



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**CIVIL APPEAL NO. 119 OF 2010**

**SPIN KNIT DAIRY LTD.....APPELLANT**

**VERSUS**

**MWANIKI ANDERSON AKA**

**MWANIKI MUCHANGLI.....RESPONDENT**

**J U D G M E N T**

**A. Introduction**

1. Before the principal Magistrate Court Embu was the appellant as a defendant in a suit for damages for fatal injuries sustained by the deceased. The suit was filed by one Bedan Nyaga Njeru in his capacity as the legal representative. Vide an amended defence dated 17/11/2009, the appellant sought to bring a counterclaim for liquidated damages against the estate of the deceased plaintiff as well as the respondent herein.

2. The respondent then filed a preliminary objection against the counterclaim on grounds among other that leave was never sought or granted to file the counterclaim and as such the counterclaim was time barred under Section 5 of the Civil Procedure Act. Further the objection was grounded on the fact that it was filed out of the 6 months statutory period prescribed under section 9 (2) b of the Fatal Accidents Act and section 2 (3) of the Law Reform Act. The respondent further opposed the counterclaim by vide of Section 3 of the Fatal Accidents Act and also on the ground that he was not a party to the primary suit and as such the trial court lacked jurisdiction to make any determination on liability with respect to him.

3. The trial court upheld the preliminary objection filed by the respondent holding that the counterclaim by the appellant was time barred and couldn't be sustained. Being dissatisfied with the ruling, the appellant filed this appeal which is grounded on 5 grounds of appeal that can be summarised as follows;

*a) That the trial magistrate erred and misdirected herself in striking out the counterclaim by the appellant without considering the provisions of law, arguments and authorities relied on by the appellant.*

*b) That the trial magistrate failed to set out the issues for determination in contravention of the provisions of the Order 15, rule 4 and 5 of the Civil Procedure Rules.*

*c) That the trial magistrates erred by delivering the ruling in absence of the parties and without notice in contravention of Order 21 rule 1 of the Civil Procedure Rules.*

**B. Appellant's Submission**

4. The appellant submitted that the counter claim was not time barred as Section 35 of the Limitation of Action Act provides that a counter claim is taken as part of the main action and as such the time limitation of the counterclaim was similar to that of the parent suit CMCC No. 2008.

5. The appellant further submitted that the trial magistrate failed to consider his comprehensive submissions which set out the law clearly and cited judicial authorities. Further the appellant submitted that the magistrate failed to set out and determine the issues for determination as provided in Order 15 of the Civil Procedure Rules.

6. The appellant submitted that the ruling was a nullity as it was delivered in the absence of the parties and thus contravened Order 21 Rule 1 of the Civil Procedure Rules. It was further submitted that notwithstanding the provisions of the Fatal Accidents Act and those of the Law Reform Act, the application to allow amendment of the defence and the counterclaim constituted a valid court order that thus placed the

counterclaim properly on record and subsequently the trial court was misdirected in arriving at its decision.

### **C. Respondent's Submission**

7. The respondent submitted that the application dated 5/10/2009 by the appellant seeking to amend the defence and introduce the counterclaim and the consent order emerging there from was a nullity as it was heard and determined by the Executive Officer and not the trial magistrate as it did not fall under applications envisioned that can be determined by the Executive Officer as envisioned by Order 48 rule 5 (b) (iv).

8. The respondent further submitted that the counterclaim was time barred by virtue of section 2 (b) of the Fatal Accidents Act and section 2(3) of the Law Reform Act that require such an action to be instituted within 6 months. Further it was submitted that section 35 of the Limitation of Action Act did not aid the appellant and that the respondent was not a party to the primary suit.

9. The respondent relied on the case of **Arumba v Benga & Anor [1988] KLR** where the Court of Appeal said it was unusual to allow amendment of a defence to introduce a counterclaim. The respondent also relied on the case of **Liptons Cash Registers and Business Equipment Ltd v Hugin (GB) Ltd & Others** where the court held that there was established a rule that a party whether a defendant or plaintiff should not be added if the effect would be to deprive a defendant a defence under the Limitation Acts and thus if an amendment was allowed the counter claim cannot be backdated. Further the respondent submitted that failure to give notice for a judgement or ruling could not invalidate the decision.

### **D. Appellant's Submission in Response**

10. In response, the appellant submitted whilst relying on Order 7 Rule 8 of the Civil Procedure Rules that the Rules did not envisage a situation where a party had to seek consent to join another as a party to a claim.

11. Further, the appellant submitted that the record at pages 211-212 indicated that the consent to allow the amendment and counterclaim was recorded by the resident magistrate and not the executive officer as claimed by the respondents.

12. The appellant further submitted that his claim was for material damage which arose on 18/05/2007 whereas the counterclaim was filed on 18/11/2009 which was within time.

### **E. Analysis & Determination**

13. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424**.

14. Having looked at the Appellant's grounds of appeal and in particular to the oral submissions, it was clear that the said grounds all related to the question of whether or not the Learned trial magistrate was justified in striking out its counterclaim.

15. The issues that are emerging for determination herein are as follows;

a) Whether the trial magistrate erred and misdirected herself in striking out the counterclaim.

b) Whether the trial magistrate failed to set out the issues for determination in contravention of the provisions of the Order 15, Rule 4 and 5 of the Civil Procedure Rules.

c) Whether the trial magistrates erred by delivering the ruling in absence of the parties and without notice in contravention of Order 21 Rule 1 of the Civil Procedure Rules.

