



CMM v Kenya Hospital Association t/a Nairobi Hospital & another (Civil Case 57 of 2019) [2022] KEHC 15918 (KLR) (Civ) (29 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15918 (KLR)

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

CIVIL

CIVIL CASE 57 OF 2019

JK SERGON, J

NOVEMBER 29, 2022

BETWEEN

CMM PLAINTIFF

AND

**KENYA HOSPITAL ASSOCIATION T/A NAIROBI HOSPITAL 1ST
DEFENDANT**

DR. JOSEPH AMOLO ALUOCH 2ND DEFENDANT

RULING

1. The plaintiff herein instituted a suit against the 1st and 2nd defendants by way of the plaint dated March 26, 2019 and sought for general damages arising out of a claim for medical negligence.
2. Upon service of summons, the 1st defendant put its statement of defence dated May 28, 2019 to deny the plaintiff's claim.
3. The 1st defendant herein filed a Preliminary Objection to the Application dated March 15, 2021 on the following grounds:
 - a. At paragraph 6 of the plaint dated March 26, 2019, the plaintiff alleges that there was negligence on the part of the 1st defendant which occurred on or about November 6, 2015.
 - b. The cause of action against the 3rd defendant, which arose on or about November 6, 2015, is therefore the tort of negligence.
 - c. The suit herein was filed on March 27, 2019.



- d. The suit is expressly time barred by dint of Section 4 (2) of the [Limitation of Action Act](#), Cap 22 of the laws of Kenya, and should be struck out with costs.
4. In opposing the Preliminary Objection, the plaintiff filed grounds of objection and raised the following grounds;
 - i. The preliminary objection is an afterthought, brought in bad faith with the sole intention of frustrating the plaintiff's attempt to realize the fruits of justice.
 - ii. The plaintiff admits that this suit was filed on March 27, 2019 within the time frame of his knowledge of the medical negligence.
 - iii. The 1st defendant has misconstrued section 4(2) of the [Limitation of Action Act](#), Cap 22 of the Laws of Kenya by failing to take into account that the cause of action arose on 24 June 2017 as averred in Paragraph 10 and 11 of the Plaint dated 26 March 2019.
 - iv. Allowing the Preliminary Objection would defeat this Honourable Court's overriding objective of facilitating affordable and expeditious resolution of civil disputes.
 - v. The 1st defendant has not been fully sincere in its preliminary objection hence rendering it undeserving of this Honourable Court's discretion.
 - vi. Consequently, the 1st defendant herein has not demonstrated sufficient cause for grounds upon which this Honourable Court can exercise its discretion to grant the objection sought.
5. The parties dispensed with the preliminary objection through filing and exchanging written submissions. In their submissions dated November 25, 2021 the 1st defendant submitted that the lawsuit is time-barred because it should have been filed by the November 6, 2018 after being filed on the March 27, 2019 and that it should be struck out because the cause of action, negligence, which is a tort, arose on the November 6, 2015 while the lawsuit was filed on the March 27, 2019.
6. The 1st defendant has relied on the case of [Gathoni v Kenya Co-operative Creameries Limited](#) (1982) KLR 104 held that:

“The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest”
7. The 1st defendant contends that just because the instant case is still in the pretrial phase, the plaintiff's claims that the preliminary objection was made too late in the day are unfounded and unsupported by the law. A party may raise a legal issue under Order 2 Rule 9 of the [Civil Procedure Code](#) at any time during the course of the proceedings, including after the case has been heard but before a decision has been made.
8. The plaintiff whose submissions are dated January 17, 2022 argues that the cause of action in this case arose when the plaintiff found out he was not HIV positive on June 24, 2017 and that the defendants had admitted that the cause of action in this suit is a tort of negligence.



9. It is the plaintiff's submissions that in medical negligence cases, there has been a significant departure from this rule because the courts have adopted a discovery rule to determine the cause of action for medical negligence. This is because the courts recognize that an injury may not manifest itself until the limitation period has passed, even though the injured party had no knowledge or reason to know of the tort.
10. The plaintiff relied on the case of *Yoshizaki v Hilo Hospital*, 50 Haw 150, 433 P 2d 220 (1967) a medical malpractice case, the Supreme Court of Hawaii adopted what has become known as the discovery rule which states that, under the statute of limitations currently codified in HR S 657-7, a cause of action does not accrue and the limitations period therefore does not begin to run, until the plaintiff knew or should have known of the defendant's negligence.
11. The plaintiff believes that the time to file a lawsuit is when he learns of the defendant's negligence. He claims that the defendants misled him into thinking he had HIV when they tested him for the first time on November 5, 2015, and that he held that belief until June 24, 2017, when he learned otherwise after receiving a negative test at a different hospital. It is at this point that the plaintiff became aware of the relevant facts pertaining to the case.
12. I have considered the grounds laid out in the notice of preliminary objection; and the rival submissions and authorities cited in that respect.
13. It is clear that the preliminary objection is fundamentally challenging the validity of the suit for being statute barred.
14. To begin with, what constitutes a preliminary objection was discussed in the case of *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696 in the following manner:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”
15. The above definition was further advanced in the Supreme Court case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR when it rendered itself thus:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”
16. Upon considering the rival positions taken by the parties and upon my perusal of the pleadings on record, I note that it is not in dispute that the claim in question is in the nature of medical negligence which is a tort.
17. I therefore turn my attention to the proviso of Section 4(2) of the *Act* which expresses the following:

“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...”
18. The law on limitations is clear that the time begins to run when the cause of action accrues. The real contention as seen from the preliminary objection and contending submissions lies in ascertaining when the cause of action began to accrue in the present instance.



19. From my perusal of the plaint, I observed that the plaintiff claims that the defendants falsely informed him that he had HIV when he was first tested by them on November 5, 2015, and that he continued to believe this until June 24, 2017, when he learned that he had tested negative at a different hospital.
20. I associate myself with the reasoning of the court in the case of *Humphrey Kiriungi Njagi v Aga Khan Health Services Ltd* (2005) eKLR

“Are the Courts to take at face value the provisions of section 4(2) of the *Limitation of Actions Act* (Cap.22), and indiscriminately require that tort cases must be filed within three years of the occurrence of a particular incident? The answer must be no, because identifying the cause of action and determining its nature, may be a judicial task, performed after taking into account the facts of each case. The cause of action may not be obvious, or may be so extended or so dynamic that it cannot be marked as elapsed over one single day. The cause of action in health-care matters, for instance, cannot realistically be assigned to one single act occurring on a particular day, and for which one individual takes the blame. The reference-point in such a situation must be when the harm was sustained by the claimant; and the relevant date may be somewhat removed from the date when a particular act of medical care took place...”
21. This being a medical negligence claim, it is apparent that the cause of action did not accrue in one event but was sustained over time.
22. Upon considering the facts presented in the plaint, I am of the view that the time began to run as from June 24, 2017 when the plaintiff discovered that he was HIV negative after being tested in another hospital.
23. Suffice it to say that I am satisfied that at the time of filing the suit sometime on or about March 26, 2019 the statutory time period had not lapsed and hence the suit is valid.
24. Consequently, the 1st defendant’s notice of preliminary objection dated March 15, 2021 is without merit. It is dismissed with costs to the plaintiff.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 29th day of November, 2022.

.....
J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff
 for the 1st Defendant
 for the 2nd Defendant

