



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 282 OF 2017

*(Arising from the judgment of Hon. I. Gichobi, SRM delivered in*

*Milimani CMCC 3170 of 2013 on 5<sup>th</sup> May 2017)*

(CORAM: F. GIKONYO J.)

SAMUEL MWANGI KAROGO .....APPELLANT

Suing as the administrator of the estate

Of the late ALLAN MWANGI (Deceased)

**VERSUS**

THE ATTORNEY GENERAL.....RESPONDENT

**JUDGMENT**

1. This appeal arises from the judgment of Hon. I. Gichobi, SRM in Milimani CMCC 3170 of 2013 which dismissed the suit on the grounds of non-compliance with the High court timelines and failure to seek leave in the chief magistrate's court. The appellant was aggrieved by the said judgement and filed this appeal setting out the following grounds;

- a. That the learned magistrate erred in law and in fact by dismissing the entire suit on grounds of technicality.
- b. That the learned magistrate erred in law and in fact by stating that the plaintiff failed to seek leave of the court to file the suit out of time yet that same was made in the high court.
- c. That the learned magistrate erred in law and in fact by failing to exercise her discretion to advise that the matter be taken to the high court as opposed to trying the matter until conclusion
- d. That the learned magistrate erred in law and in fact by disregarding all the rules of equity which translates to the appellant's prolonged suffering after losing his son through such a tragic manner.

**Appellant's case**

2. The appellants in their submissions argued that the appellant sought leave in the High Court at Nairobi to file the suit out of time on 24<sup>th</sup> December 2012 which was granted by the court on 9<sup>th</sup> May 2013. The appellant had the intention of filing the suit in the same court, however their advocates were of the opinion that suit is within the pecuniary jurisdiction of the magistrates' court. The advocates then filed the suit in the magistrate's court without seeking further leave. They took the view that the leave obtained in the High court traverses to the magistrate's court because of the hierarchy of the courts.

3. Additionally, the appellants argued that the main premise in the judgment of the learned magistrate in dismissing the suit was failure to obtain leave and consequently filing the suit out of time. According to the appellants this goes against article 159 (2) of the Constitution which sets out judicial authority and sections 1A and 1B of the Civil Procedure Act that provides for the overriding objective to facilitate just, expeditious, proportionate and affordable justice. Furthermore, the trial court heard the evidence presented by the witnesses and had the opportunity to observe their demeanor. The respondent on the other hand did not avail any witnesses to support their case. The appellants relied on **Shashikant C. Patel v. Oriental Commercial Bank [2005] eKLR** where it was held;

**“.....we should never lose sight of the fact that rules of procedure, though they should be followed are hand maids of justice. They should not be given pedantic interpretations which at the end of the day denies parties justice.”**

4. The appellants added that the respondent would not be prejudiced by the determination of this suit on merit. This was because no preliminary objection was filed challenging the leave sought at the high court neither was there any formal pleading contending that the suit was out of time.

5. Finally, the appellant has been prejudiced by the decision of the magistrate’s court as he is a grandfather who is seeking justice for his grandson after he fell victim to the reckless shooting of police officers. There is no justice in the dismissal of the said case for the reason that procedure was not followed. In support thereof the appellants relied on **Lucy Bosire v. Kehancha Div Land dispute Tribunal & 2 Others** and **Tana & Athi Rivers Development Authority v. Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR** where it was held;

**“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.”**

#### **ANALYSIS AND DETERMINATION**

6. The Limitation of Actions Act **Section 28 (5)** defines “court”, in relation to an action to mean the court in which the action has been or is intended to be brought”. It follows therefore that an application for leave of court under section 27 of the Act may be sought from the court in which the suit is intended to be filed, where no suit has been filed yet or in the case where suit is already instituted, in that particular suit.

7. In this case the appellant applied and obtained leave in the High Court but, upon advice by his legal counsel, a suit was filed in the Chief Magistrates’ court. His legal counsel was of the opinion that the subject matter of the suit was within the pecuniary jurisdiction of the magistrate’s court. I must admit that this case presents a kind of a squirm scenario. Arguments which have been presented do not make the assignment any easier; they only help in adding a twist to the matter. But courts are experienced at determining even scary-edge cases.

#### **Limitation as an issue for trial**

8. Limitation of actions has come under sharp focus in the appeal. The trial court dismissed the Appellant’s solely on the ground that leave to file suit out of time was not sought in the magistrates’ court where the suit was intended to be and was filed. According, to the Appellant, the leave they obtained from the High Court suffices to file a suit in any court of competent jurisdiction. The Respondent took quite a disparate position. I note also that it has been argued that the question of limitation of action ought to have been taken out as a preliminary objection rather than be used as a basis for dismissing the case after full hearing. This latter argument requires further insights.