16. The question herein is whether the appellant's counterclaim was sustainable as filed, with regard to limitation period for filing suits. I do note that a suit that is filed out of the statutory period would in essence oust the jurisdiction of the court in determining that dispute. Furthermore, jurisdiction is everything, without which a court of law downs its tools. It is not a procedural technicality which can be cured by the application of Sections 1A and 1B of the Civil Procedure Act commonly known as the overriding objectives of the law; and or invocation of Article 159(2) (d) of the Constitution of Kenya. (see **Owners of Motor Vessel Lilian S' V Caltex Oil (K) Ltd [1989] KLR** and **David Githumbi Thande V Dairy Farmer's Co-operative Society and 9 Others HCC 2004[2010] e KLR**).

17. In **Rawal V Rawal [1990] KLR Page 275** Bosire J as he then was stated authoritatively that: -

*“The object of any limitation statute is to prevent a plaintiff from prosecuting state claims on the one hand, and on the other hand protect a defendant after he had lost evidence or his defence from being disturbed after a long lapse of time. It is not to extinguish claims.”*

18. The learned Judge in the above case was citing with approval the decision in **Dhanesvar V Mehta Vs Manilal M Shah [1965] EA 321** where the court Stated that: -

*“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand and on the other hand to protect a defendant after he had lost the evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”*

19. And in Iga V Makerere University [1972] EA 62 it was held inter alia that: -

*“A plaint which is barred by limitation is a plaint “barred by law.” A reading of the provisions of Section 3 and 4 of the Limitation Act ( Cap 70) together with Order 7 Rule 6 of the Civil Procedure Rules seems clear that unless the appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the court “ shall reject” his claim....the limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time barred, the court cannot grant the remedy or relief.*

20. The holding in the Iga Vs Makerere University case (supra) What the above decisions speak is that once a claim is statute barred, unless the barrier of limitation is lifted by extension or enlargement of time, the claim shall be rejected irrespective of its merits.

21. Section 2 sub-section 3 of the Law Reform Act provides:

*“(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless either: -*

*a) proceedings against him in respect of that cause of action were pending at the date of his death; or*

*b) proceedings are taken in respect thereof not later than six months after his executor or administrator took out representation.”*

22. The above position is mirrored in Section 9 (2) (b) of the Fatal Accidents Act. These were the main swords used by the respondent in opposition to the appeal. The appellant on his part relied on the **Limitations of Actions Act** which at **Section 35** clearly states: -

*“For the purposes of this Act and any other written law relating to the limitation of actions, any claim by way of set-off or counterclaim is taken to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.”*

23. The appellant further sought to rely on the consent between himself and the plaintiff, currently not before this court, that allowed his amended defence as well as the counterclaim against the respondent. I do note that the respondent was not a party to the consent and cannot, in my view, be bound by the same.

24. The position with regard to the effect of the Limitation of Actions Act where a party is added is now so well established that it requires little comment. In the unreported case of Waweru Mangere v Silingi ole Kuriti. Civil Suit No 554 of 1973 cited in the case of Atieno v Omoro & Another [1985] eKLR Trainor J stated: -

*“The number of cases that have been reported dealing with applications to amend proceedings by adding a new party are many. The position now seems to be well established. Where the application is granted the new party will not be prejudiced. Any defence that is open to him at the time the application is granted is available to him as if proceedings were first instituted against him at that time. To put it another way, the Act may be relied on as a defence if the period has expired. It would appear from the cases that I have found, and there are many, that time is calculated up to when the proceedings are instituted; in the case of an added party time continues to run until the amendment adding him as a defendant is ordered.”*

25. In the case of Lipton’s Cash Registers and Business Equipment Ltd v Hugin (G B) Ltd and others [1982] 1 ALL E R 595 relied on by the respondent it was held, inter alia: -

*“(3) Accordingly the appeal would be allowed and the orders made in May and June giving leave to amend the writ by adding the third and fourth defendants would be restored, subject to the adding of the new defendants being treated as operative only from the date when the amendment was made, ie 16th June, 1978.” In his judgment His Honour Judge Hawser said that the amending order would be treated as if there had been a fresh writ issued on the date the orders were made.”*

26. To deny the appellant an opportunity to bring forth their case against the respondent as if the amendment took place with retroactive effect to the date the original plaint was filed would most certainly be prejudicial to the rights conferred on her by the Limitation of Actions Act.

27. At the time the name of the respondent was added the appellant had lost the right to sue him. This is an uncontested fact. There is only one case in which proceedings may be instituted or continued out of time and that is when Section 27 of the Limitation of Actions Act (cap 22) applies. That section, which involves obtaining the leave of the court. It is that leave which the appellant sought and was allowed vide a consent order filed before the court on the 24<sup>th</sup> November 2009.

28. The upshot of the above is that it is my opinion that the trial court erred in striking out the counterclaim against the respondent.

29. Further to the above, I have perused the ruling of the trial court and note that it does not comply with the provisions of Order 21 Rule 4 of the Civil Procedure rules which requires that, *“Judgments in defended suits shall contain a concise statement of the case, the points for*

*determination, the decision thereon, and the reasons for such decision.*” The ruling by the trial court was devoid of the points for determination.

30. Consequently, it is my considered opinion that the ruling of the trial court delivered on the 7<sup>th</sup> August 2010 was a misdirection in law and fact. The striking out of the counterclaim was erroneous and uncalled for.

31. The appeal is allowed with no order as to costs

32. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Muriuki for Ithiga for 1<sup>st</sup> respondent and for Abudulahi for 2<sup>nd</sup> respondent**