



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

CIVIL SUIT NO 24 OF 2018

JOHN PAUL ODERO (The Administrator of the Estate of the late

SYBIL MASINDE ODERO- Deceased).....PLAINTIFF

VERSUS

DR BARTILOL KIGEN.....1ST DEFENDANT

DR GERALD MONIZ.....2ND DEFENDANT

THE KENYA HOSPITAL ASSOCIATION T/A NAIROBI HOSPITAL...3RD DEFENDANT

RULING

1. The Plaintiff filed the suit herein on 5th February 2018. The claim was for medical negligence against the Defendants herein. The circumstances of the case were that on or about 11th February 2011, Sybil Masinde Odero (hereinafter referred to as “the deceased”) was admitted in the 3rd Defendant’s Hospital Maternity Ward but died while under the care of the 1st and 2nd Defendants herein.
2. On 30th April 2019, the 3rd Defendant filed a Notice of Preliminary Objection (P.O.) of even date. It stated that this court lacked the jurisdiction to hear and determine the suit herein on the ground that the suit was expressly time barred by dint of Section 4(2) of the Limitation of Actions Act Cap 22 (Laws of Kenya) and hence ought to be struck out against it.
3. On 7th August 2019, it filed a P.O. amended on 6th August 2019 wherein it stated that the order issued by the Magistrate’s court was not binding on the High Court as the High Court was the only one that had jurisdiction to grant the Plaintiff leave to file his suit out of time. It was categorical that since this court did not grant him leave to appeal out of time, this court therefore lacked jurisdiction to hear and determine the matter. It thus urged this court to strike out the suit against it.
4. It placed reliance on the cases of **Wilson Nyabuto Areri vs Postal Corporation of Kenya Limited [2018] eKLR** and **Stanley Ombeva & Another vs Nathan M Murugu & 5 Others [2015] eKLR** to support its submissions that a court had no jurisdiction to hear a statute barred case.
5. On his part, the 1st Defendant filed a Notice of Preliminary Objection dated 8th May 2019 on 7th June 2019. He also pointed out that being a negligence claim, the same ought to have been filed within three (3) years which was 12th February 2014 and that the same having been filed on 5th February 2018, it was time barred by virtue of Section 4(2) of the Law of Limitations Act.
6. He relied on the cases of **Tom Onyango Oketch vs Kenyatta National Hospital [2016] eKLR**, **Rosemary Wanjiru Kungu vs Elijah Macharia Githinji & Another [2014] eKLR** amongst several other cases to buttress his argument that a suit that was time barred had to be struck out.
7. On his part, the 2nd Defendant referred this court to the cases of **Tom Onyango Oketch vs Kenyatta National Hospital** (Supra), **Bernard M Mbithi vs Mombasa Municipal Council & Another [1993] eKLR** amongst several other cases and fully associated himself

with the 1st and 3rd Defendant's positions.

8. In response to the said Preliminary Objections (P.O.), the Plaintiff swore a Replying Affidavit on 16th July 2019. The same was filed on 17th July 2019. He stated that the delay in filing the suit was not intentional but that the same was due to the fact that he was awaiting the verdict from the Medical Practitioners and Dentists Board and that of the court in **JR No 398 of 2016** also touching on the same subject matter, which latter decision was delivered on 28th March 2018.

9. It was his further contention that he filed **CMCC Misc Civil Suit No 731 of 2017** seeking leave to file suit out of time, which leave was granted and consequently, the P.O.s herein were misconceived and lacking in merit, befitting dismissal.

10. It was not in dispute that a suit based on negligence had to be filed within three (3) years of the cause of action accruing. It was also not in dispute that if such a suit was not filed within the said period of three (3) years, then a party had to seek leave of the court to file the same failing which the suit would have to be struck out for having been statute barred and filed out of time.

11. However, the parties placed before the court two (2) diametrically opposite sides regarding the stage in the proceedings at which a challenge on the limitation of a suit could be raised.

12. All the Defendants submitted that the suit herein had to be struck out *in limine* and ought not to await the hearing of the case. In this respect, the 2nd and 3rd Defendants relied on the case of **Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Limited (1969) EA 696**, Law J rendered himself as follows:-

“...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation (emphasis court) or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

13. On his part, the Plaintiff argued that he duly sought and obtained leave to file suit out of time and that the order having been provisional and that the Defendants could only challenge the same during trial placed. In this regard he placed reliance on the cases of **Oruta & Another vs Nyamato [1988] eKLR** and **Principal Magistrate P. Ngare Gesora Principal Magistrate's Court & 2 Others Ex parte Nation Media Group Ltd [2013] eKLR** where the common thread was that where leave to file suit out of time had been sought and granted *ex parte*, that leave could only be challenged during the trial.

14. In the case of **Gathoni vs Kenya Co-operative Creameries Ltd** (Supra), the court held as follows:-

“...if the applicant were under a relevant disability, she would need leave of the court to commence her action. The issue as to whether the period of limitation was extended in her case under Section 22 would no doubt be raised as a preliminary issue during trial (emphasis court)...”

15. This court took the view that where leave to file suit had been granted, then the question of whether or not the said leave should have been granted ought to be raised during trial. As could be seen in the case of **Bernard M Mbithi vs Mombasa Municipal Council & Another** (Supra), the question of whether or not a plaintiff was entitled to extension could only be challenged in the proceedings.

16. Further, in the case of **Mary Wambui Kabugu vs Kenya Bus Service Limited [1997]eKLR** that was also relied upon by the 2nd Defendant herein, the only time a defendant could challenge the order for granting extension of time to file suit would at the time of trial, be either on facts brought out at the trial and/or arguments brought out during the trial.

17. Indeed, this position was fortified by the decision of the Court of Appeal in the case of **Oruta & Another vs Nyamato** (Supra) where it rendered itself as follows:-

“It will be upto the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary issue (emphasis court). The raising of a preliminary issue that would cause the suit to be struck out is not to be encouraged by the Limitations of Actions Act particularly where leave to file an action against the defendant has been granted *ex- parte*.”

18. If on the other hand, no leave had been granted to file a suit out of time, then the suit could be struck out *in limine*. In the mind of this court, this is the scenario the case of **Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Limited** (Supra) seemed to have been addressing. This is because it would be out rightly clear that the court would have no jurisdiction to hear and determine the case if a plea of limitation was successfully argued.

19. As was held in the case of **Owners of the Motor Vessel “Lillian S” vs Caltex Oil Kenya Limited (1989) KLR 1**, jurisdiction is everything and without it, the court had no power to do one more step but was called upon to down its tools. The downing of tools would also ensure that a defendant is not dragged through the court process unnecessarily. This is the same position that was taken in the case of **Stanley Ombeva & Another vs Dr Nathan Murugu & 5 Others [2015] eKLR** that was relied upon by the 2nd Defendant herein.

20. The question of which court had jurisdiction to grant an order for leave to file a suit out of time, an issue that had been raised by the 3rd Defendant and/or whether the Plaintiff had demonstrated that he was entitled to such leave at the time he sought and obtained the same were best left to the trial court to determine. Notably, this court could not separate the two (2) issues without entering into the realm of a trial court.

DISPOSITION

21. For the foregoing reasons, the upshot of this court's decision was that the 1st Defendant's Notice of Preliminary Objection dated 8th May 2019 and filed on 7th June 2019 and the 3rd Defendant's Preliminary Objection amended on 6th August 2019 and filed on 7th August 2019 were not merited and the same are hereby dismissed. Costs of the said Preliminary Objections shall be in the cause.

22. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **30th** day of **June** 2020

J. KAMAU

JUDGE