



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO.6 OF 2017

MAITAI WANG'OMBE.....APPELLANT

VERSUS

NYERI CLOTHING CO.LTD.....RESPONDENT

(Appeal against the Ruling/order of Hon. Ruth Kefa Chebesio-Senior Resident Magistrate, Nyeri in the CMCC NO.135'A' of 2016 delivered 23rd January 2017)

JUDGMENT

By a plaint dated 19th March 2016 the plaintiff/appellant Maitai Wang'ombe sued the defendant/respondent Nyeri Clothing Co. Ltd. His claim was expressed at paragraph 3 of the plaint thus: -

“A return of his National Identity card that was taken away from him by one Babury a director/employee/agent of the defendant on 28th February 2002”

That as a result of the said Babury's action of taking away his National Identity Card, (ID Card) he suffered loss and damage therefore he sought general damages as a result of the loss of the use of the Identity Card for 14 years, that the defendant illegally held onto his ID card and which they had refused to release to him.

He therefore sought orders: -

- 1. The defendant be ordered to surrender the plaintiff's National Identity Card.*
- 2. The defendant to pay General Damages for loss of use of the National Identity Card and for continued loss.*
- 3. Costs of the suit.*
- 4. Interest on (2) and (3) above.*

He filed his statement, list of documents and correspondence which showed that the plaintiff/appellant had left his ID card as a security for a loan of Kshs.100,000/- with the defendant/respondent which the plaintiff/appellant denied.

The defendant/respondent sued him for the alleged loan of Kshs. 100,000/- but the suit was dismissed with costs in Nyeri CMCC No.597 of 2006.

The defendant/respondent filed defence dated 3rd May 2016 where they denied the claim putting the plaintiff still proof thereof- contending that the suit was bad in law frivolous, vexatious, non-suited, time barred and that they would raise a preliminary objection. They filed a copy of the National Identity Card, and a letter from their lawyers denying any illegal dealing, over the plaintiff's Identity Card.

On 28th November 2016 when the matter came for hearing before the learned trial magistrate, Mr. Ng'ang'a for the defendant/respondent raised the preliminary objection in the following terms: -

“.....we have indicated that the claim is time barred, the same is on the issue of the retaining of Identity card by defendant

which was done in 2002 and to date is 14 years. This is a matter of detinue which is a tort and the present matter should have been filed within 3 years. No leave to file out of time has been sought, I pray that in addition to paragraph 3, the plaintiff states that the Identity card was taken by Mr. Babury that person and the defendant are 2 different entities. Therefore, the actions of one person cannot be transferred to another hence the action is barred by law and should be struck out”.

Ms. Kainga who was holding brief for Mr. Kebuka Wachira for the plaintiff sought for time to file written submissions. The plaintiff/appellant in submissions dated 14th January 2017 submitted that the suit was not statute barred but a continuous tort as the National Identity Card had never been returned to the plaintiff despite several demands to do so.

Citing from **Black’s Law Dictionary 2nd Edition’s** definition of detinue

“Detinue is a form of action which is a form of recovery in specie, of personal chattels from one who acquired possession of them but retains them without right together with damages for detention”.

It was argued that a claim in detinue was indicated by the individual who claims a greater right to the immediate possession than the current possessor- that a claimant has to establish; -

Ø Better right to possession of the chattel than the defendant.

Ø Defendant refused to return chattel once demanded by claimant.

Ø That detinue is a continuous tort and cause of action accrues on the date of wrongful refusal to deliver the goods and continues till the delivery of judgment.

The plaintiff/appellant relied on **Beaman vs.A.R.T.S Ltd (1998) 2 AII ELR 89** and **Umoru Vs.Ijumu Local Government Council (2010) 7 NWLR (pt 1192) 1 at 13-14.**

The 2 decisions were in agreement that ***“detinue is a wrongful detention of the possession of goods and the wrong arises upon the detention of the chattel after demand for its return by the person entitled to its possession had been made”***

That for as long as the defendant held the Identity Card after the demand for its return, the loss of detinue persisted.

Further that when the said Mr. Babury took the Identity Card for the benefit of the company – defendant/respondent who alleged that it was holding the Identity Card as security for a loan of Kshs.100,000/-.

The plaintiff/appellant urged that the preliminary objection be dismissed.

By a ruling delivered on 23rd January 2017 the learned trial magistrate relying on **Jaribu Credit Traders Ltd-vs- Amedo Centres & another (2018) eKLR** found that the cause of action arose in 2002 when the defendant unlawfully detained the plaintiff’s National Identity card, upheld the preliminary objection, to the effect that s.4(2) of the Limitation of Actions Act Cap 22 was applicable, found the plaintiff’s suit time barred and dismissed it with costs.

