claimant must file his claim within three (3) years' failure to which the court lacks jurisdiction to extend time of causes of actions based on contract.

21. The respondent relied on the case of Owners Of Motor Vessel "Lilian S" Caltex Oil (Kenya Ltd [1989] eKLR as confirmed in the case of Peter Nyamai & 7others vs M.J. Clarke Limited [2013] eKLR where the court observed that the law does not create room for extension of time.

22. The respondent also relied on the Court of Appeal decision in Divecon Limited vs Samani [1995-1998]1EA at 54 where the court stated that section 4(1) of the Limitation of Actions Act was clear about there being no room for extension of time in matters contract.

23. The Respondent's position is that this court lacks jurisdiction to extend limitation period under Section 90 of the Employment Act.

24. On the second issue, the respondent argued that the appellant ought to have filed the matter within statutory period as he was represented by an advocate M/S Gekanana & Co. Advocates who was given instructions to seek compensation for the deceased's estate one year after the demise of the deceased. They argued further that negotiations commenced and respondent paid the Appellant Kshs.200,000/= and therefore the issue of fraud as alleged is an afterthought which must not be entertained by this court.

25. They stated that there was no order stopping the Appellant from moving to court in the pendency of negotiations.

26. They argued that the case of Beatrice Kahai Adagala Vs. Postal Corporation Of Kenya [2014]eKLR relied on by the appellant is inapplicable to their case since the court therein declined to grant leave to file suit out of time or extend the limitation period.

27. It was the respondents position that allegation of fraud cannot stand as the appellant has not demonstrated that the respondent had promised to pay any other additional sum or a further out of court settlement in order to allege fraud.

28. The appellant prayed that this appeal be dismissed with costs.

ISSUES FOR DETERMINATION

1. Whether the suit herein is founded on tort and not purely on breach of employment contract as was determined by the trial magistrate.

2. Whether the suit is time barred.

3. Whether this court can extend the limitation period for filing the suit.

4. Who should bear the costs.

ANALYSIS

Whether the suit herein is founded on tort and not purely on breach of employment contract as was determined by the trial magistrate

29. I must point out that the mere mention of **Section 90 of the Employment Act** made me consider transferring this matter to the Employment and Labour Relations Court. It became necessary to consider the issue set out herein before making that determination.

30. The appellant in her Memorandum of Appeal faulted the trial magistrate for treating the claim herein as if it was purely under employment whereas in her view it fell under the law of tort whereby extension of time is allowed.

31. According to Black's Law Dictionary 8th Edition a tort is a "civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another."

32. Sir John Salmond *Salmond on Torts 17th Edition* described a tort as a civil wrong for which the remedy is a common law action for unliquidated damages and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation.

33. To determine whether the claim herein is founded on tort it is necessary to examine the plaint. At paragraph 4 the Appellant averred as follows;

“on or about 24th April, 2011 while the deceased herein was engaged in his duties at the defendant’s behest he sustained fatal injuries by being stabbed by one of the rowdy revelers during rugby events for East Africa at Nakuru Athletics Club at the left side of the chest direct to the heart of the deceased herein. It is the plaintiff’s contention that the said injuries were solely and substantially caused by the defendant’s breach of contract.

PARTICULARS OF BREACH OF CONTRACT

- a. Not providing the deceased with protective gears e.g helmet,shield,protective jackets and gloves**
- b. allowing the deceased to work in a dangerous place without warning**
- c. failing to provide the deceased with proper and safe system of working**
- d. exposing the plaintiff to injury or damage they knew or ought to have known by providing enough guards to the volatile ground especially at night time to control rowdy revelers thereto**
- e. in total breach of employment contract and terms thereof in regard to protection of employment herein under the employment act.”**

34. The prayers sought in the suit are;

- i. General Damages under the Fatal Accidents Act Cap 32 and the Law Reform Act Cap 26.**
- ii. Special Damages Kshs. 30,000/=**
- iii. Costs of this suit.**
- iv. Interest on a, b and c at Court rates.**
- v. Any other relief this court may deem necessary.**

35. A consideration of what is pleaded in the plaint that claim is on breach of contract, one can see from the particulars that there is an element of allegation of negligence on the part of the Respondent, and the appellant is simply seeking for damages for personal injuries arising out of negligence on the part of the respondent.

