



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 26A OF 2015

JAMES OМУKHALA OTIENO.....1ST APPELLANT

JESICA ANYOSO OМУKHALA.....2ND APPELLANT

(Suing as the personal representatives

estate of WILSON OKATE

OMUKHALA (DECEASED)

-VERSUS

LOMOLO 1962 LIMITED.....RESPONDENT

(Being an appeal from the Judgment, ruling and order before Hon. Amwayi Resident Magistrate at Nakuru Delivered on 4th February, 2015)

JUDGMENT

1. This Appeal is against the trial Magistrate's ruling dated the 4th February 2015 upon a Preliminary Objection (P.O) dated 1st August 2013 raised by the defendant.

The P.O. was on grounds that the suit was statute barred pursuant to **Section 4(2) of the Limitation of Actions Act Cap 22 Laws of Kenya** and that no leave to file the suit out of time was sought by the plaintiff.

2. By a ruling dated the 4th December 2015 the suit was found to have been based on tort and therefore time barred having been filed four years after the cause of action arose. The suit was therefore struck out with costs.

3. At the time of the ruling the appellant had testified and closed his case.

Issues for Determination

1. Whether the primary suit was time barred.

2. Whether the trial magistrate erred in law and fact by allowing the preliminary objection when the Appellant had closed his case.

3. Whether the course of action is a tort or contract.

4. The primary suit arose from a traffic accident involving the deceased and the Respondent's motor vehicle on the 21st September 2003 wherein it is alleged that the deceased was a lawful passenger in the vehicle and was in the employment of the Defendant. Allegations of negligence by the driver are stated, among them that the deceased fell from the vehicle and was run over thus causing his death. Particulars of breach of contract of employment by the Respondent are also stated.

5. By leave of the court dated 16th July 2014, the Defendant by its Amended Defence gave notice of its intention to raise a preliminary objection that the suit was time barred and to seek its dismissal. This was after closure of the plaintiff's case.

Upon hearing of the preliminary objection (P.O), the trial magistrate found the suit to have been filed out of time as it was based on tort, and not contract, and proceeded to strike it out.

6. The Appellant's gist of the appeal is that the trial Magistrate allowed the Preliminary Objection too late in the day.

7. A preliminary objection as stated in the case **Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors (1969) EA**, and followed in numerous court decisions

“Consists of a point of law which has been pleaded, or which raises by clear implication out of pleadings, and which if argued as a preliminary point may dispose off the suit. Examples are an objection to the jurisdiction the court or a plea of limitation...”

8. In the same case, **Charles Newbold P** stated that *“ a Preliminary Objection --- raises a pure point of law which if argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”*

9. The preliminary objection raised by the defendant in my view is a pure point of law based on **Limitation of Actions Act** under Cap 22 **Laws of Kenya**. It can be raised at any time but more preferably if raised at the earliest opportunity at the commencement (of hearing) of the suit. It can also be raised after the suit is fully heard but before judgment is delivered.

-Beatrice Cherotich Koskei and Another –vs- Olenguruone Land Dispute Tribunal & 2 others (2007) e KLR and Mary Nyambura Mbote –vs- Isaac Wanjohi Wangai (2017) e KLR.

10. **Order 2 rule 9** of the CPR allows a party to raise an objection on a point of law at any stage of the proceedings even when the case has been heard but before final decision is rendered.

The appellant's submission that the P.O. came too late in the day is thus not supported by the law.

11. Whether the cause of action was based on tort or contract

The Appellant did not demonstrate that the deceased was an employee of the Respondent – Paragraph 4 Plaintiff. In cross examination the Appellant testified that he had nothing to show that the deceased was employed by the defendant. No contract of employment was demonstrated to have existed between the deceased and the defendant/appellant.

12. A claim such as the one in this matter can not be two faceted. It is either a contract or a tort, but not both.

What is clear is that the deceased was run over by the Respondent's motor Tractor-**PW2's** evidence.

In the case **Kiamokama Tea Factory Co. Ltd –vs- Joshua Nyakoni (2015) e KLR**, faced with a similar issue the court rendered that where no terms of contract of employment are pleaded in the plaint there is no duty of care as stipulated in the statute in employment matters.

13. The court further stated that

“Breach of the statutory duty of care is not a breach of the contract but breach of duty of care in tort and therefore subject of the limitation period prescribed for actions based on tort...”

Based on the above the court found that the cause of action was a tort and therefore time barred under Limitation of Actions Act having been filed one year after the three years Limitation Period.

14. Paragraph 4 of the Plaintiff states that the deceased fell from the Respondent's Tractor and was run over by the said tractor.

I have perused the Appellant's evidence as recorded.

I agree with the trial magistrate's findings that the pleadings and evidence pointed to an action in tort and not contract and therefore the suit was subject to limitation period of three years as stipulated under the Limitations of Actions Act, Section 4(2).

15. For the above reasons I find no merit in the Appeal. Accordingly it is dismissed with costs to the Respondent.

Dated, signed and delivered this 21st Day of February 2019.

J.N. MULWA

JUDGE