The dismissal provoked this appeal on the following grounds: -

- 1. The Learned trial Magistrate erred in law and in fact in holding that the plaintiff’s claim was time –barred when in effect the claim was based on a continuing tort of detinue.*
- 2. The Learned trial Magistrate erred in law in failing to find that the subject cause of action accrued when the defendant failed to return the National Identity card upon demand by the plaintiff.*
- 3. The Learned trial Magistrate erred in law and in fact in dismissing the plaintiff’s claim without giving him a chance to ventilate his claim.*

Parties agreed to dispose of the appeal through written submissions. The appellant’s argument is that his suit was based on the tort of detinue which is a continuous tort. Secondly the defendant/respondent admitted holding his Identity card and the defendant’s respondent’s claim against the plaintiff/appellant that it was holding the ID as security for a loan was dismissed with costs.

That the plaintiff/appellant’s suit was not time barred- neither was it hopeless to warrant summary dismissal- see **DT Dobie & Co. (K) Ltd Vs. Muchina(1982) KLR** where it was held that;

“No suit ought to be summarily dismissed unless it appears so hopeless that is plainly and obviously discloses no reasonable cause of action and so weak as to be beyond redemption.....”

That the decision was draconian – see **Co-operative Merchant Bank Ltd Vs.George Fredrick Wekesa Civil Appeal No.54 of 1999.**

That the learned trial Magistrate ought to have allowed the suit to proceed to full hearing so that the plaintiff/appellant could demonstrate

what he meant by continuous tort.

The respondent vide submissions dated 15th March 2019 argued that cause of action arose in 2002 and s.4 (2) of Cap 22 the Limitation of Actions Act was applicable.

That the issue of limitation touches on jurisdiction and it was necessary for the learned trial magistrate to deal with it at the earliest *in limine* and hence the plaintiff/appellant could not have been given any chance to ventilate his claim.

Relying on **Martha Karwira Anthony vs. Barclays Bank of Kenya Ltd (2019) eKLR** citing **IGA vs. Makerere University (1972) EA 65-Mustafa**

That when a suit is time barred the court cannot grant remedy or relief.

Also –**Haron Onyancha vs. National Police Services Commission & another (2017) eKLR.**

That Limitation was to bar plaintiffs from prosecuting stale claims and protecting defendants who may have lost evidence due to lapse of time.

‘The effect of limitation is to remove remedies irrespective of the merits of the particular case’.

The issue is – is the plaintiff’s claim time barred?

In **HCC Nairobi Civil Case No.914 of 2003 Jaribu Credit Traders vs. Amedo Centers (K) Ltd & AG (2010) eKLR** (Mwera J), the preliminary objection was raised on similar grounds in a case where the goods were held pending a criminal trial. Upon the acquittal of the appellant against criminal charges he filed the suit *in detinue*.

The defendant argued that the suit was time barred. The Judge rejected that argument on the ground that it was established during the hearing of the criminal case that the goods were held unlawfully- that the cause of action arose on the date of the order for the release of the goods to the plaintiff and not on the date the goods were detained.

“The gist of detinue, a form of action lies for recovery of personal chattels from one who has acquired possession of them lawfully but retains it without right, is the wrongful detainer and not the original taking. The plaintiff proves property in himself and possession in detinue sur trover in the circumstances”.

Nyarangi, JA in **AG vs. ZAHERALJI J SUNDERJI T/A “Crystal Ice Cream” (1986) eKLR.**

From the foregoing it would appear that time begins to run when the goods or chattel is held unlawfully and not at the original taking.

In this case the plaintiff alleges that the defendant held the Identity card claiming that he owed Kshs.100,000/- and it was security.

After the dismissal of the defendant’s suit, the plaintiff vide letter dated 21st December 2015 through his advocate demanded for release of his Identity card. The defendant through its advocates responded that the plaintiff’s Identity card was being held as security for a loan and that any suit for the recovery of the Identity would be resisted including filing suit to recover the Ksh.100,000/-.

It is then that the plaintiff’s counsel wrote to defendant’s counsel that claim for the Kshs.100,000/- had been dismissed and requested to “*kindly advise your client to surrender the Identity card*”. The Identity card was not surrendered.

Clearly therefore the moment the suit was dismissed and a demand was made and the defendants refused to release the Identity card the wrongful detainer began then hence it would appear to me that the plaintiff’s cause of action did not arise in 2002 but on 19th January 2016 when the last demand was made.

My view then is that the dismissal of the plaintiff/appellant’s suit was wrongful.

The appeal is allowed with costs to the plaintiff/ appellant.

The case be remitted to the Chief Magistrate’s Court for re allocation, hearing and determination.

The matter be mentioned before the Chief Magistrate on 4th of June 2019 for directions.

Signed, Delivered and Dated at Nyeri this 23rd day of May 2019.

Mumbua T Matheka

Judge

In the presence of:

Court Assistant: Jerusha

No Appearance for parties or counsel

Mention Notice to issue from the Registry.

Judge