REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 122 OF 2015

WILSON KIPROTICH.....APPELLANT

-VERSUS-

ELKANA KIPROTICH KOSITANYE.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Hon. P. Mbulika, RM,

in Eldoret CMCC No. 632 of 2014 delivered on 8 October 2015)

JUDGMENT

[1] Before the lower court, the Appellant herein, **Wilson Kiprotich**, had sued the Respondent, **Elkana Kiprotich Kositany**, seeking a refund of some **Kshs. 738,600/=;** general damages, interest and costs. His cause of action was that, on or about the months of **March** and **April 2008**, he had assigned the Respondent various duties as his driver of **Tractor Registration No. KAU 768D**; and that during the said period, the Respondent reported to work as usual and ploughed three separate farms, namely: Kitale Airstrip, Eldoret Airstrip and Kinyoru Farm, respectively.

[2] It was further the contention of the Respondent that it was an express term of the agreement that after the completion of the work, the Respondent would remit payment in the total sum of **Kshs. 738,600/=** made up as follows:

[a] Kshs. 158,400/= after the ploughing, harrowing and planting of Kitale Airstrip farm measuring approximately 36 acres;

[b] Kshs. 484,200/= after the ploughing, harrowing and planting of Eldoret Airstrip farm measuring approximately 110 acres;

[c] Kshs. 96,000/= after the tilling and planting of Kinyoru farm measuring approximately 30 acres;

[3] The Appellant averred that, in spite of several demands, the Respondent failed to remit the aforesaid sum to him; and had stayed put and was adamant in his refusal to pay; hence the suit.

[4] In his Defence before the lower court, the Respondent conceded that in the year **2008**, he was working for the Appellant as a tractor driver; and that they were contracted to plough the three farms aforementioned. He however averred that, as the farms were big, the Appellant's tractor was not the only tractor hired for the work. He further averred that he performed his duty as a tractor driver; and that the payments were made directly either to the Appellant or his brother, **Samwel Cheserem,** who was the Appellant's manager. It was further the contention of the Respondent that the Appellant reported the matter at Eldoret Police Station, thereby causing him to be arrested by officers from Kapsabet Police Station; and yet the Appellant thereafter failed to record a statement with the Police to enable conclusion of investigations. Thus, the Respondent denied the claim against him and put the Appellant to strict proof thereof.

[5] Although the case was fully heard by **Hon. Mbulika, RM**, the suit was ultimately decided on a technicality and the suit struck out for being time-barred from the standpoint of **Section 4(1)** of the **Limitation of Actions Act, Chapter 22** of the **Laws of Kenya**. Being aggrieved by that decision, the Appellant filed this appeal on the following grounds:

[a] That the learned Resident Magistrate erred in law and facts in striking out the Appellant's suit;

[b] That the learned Resident Magistrate erred in law and facts in failing to take note that the Respondent in his testimony in court under oath and in his pleadings acknowledged the Appellant's claim and the issue of the cause of action being time-barred did not

arise;

[c] That the learned Resident Magistrate erred in law in failing to take note that the Respondent had acknowledged his contractual relationship with the Appellant in respect of the Appellant's cause of action and the issue of being time-barred did not arise;

[d] That the learned Resident Magistrate further erred in law in failing to appreciate that the Respondent having admitted in his pleadings the existence of the contractual relationship with the Appellant, the cause of action was revived in terms of the **Evidence Act, Chapter 80** of the **Laws of Kenya;**

[e] That the learned Resident Magistrate further erred in law in failing to administer substantive justice in terms of the law and the Constitution;

[f] That the learned Resident Magistrate further erred in law in failing to appreciate that once the suit goes to full trial she could only dismiss the same and not strike it out;

[g] That the learned Resident Magistrate failed in law to appreciate that it was the duty of the Respondent to institute Third Party Proceedings against **Edith Wamalwa** in terms of **Order 1** of the **Civil Procedure Rules**; or alternatively, apply to have the said **Edith Wamalwa** joined as a Defendant.

[6] Accordingly, the Appellant prayed that the Judgment of the Trial Magistrate delivered on **8 October 2015** be set aside; and that the matter be determined on merit on the basis of the evidence on record. He also prayed for the costs of this appeal and in the lower court; and any further or other relief the Court may deem fit to grant. I however note that the last ground has to do with the merit of the case before the lower court record; and yet the learned Resident Magistrate did not deal with the merits of the case before her. I therefore propose not to deal with that aspect of the appeal.

[7] Pursuant to the directions given on **28 May 2019** that the appeal be urged by way of written submissions, Counsel for the Respondent filed her written submissions herein on **19 June 2019**, though she erroneously titled the same as the Plaintiff's Submissions. There appears to be no submissions filed by or on behalf of the Appellant; and having perused and considered the written submissions filed by the Respondent, it is my view that the single issue for determination is whether or not the Trial Magistrate erred in **striking out** the Appellant's suit on the ground that it was **time-barred**.