9. The law as I understand it is that the limitation of actions is a matter for determination at the trial; it cannot be dealt with in a summary manner or as a preliminary objection. The court should therefore formulate limitation as one of the issues for determination and decide it on evidence adduced thereto. On this see the case of **Oruta & Another vs. Nyamoto [1998] KLR 590**, where the court held that limitation of action:-

**”... could only be queried at the trial but not by... a preliminary objection... The appellant could raise the objection at the trial and the trial judge would have to deal with the matter on the evidence to be adduced at the trial”**

10. See also the case of **Divecon Ltd vs Shirinkhanu S. Samani Civil Appeal No. 142 Of 1997**, where the court quoted with approval the words of Gachuhi, J.A., the leading judge in the Oruta case (ibid) that:

**“It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the Limitation of Actions Act...”**

11. The case of **El-Busaidy vs. Commissioner of Lands [2002] KLR 508**, buttressed the above position when it held that the issue of limitation under Government Lands Act could only be decided at the trial on evidence.

12. Accordingly, the intention of the law is that the issue of limitation of actions should be undertaken and determined at the trial.

13. I should also think that the requirement in Order 2 rule 4 (1) of the Civil Procedure Rules that the relevant statute of limitation should be specifically pleaded in the defence underscores the legal necessity that limitation is a matter for determination at the trial. The reason here is that a successful defence of limitation makes the claim not maintainable. The effect is that the plaintiff is divested of remedy in law; something that is quite substantial for it affects rights; the Constitution will not permit such divestiture of remedy through a summary procedure when the law requires the issue to be determined after hearing evidence of the parties. See the rule below:

**4. (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—**

**(a) which he alleges makes any claim or defence of the opposite party not maintainable;**

**(b) which, if not specifically pleaded, might take the opposite party by surprise; or**

**(c) which raises issues of fact not arising out of the preceding pleading.**

14. Thus, the issue of limitation is both a matter of law and fact. The cases of **El-Busaidy ibid, Lulu Drycleaners Ltd & Another vs Kenya Industrial Estates & Another [2005] 2 KLR 97 and Achola & Anr vs. Hongo & Anr [2004] 1 KLR 462** have so held.

15. In light of what I have stated, I do not think that limitation of actions is a mere technicality as it has been argued by the Appellant. It is a substantial question of law and fact which should be determined in a substantive manner at the trial. Therefore, article 159(2) (d) of the Constitution has been invoked inappropriately.

16. Be that as it may, I am alive to the fact that Section 27, 28 of the Limitations of Actions Act and Order 37 rule 6 of the Civil Procedure Rules provide for extension of time *before or after* commencement of suit. This makes it absolutely necessary that limitation is determined after hearing evidence at the trial. See rule 6 below:

**6. (1) An application under section 27 of the Limitation of Actions Act made before filing a suit shall be made ex parte by originating summons supported by affidavit. (2) Any such application made after the filing of a suit shall be made ex parte in that suit.**

17. Therefore, the trial magistrate should have considered the relevant evidence including leave granted by the High Court to determine limitation as one of the issues at the trial.

18. Notably, Civil Suit No. 3170 of 2013 was filed and heard to conclusion. Witnesses were heard and evidence was presented and the respondents given their right to defend their case. Nevertheless, at the conclusion of the suit the learned magistrate dismissed the made solely on the fact that leave to file the suit out of time was not sought in the said court. The trial court seems to have been beholden to the fact that leave ought to have been applied for in the trial court before filing suit as to forget limitation of actions was an issue for determination by the court at the trial upon evaluation of all relevant evidence in relation thereto. The trial court missed the point and focused on the wrong question instead of focusing on limitation as an issue and the evidence adduced. In my view, in this case where leave had been obtained from the High Court, it was wrong to ask whether the High Court was the right court from which to obtain leave. It bears repeating that the proper focus would have been on limitation as an issue and make a decision on it on evidence adduced. Even section 27 emphasizes on evidence adduced to the satisfaction of the court. The trial court therefore committed an error in principle on determination of issues.

19. Worth of note is that the said civil suit was on wrongful death where the appellant was suing the Attorney General on behalf of the Estate of Allan Mwangi who was allegedly shot by a police officer. The police officers were actively pursuing thugs when a stray bullet hit Mr. Mwangi and he met his death. Truly, then the dismissal of the case by the Hon. Magistrate caused an injustice on the part of the appellant all on account of the rules.

20. In the upshot, for substantive justice to prevail in this appeal as envisaged in Article 159 of the Constitution, I find this appeal to be merited. Consequently I make the following orders;

**I. Judgment delivered on 5<sup>th</sup> May 2017 is hereby set aside**

**II. Civil Suit No. 3170 of 213 is reinstated and referred back to the trial court for hearing and determination by any other competent magistrate apart from the trial magistrate herein.**

**III. In light of the circumstances of this appeal, I order each party to bear own costs of the appeal.**

**Dated and signed at Nairobi this 14<sup>th</sup> day of October 2019**

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**F. GIKONYO**

**JUDGE**

**Dated, signed and delivered in open court at Nairobi this 31<sup>st</sup> day of October 2019**

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**L. NJUGUNA**

**JUDGE**