



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 91 OF 2019

RAJA MATERIAL SUPPLIES.....APPELLANT

VERSUS

JOSEPH KIARIE WAGURAH.....RESPONDENT

(Being an appeal against the ruling of Wanjala (RM) in Nairobi

Milimani CMCC No. 7603 of 2016 delivered on 23rd January, 2018)

JUDGMENT

1. This appeal emanates from the ruling delivered on 23rd January, 2018 in respect of the motion dated 3rd October, 2017 by **Joseph Kiarie Wagurah**, the plaintiff in the lower court and now the Respondent.

2. The Respondent had by a plaint filed on 3rd November, 2016 sued the defendant, **Raja Material Supplies** now the Appellant, to recover damages in the sum of Kshs. 218,360/- arising from an accident involving the Respondent's motor vehicle registration number **KAX 188V** and the Appellant's motor vehicle registration number **KAR 668V**, in which the Respondent's vehicle allegedly sustained damage. The accident was alleged to have occurred on 4th November 2013. The Appellant filed its statement of defence dated 19th April, 2017 denying the occurrence of the accident and liability, and alternatively attributing the accident to the negligence of the Respondent. It was further averred that the suit was statute barred.

3. Apparently prompted by the latter averment, the Respondent filed a motion dated 3rd October, 2017, seeking the enlargement of time to file his suit out of time, and that the plaint filed on 3rd November, 2016 be deemed as duly filed; and leave to amend the plaint. On grounds, *inter alia*, that the Respondent had erroneously relied on the date of the accident contained in the police abstract namely, 4th November 2013 whereas the correct date was 31st October 2013. The motion was supported by the affidavit of **Caren Jaguga** in amplifying the grounds on the face of the motion.

4. The Appellant opposed the Respondent's motion through the replying affidavit sworn by **Catherine Njogu**. The motion was canvassed through written submissions and on 23rd January, 2018 the trial magistrate in her ruling found in favour of the Respondent, granting the motion.

5. The ruling triggered the instant appeal by the Appellants, on the following grounds:

1. **“That the learned magistrate erred in law and fact by failing to appreciate and find that the Respondent's cause of action against the Appellant was statute barred under Section 4(2), 27, 28 and 30 of the Limitation of Actions Act, Chapter 22 Laws of Kenya.**

2. **That the learned magistrate erred in law and fact by failing to appreciate and find that the Respondent's cause of action against the Appellant is for material damage and extension of time for such suit is not envisaged under Section 4(2), 27, 28 and 30 of the Limitation of Actions Act, Chapter 22 Laws of Kenya.**

3. **That the learned magistrate erred in law and in fact in allowing the application to file suit out of time whereupon the said suit had already been filed out of time and without leave of the court contrary to Order 37 Rule 6 of the Civil Procedure Rules, 2010.**

4. **That the learned magistrate erred in law in disregarding or failing to accord due and proper consideration upon the**

Defendant's/Appellant's written submission in totality that it lacked jurisdiction to hear and determine the Plaintiff's/Respondent's suit.

5. That the learned magistrate erred in law in disregarding or failing to accord due and proper consideration upon defendant's written submissions in totality. "

6. The appeal was canvassed by way of written submissions. The Appellant challenged the trial court's findings and the resultant orders. Counsel submitted that from the averments in the plaint, the Respondent's suit was a claim for material damage; that pursuant to Section 27(1) of the Limitation of Actions Act, extension of time for filing suit founded on tort is limited to torts of negligence, nuisance or breach of duty and the damages claimed must relate to personal injury. Citing the case of **Emmanuel Kidaho Ruhengeri v Sadry Dhala [2017] eKLR** counsel argued that time cannot be extended for the filing out of time of a suit for material damage. Regarding the rationale for limitation, counsel cited **Askah Mogendi & Another v Shem Magara [2012] eKLR** to the effect that the object is to prevent claimants from prosecuting stale claims. Finally, it was submitted the suit had been initially filed without leave contrary to Order 37 Rule 6 of the Civil Procedure Rules, and the trial court erred in allowing the motion. The Court was urged to allow the appeal.

7. The Respondent in defending the impugned ruling reiterated material in his affidavit before the lower and asserted that the mistake in the accident dates was innocent and ought not be visited upon the innocent litigant. Further, counsel stated that Sections 4(2) and 27(3) (b) of the Limitation of Actions Act and Order 50 Rule 6 of the Civil Procedure Rules donate power to the court to extend time within which to perform an act prescribed by statute, and that the Appellant had failed to demonstrate what prejudice it would suffer if the court granted the leave sought. Counsel argued that the damages claimed arise from acts of negligence and the suit fell within the purview of Sections 4(2), 27, 28 and 30 of the Limitation of Actions Act.

8. In support of these propositions, he relied on decisions in **Phillip Chemwolo & Another v Augustine Kubede (1982-88) KAR 103** and **Ugas Sheikh Mohammed v Abdullah Said Salat & 2 others [2014] eKLR**. Finally, calling to his aid the decision of the Supreme Court in **Nick Salat v Independent Electoral and Boundaries Commission & 7 Others** counsel submitted the Respondent had fulfilled all conditions for the grant of extension of time. He urged the Court to dismiss the appeal with costs.

