REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET.

CIVIL APPEAL NO. 144 OF 2016

NANDI TEA ESTATES LIMITED.....APPELLANT

-VERSUS-

JOHN MABIALO ONYANGO.....RESPONDENT

JUDGMENT:

This an appeal from the judgment and decree of the **Hon. M. Cheronoh, Senior Resident Magistrate** sitting in Kapsabet, delivered on **19/9/2016** via Kapsabet **SRMCC No. 331 of 2011.**

In the lower court the Respondent vide plaint dated **15/9/2010 and filed in court on 21/12/2017** filed a suit for negligence against the Appellant herein seeking for general and special damages, costs and interest. He alleged that on or about **2/11/2007**, while on duty as an employee for the Appellant, he slipped and fell down as a result of which he sustained serious injuries suffering loss and damage for which he holds the appellant responsible for alleged none provision of protective gears.

The matter proceeded to full hearing and on **19/9/2016** the trial court delivered its judgment whereby the respondent herein was awarded **Kshs.200,000/=** as general damages, **Kshs.3,000/=** as special damages as well as costs and interest of the suit.

The court also in its judgment apportioned liability in the ratio **of 20%:80% in** favour of the Respondent herein.

Being dissatisfied with the trial court's judgment in its entirety, the Appellant has filed the instant appeal challenging both liability and quantum via its memorandum of appeal dated **4/10/2016** citing four grounds of appeal as stipulated on the face of the memorandum of appeal.

When the matter came up for mention for directions, it was agreed that the appeal be canvassed by way of written submissions and both the Appellant and Respondent filed their respective submissions.

ISSUES FOR DETERMINTION

1. **Whether the court has jurisdiction to entertain this matter in view of the Work Injury Benefits Act of 2007 and the Supreme Court's Judgment delivered on 3rd December, 2019.**

2. **Whether the suit herein is time-barred by the Limitation of Actions Act.**

ANALYSIS AND DETERMINATION

This being a first appeal, this court is obliged by the stipulation in **Section 78 of the Civil Procedure Act**, to re-assess and re-evaluate the evidence adduced before the trial Court and arrive at its own independent conclusion, bearing in mind the fact that unlike the trial court, it neither saw nor heard the witnesses as they testified. This legal principal was pronounced in the case of; -

SIAYA CIVIL APPEAL NO. 5 OF 2017, FRANCIS NDAHEBWA TWALA VS BEN NGANYI, where **R. E. ABURILI J.** stated as follows;

> ***"……. This being a first appeal, this Court is mandated by Section 78 of the Civil Procedure Act and as was espoused in the case of Kenya Ports Authority Vs Kushton (K) Ltd (2009) 2 EA, 212 wherein the Court of Appeal stated; inter alia: -***
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> ***"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither heard the witnesses and should make due allowance in that***

respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

I have carefully considered the grounds of appeal, the pleadings and evidence adduced before the trial Court, the exhibits produced therein, the submissions in support of this appeal and the authorities relied on by the counsels on record for parties herein.

Upon perusal of the lower court proceedings, I have noted that the plaint in the primary suit is dated **15.9.2010** while the verifying affidavit is dated **15.9.2011**. It is not clear when the plaint in the lower court was filed since the same does not bear the court's receiving stamp. However, as per the plaint attached in the Record of appeal, it is stamped **21.12.2017**. A receipt Number **4115853** issued on **4.10.2011** in respect of **Kapsabet SRMCC NO.331/2011** indicates that the plaint, verifying affidavit, list of witnesses, list of documents and summons were filed on that day **(4/10/2011)**. The said discrepancies in the plaint and verifying affidavit have not been explained.

Be it as it may, as per the receipt dated **4.10.2011**, it can be deduced that that's the date when the plaint in the primary suit was filed.

The **Work Injury Benefits Act (WIBA), 2007** came into operation on **2nd June 2008 via Gazette Notice No. 60 of 23rd May, 2008.**

Section 16 of the Act ousts the jurisdiction of the Courts in claims arising from an occupational accident or disease-causing disablement or death in the course of work. The section thus provides;

"***No action shall lie by an employee or a dependent of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death…."***

Under the framework established under the Act, work injury related claims are to be referred to the **Director of Occupational Safety and Health**.

The Law Society of Kenya on **14th April, 2008** moved to court to challenge this provision and other provisions of the Act citing that it was inconsistent with **Section 60** of the old constitution, via ***LAW SOCIETY OF KENYA V HON. ATTORNEY GENERAL & ANOR. NAIROBI PETITION NO. 185 OF 2008,*** and on **4 March 2009**, the High Court issued a declaration that **Section 16** of the Act (amongst other sections were inconsistent with the Constitution and therefore null and devoid of the status of law.