36. I find persuasive support of the above position in **Kisii High Court Civil Appeal No. 169 Of 2009; Kiamokama Tea Factory Co. Limited Vs Joshua Nyakoni, [2015] eKLR**, where it was stated:-

“.....With respect, there is no magic in mentioning in a plaint the term breach of contract as a basis of the suit so as to give it the 6-year protection against the Limitation of Actions Act. It is the substance of the claim that must be examined not the nomenclature! Other than using the phrase ‘breach of contract’ in paragraph 7 of the Plaint, there is no related averment in the entire Plaint. The claim is purely presented as a breach of statutory duty and in negligence, and the particulars of the breach of statutory duty and the particulars of negligence are given in paragraphs 6 and 7 of the Plaint as shown above”

37. The court went on to state;

“.....As I understand the matter, the duty of care stipulated by the statute in employment cases is a civil obligation which arises where a relationship of employment exists, hence the need to plead the contract of employment. The contract of employment is a condition precedent for the crystallization of the statutory duty of care. This duty remains a tort which only arises in the context of a contract of service. Breach of the statutory duty is not a breach of the contract but breach of duty of care in tort.”

38. Having considered the substance of the claim herein, it is my view that it arises out of the statutory duty of care imposed on the respondent by the contract of employment, hence it is a suit premised on tort.

39. Before leaving this point I find it necessary to point out that the appellant mentioned in the plaint at paragraph 8 the assessment made the labour office on the work man compensation with respect to the deceased. However, in the prayers for judgment in the suit was filed she did not seek to enforce that assessment.

Whether the suit is time barred

The limitation period for filing a claim under tort is 3 years as stipulated under **section 4(2) of the Limitation of Actions Act**. The said **section 4(2)** states that;

“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...”

40. It is pleaded in the plaint that the cause of action arose on the 24th April 2011. This suit was filed on 8th February, 2016 about 4 years after the date the cause of action arose. The respondent’s action therefore being one founded on tort became statute barred on 24th April, 2014.

Whether this court can extend the limitation period for filing the suit

41. Having found that the claim herein is based on tort, is there ground for extension of time? In **Gathoni vs Kenya Co-operative Creameries Ltd Civil Application No. 122 of 1981**, *Potter, J.* observed in *obiter* that;

“The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest”

42. **Section 4(2) of the Limitation of Actions Act** has been the subject of interpretation in different superior courts. The Court of Appeal in the case of **Mary Osundwa vs Nzoia Sugar Company Limited [2002] eKLR** observed as follows with regard to the section:

“This section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort.”

43. Therefore, extension of time applies only to claims made in tort and even then the claims must be in respect of personal injuries arising from 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).

44. The application before the subordinate court was brought under the provisions of **sections 5(b), 27 , 28(3) and 29(1) of the Limitation of Action Act Cap 22, Article 159(2) of the Constitution** among others.

45. The appellant had the obligation to demonstrate the requirements of **Section 27(2)** which states;

“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.”

45. Nothing was placed before the court as an explanation as to also comply with **Section 28(3) of the same Act** which states:

(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.”

47. Without the applicant demonstrating compliance with the above provisions of the law the court would not be in a position to exercise its discretion in granting the orders sought.

48. The appellant had a WIBA assessment and a demand letter from the labour office i.e. District Occupational Health and Safety Officer Nakuru dated 8th November 2011 for **Kshs. 1,632,000**, addressed to the Respondent. Clearly, she was always aware of this claim and all that appertained to it.

49. The learned trial magistrate applied **section 90 of the Employment Act** because he considered that this was a purely breach of contract case in disallowing the application. I am of the view that the claim as filed was based on tort. However, having failed to fulfil the requirements of the law with respect to extension of time, I am of the view that there is no basis for this court to interfere with his decision.

50. To that event the appeal must fall.

Who should bear costs

51. Costs are in the discretion of the court under **Section 27 of the Civil Procedure Act** and ordinarily they follow the event. In this case the appellant and the respondent were involved in the back and forth with respect to the labour office's WIBA assessment of what ought to have been paid to the appellant's family. That appears to have been the cause of this suit, and the alleged delay in filing any suit. For that reason, it is my view that each party bears its own costs.

DATED, SIGNED AND DELIVERED THIS VIRTUALLY THIS 7TH DAY OF APRIL, 2022

MUMBUA T. MATHEKA

JUDGE

M/s Ogeto & Co. Advocates for Appellant N/A

Githiru & Co. Advocates for respondent N/A

Ruling be sent via email