9. The court has perused the record of the lower court and considered the material canvassed in respect of the appeal. The motion which was the subject of the impugned ruling had been expressed to be brought under Order 50 Rule 6 of the Civil Procedure Rules and Section 4(2) and 27(1) of the Limitation of Actions Act.

10. In its ruling, the trial court referred to Sections 4(2), 27(1)(c) and 28(3) of the Limitation of Actions Act and in allowing the Respondent's motion the court had this to say: -

".....It is not disputed that the claim before this court emanates from a road traffic accident as such under tort, it is a claim from damages for negligence as pleaded in paragraph 6 of the plaint, as such as stated in the above provisions of the law Section 4(2) cannot afford a defence to such a claim meaning the defendant cannot in my opinion raise a defence of limitation to defeat this claim.

Further I find that section 27(1)(c) envisages a situation where a court can grant leave to file suit out time after the commencement of an action.....

.....The plaintiff has made the relevant application after filing of the suit he seeks to regularize and in the interest of justice as provided for under Article 48 of the Constitution to enable the plaintiff access justice as envisaged under the Constitution, and to enable this court render substantive justice as envisaged under Article 159(2)(d) of the Constitution and Section 1A the Civil Procedure Act on the overriding objective of the court being to render justice. In Peter Gichuki Kabio v Joseph Muturi Chege [2015] eKLR the court held that, it is clear that the law of limitation does not extinguish claims but operates to bar the claim sought for when the suit or claim is time barred.

..... similarly, the defendant herein has not demonstrated the prejudice that it will suffer if the application is allowed, guided by the above provisions of the law and the cited authorities, I will allow the application....." (sic)

11. Section 4(2) of the Limitation of Actions Act provides 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;

Provided that an action for libel or slander may not be brought after the end of twelve months form such date".

12. In **Rawal v Rawal (1990) KLR 275** and **Dhanesvar V. Mehta vs Manilal M. Shah [1965] EA 321** it was stated that the object of the limitation law is to prevent claimants from prosecuting stale claims and to protect the adverse party after he had lost evidence from being disturbed after a long lapse of time, the effect being to remove remedies that otherwise would have been available to the late claimant, irrespective of the merits of his case.

13. No doubt echoing the holdings in **Wycliffe A. Swanya v Toyota East Africa Limited and Another [2009] eKLR; Rawal v. Rawal and Dhanesvar V. Mehta's case, Aburili J.** restated the rationale behind the Limitation of Actions Act, in **Bosire Ogero v. Royal Media Services [2015] eKLR** as follows:

“The law of limitation of actions is intended to bar plaintiffs from instituting claims that are stale and (is) aimed at protecting defendants against unreasonable delay in bringing of suits against them. The issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same”.

14. There is no dispute that the Respondent’s claim in the lower court was one for material damage and had been filed outside the statutory period. It seems to me that on this appeal, that the Respondent was making the case that the lower court had discretion to enlarge time for his late suit. Hence the reference to authorities relating to the exercise of discretion of the Court, generally, to extend time under the Civil Procedure Rules. The time within which the various categories of civil claims may be filed by parties is regulated by statute, namely the Limitation of Actions Act, and not the Civil Procedure Rules.

15. Section 27 (1) of the Limitation of Actions Act provides that:

“(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) ...”

16. The above provision has been the subject of interpretation by various superior courts. Sub-section 1 (b) thereof only envisages the granting of leave to file suit out of time for damages in respect of negligence, nuisance or breach of duty consisting of or including damages in respect of personal injuries of any person. Clearly material damage claims are excluded. The Appellant in the case of **Mary Osundwa V. Nzoia Sugar Company Limited Civil Appeal No. 244 of 2000 [2002] eKLR** had successfully sought leave (granted by consent in the High Court) to file a suit for alleged breach of contract, some 7 years since the cause of action accrued. The Court of Appeal having set out the provisions of Section 27 (1) of the Limitation of Actions Act stated that:

“The 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 torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff because 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. Accordingly, Osiemo J. had no jurisdiction to extend time as he purported to do on 28th May, 1991. That the order was by consent was neither here nor there; the parties could not confer jurisdiction on the Judge by their consent”.

17. Similarly, in **Emmanuel Kidaho’s** case (supra) and **Bosire Ogero v. Royal Media Services [2015] eKLR**, the courts held that Section 27 (1) does not provide for the extension of time to file a suit in respect of a material damage claim and for defamation, respectively. The Respondent’s claim in the lower court was statute barred pursuant to section 4(2) of the Limitation of Actions Act and neither section 27(1) of the Limitation of Actions Act nor the Civil Procedure Rules could provide succour for him. The lower court erred in assuming a discretion it did not possess under the applicable law. It was a misdirection on the part of the lower court to treat the provisions of Section 4(2) of the Limitation of Actions Act as mere technicality while failing to read various limbs of section 27(1) conjunctively as a whole. The court had no jurisdiction to entertain the statute barred suit before it or to extend time as it did.

18. In the result, this appeal must succeed. The Court hereby sets aside the ruling of the lower court and substitutes therefor an order dismissing the Respondent’s motion dated 3rd November 2017, the net effect being that the suit in the lower court stands struck out. The costs of the appeal and in the lower court are awarded to the Appellants.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 28TH DAY OF OCTOBER 2021

C. MEOLI

JUDGE

In the presence of:

Ms. Malasoy for the Appellant

N/A for the Respondent

C/A: Sarah