The Honourable Attorney General aggrieved with the High Court's declarations, appealed to the Court of Appeal in **ATTORNEY GENERAL -VS- LAW SOCIETY OF KENYA & ANOR [2017] eKLR,** and the Court of Appeal rendered itself on **17th November 2017** whereby it set aside the High Court's declaration that **Section 16 of the Act** was inconsistent with the Constitution.

Dissatisfied with the said decision, the Law Society of Kenya appealed to the Supreme Court via ***LAW SOCIETY OF KENYA -Vs- ATTORNEY GENERAL & ANOR [2019] eKLR.***

The Supreme Court dismissed the petition appeal on **3rd December, 2019** and at **Paragraph 85** it rendered itself, in the following terms:

".. In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the Act, litigation relating to work-injuries had gone on, and a number of the suits had progressed up to decree stage; some of which were still being heard, while others were still at the preliminary stage. All such matters were being dealt with under the then existing and completely different regimes of law. We thus agree with the Appellate Court that Claimants in those pending cases have a legitimate expectation that upon the passage of the Act, their cases would be concluded under the judicial process which they had invoked. However, were it not for such legitimate expectation, WIBA, not being unconstitutional and even more progressive statute, as we have shown above, we opine that it is best that all matters are finalized under Section 52 aforesaid.

It is my view that ***Section 16 of the Work Injury Benefits Act*** became operational and applicable on **2.6.2008** when the Act came into operation. According to the supreme court's decision at **Paragraph 85** above, only those matters that were filed in court before the enactment of the **Work Injury Benefits Act (WIBA)** would be heard and concluded by the Courts. However, those matters that were instituted in Court after **2.6.2008** when the Act came into operation were to be handled by the **Director of Occupational Safety and Health**.

In this instant case, it is alleged at **Paragraph 5** of the plaint on **Page 6 of the Record of appeal,** that the cause of action occurred on **2/11/2007** which is before the **Work Injury Benefits Act (WIBA)** came into force. However, as per the filing receipt number **4115853,**the claim in the lower Court was filed on **4.10.2011 close to four (4)** years after the occurrence of the alleged accident and way after the enactment of the Act.

It is therefore evident that when the Respondent herein moved the trial Court, the Courts had no jurisdiction to entertain work injury related claims as stipulated under the **Work Injury Benefits Act (WIBA).**

The Court of Appeal's judgment in **Attorney-General -vs- Law Society of Kenya & Anor [2017] eKLR,** all cases filed in Court after **2nd June 2008** could only continue and be sustained before the Director of Occupational Safety and Health as per the provisions of the Act and therefore the Courts could only adjudicate on matters filed before **2nd June, 2008.**

From the foregoing position, it is clear that this Court lacks jurisdiction to hear and determine this matter By dint of **Section 16 of the Work**

Injury Benefits Act, which requires that from **2nd June 2008**, no employee could approach the Courts with claims seeking damages for action in respect of occupational accident or disease resulting in disablement or death of an employee against the employer.

It is notable that the trial Court as well as the parties herein did not notice nor did they point out the issue of jurisdiction of the Court in handling a work injury related matter.

Further, none of the parties raised the issue of limitation of actions in their respective submissions.

It is trite law that jurisdiction is everything without which the Court downs its tools.

This legal principle was reiterated in the *locus* classicus case *of* ***OWNERS OF THE MOTOR VESSEL LILLIAN 'S' V CALTEX OIL (KENYA) LTD [1989] KLR 1*** *where* ***Justice Nyarangi*** *of the Court of Appeal held as follows;*

> ***"Jurisdiction is everything. Without it a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction…. Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."***

The Court further went ahead to state that**;**

> ***'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'***

Also, the Court in the case of;

SAMUEL KAMAU MACHARIA -VS- KCB & 2 OTHERS, CIVIL APPLICATION NO. 2 OF 2011 stated as follows:

> ***"A Court's jurisdiction flows from either the Constitution or Legislation or both. Thus, a Court of Law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law"***

The Court further succinctly settled the issue of jurisdiction in the case of;

JOSEPH MUTHEE KAMAU & ANOTHER V. DAVID MWANGI GICHURE & ANOTHER [2013] eKLR, in the following words: -

> ***"When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being Kagenyi v. Musirambo (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court's pecuniary jurisdiction.***
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> ***We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.***

It is therefore clear that the trial Court's judgment that led to this appeal was delivered by a court which had no jurisdiction and is therefore a nullity.

ISSUE NO.2. WHETHER THE SUIT HEREIN IS TIME-BARRED BY THE LIMITATION OF ACTIONS ACT.

As already found, the trial Court had no jurisdiction to entertain this matter and even if the trial Court had jurisdiction, the same cannot be sustainable for the following reasons;

The respondent's claim in the trial court was filed on **4.10.2011** as per the court filing *receipt* Number **4115853.** It is worth noting that at **Paragraph 5** of the plaint on **Page 6 of the Record of appeal,** the cause of action arose on **2/11/2007.**

None of the parties to this case noticed this and if they did, the same was not captured during trial in the lower Court. It should also be noted that the trial Court did not consider the issue while writing its judgment.