[8] This being a first appeal, this Court has the obligation to re-evaluate the proceedings before the lower court with a view of coming to its conclusions thereon. Hence, in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, it was held that:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect..."**

[9] There appears to be no dispute, from the pleadings and the evidence adduced before the lower court that the Respondent was, at all times material to this appeal, working for the Appellant as a tractor driver; or that in that capacity, he was deployed to perform ploughing operations for and on behalf of the Appellant on the three farms aforementioned. In the Appellant's estimation, the Respondent earned some **Kshs. 738,600/=** from the operations which he did not remit to him despite various reminders. It was further the contention of the Appellant that he suffered mental anguish as a result of the Respondent's actions for which he claimed general damages.

[10] A consideration of the Plaint shows, in paragraph 3 thereof, that the cause of action arose in the months of **March** and **April 2008**; and since the dominant aspect of the claim was hinged on the contractual relationship between the parties, the cause of action was valid and justiciable up to **April 2014;** for **Section 4(1)** of the **Limitation of Actions Act** provides that:

> **"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;"**

[11] There being no dispute that the Appellant's suit was not filed until **2 September 2014**, the twin issues to ascertain are:

[a] Whether there was acknowledgment of the claim as contended by the Respondent in his Grounds of Appeal; and,

[b] Whether the Trial Magistrate erred in striking out the suit, as opposed to a dismissal.

[12] For purposes of limitation, **Section 23(3)** of the **Limitation of Actions Act** stipulates that:

> **"Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, … and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment…"**

[13] And, according to the Appellant, there was acknowledgment of his claim by the Respondent; which then had the effect of extending the limitation period. The acknowledgments, according to Grounds 2, 3, and 4 of the Appellant's Grounds of Appeal, were made not only in the Respondent's Defence, but also in his testimony in court under oath. However, a careful consideration of the Defence filed before the lower

court dated **17 November 2014**, portrays a completely different picture. In paragraph 3 thereof, the Respondent admitted that he was employed by the Appellant as a tractor driver and that they were contracted to plough the three farms belonging to one **Edith Wamalwa**. At paragraph 3(d), he averred that:

> **"…the Defendant performed his duty as the driver however the payments were to be done directly to the plaintiff or Mr. Samwel Cheserem who was the plaintiff's manager as I was not entitled to receive any payment from the owners of the farms."**

[14] Likewise, there was nothing in the evidence of the Respondent indicative of an unequivocal admission that he received **Kshs. 738,600/=** from **Edith Wamalwa** on behalf of the Appellant as to form an acknowledgment for purposes of **Section 23** of the **Limitation of Actions Act**. In any event, the evidence was adduced after the suit was filed and therefore cannot count for purposes of reckoning time under the **Limitation of Actions Act**. It is noteworthy too that **Section 24(1)** of the Act, qualifies the provisions of **Section 23** by stipulating that:

> **"Every acknowledgement of the kind mentioned in section 23 of this Act must be in writing and signed by the person making it."**

[15] To the extent therefore that there was no written acknowledgement in the manner envisaged by **Section 24(1)** of the **Limitation of Actions Act** that was brought to her attention, the Trial Magistrate cannot be faulted for finding that the Respondent's suit was time-barred.

[16] Needless to say that the issue of limitation is one that goes to the jurisdiction of the court; and therefore ought to have been taken at the earliest possible opportunity. As was aptly stated in the **Owners of Motor Vessel "Lilian s" vs. Caltex Oil (K) Ltd [1989] KLR 1** (per **Nyarangi, JA**) 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..."**

[17] Nevertheless, owing to its fundamental nature, no court would proceed and determine a matter on its merits where it lacks the jurisdiction to do so; and therefore, there was no obligation on the part of the trial magistrate to determine the case on its merits upon realizing that it was time-barred. In the case of the **Owners of Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd** (supra), this was made amply clear in the following timeless words of **Hon. Nyarangi, JA:**

> **"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."**

[18] And, according to the **Major Law Lexicon, Volume 4,** jurisdiction is defined as follows:

> **"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by Statute or Chapter or Commission under which the Court is constituted and may be extended or restricted by similar means. If no restriction or limitation is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind or nature of the actions or the matters of which the particular court has cognizance or as to the area over which the jurisdiction extends, or it may partake of both these characteristics..."**

[19] In this case therefore, the jurisdiction of the lower court was limited by the provisions of **Section 4(1)** of the **Limitation of Actions Act** and the trial court had no option but to down tools and strike out the suit as she did. I therefore find no merit in this appeal and would accordingly dismiss it with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 29TH DAY OF JANUARY, 2020

OLGA SEWE

JUDGE