Its acknowledged that the defendant appellant in his statement of defence at **paragraph 14** mentioned the issue in passing when he stated; **"the defendant avers that the plaintiff's suit herein is bad in law and improperly before this honourable court and shall at the opportune time seek to have it dismissed on these grounds….."**

However, the issue wasn't raised in their submissions both at the lower Court and in this Court.

The respondent's action, being one founded on tort, became statute barred on **2nd November, 2010**, three years after the cause of action

arose as prescribed by **Section 4(1)** of the Limitation of Actions *Act.*

Section 4 of the Limitation of Actions Act sets down the time limits within which some causes of action are to be filed. This section thus provides;

> ***4. Actions of contract and tort and certain other actions***
>
> ***(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—***
>
> ***(a) actions founded on contract;***
>
> ***(b) actions to enforce a recognizance;***
>
> ***(c) actions to enforce an award;***
>
> ***(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture; (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.***
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> ***(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.***

In as much as the respondent in his plaint at **paragraph 4** has averred that there existed a contract of employment between him and the appellant and that the appellant was in breach of its statutory duty, I will agree with the sentiments by the judges in;

> **KISII HIGH COURT OF CIVIL APPEAL NO. 169 OF 2009; KIAMOKAMA TEA FACTORY CO. LIMITED VS JOSHUA NYAKONI**, ***[2015] e KLR***, that there is no magic in mentioning in a plaint the term *"breach of contract"* in order to gain the **6 years protection against the Limitation of Actions Act.** The court thus disagreed with the ruling in "***Robin Cahill & 9 Others v. T.S. Nandhra & 3 Others – Civil Appeal No. 57 of 2002 (unreported) this Court upheld the decision of Ringera J. (as he then was) when he held:***
>
> ***"The trial Court also reasoned that as the plaintiff had based his claim under both contract and tort, it was prudent to let the case proceed to hearing on the merits when the issue would be finally determined…"***

The Court thus proceeded to hold that;

> ***"…Although the Court of Appeal in Robin Cahill, supra, cited in the Kenya Airways case did deal with a cause of action in tort could be filed as a representative action, it also upheld the decision of Ringera J. on the issue of breach of statutory duty being a tort as well as a claim in negligence and fraud, as observed by the Court in the Kenya Airways case at page 10 of the Judgement:***
>
> ***"In Robin Cahill & 9 Others v. T.S. Nandhra & 3 Others – Civil Appeal No. 57 of 2002 (unreported) this Court upheld the decision of Ringera J. (as he then was) when he held:***
>
> ***"The trial court also reasoned that as the plaintiff had based his claim under both contract and tort, it was prudent to let the case proceed to hearing on the merits when the issue would be finally determined." The learned magistrate said:***
>
> ***"Where a plaintiff pleads his claim both as tort and contract, then he has the benefit of relying on either of the limitations periods set out for tort and contract. In the present case the plaintiff's case is grounded both on tort and contract which do have a limitation period of 3 and 6 years respectively. In that regard, I would not deem appropriate to sniff out the plaintiff's claim at this point. I deem it proper that the suit proceeds to hearing on the issue and a determination be made at the full trial."***
>
> ***……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. No particulars of breach of contract are given……".***

Given the foregoing, the respondent herein cannot enjoy the 6 years protection under the law of contract. I will reiterate that in the present case, the claim is for negligence. It seeks damages for personal injuries arising out of tortious acts. The negligent act complained off is alleged to have occurred on the **2/11/2007**. This suit was filed on **4.10.2011** about **3 years and 11 months** after the date the cause of action arose. There is therefore no doubt that the claim is time barred.

Accordingly, I find that the Respondent's suit herein is an action in tort. And that the plaintiff's suit before the Resident Magistrate's Court being **Kapsabet SRMCC NO. 331 of 2011** is an action founded in negligence and breach of statutory duty both which are causes of action

in Tort and which, therefore, are subject to the 3-year limitation period under section 4 (1) of the Limitation of Actions Act.

Having held that the suit was filed outside the applicable 3-year period of limitation under section 4 (1) of the Limitations of Actions Act, the suit was statutorily time-barred.

The trial Court's judgment that led to this appeal was delivered by a Court which had no jurisdiction and is therefore a nullity.

Costs are in the discretion of the Court under section 27 of the Civil Procedure Act. As the plaintiff filed his suit in honest pursuit of his claim for compensation for personal injury, which has not been determined on its merits for reason of being statutorily time-barred and for want of jurisdiction by the Court, the order on costs that commends itself to this Court is that each party bears its own costs both in the trial Court and in this Court.

For the reasons set out above, the appeal is allowed, the decree and judgment of the trial Court is set aside with no order as to costs.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF APRIIL, 2021.

In the presence of:-

Miss Jemeli for the applicant.

Mr. Nyanwega for the respondent

Gladys - Court Assistant