



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA T NAIROBI

CIVIL APPEAL NO. 491 OF 2017

(ARISING FROM THE RULING OF HON, E.K.USUI (MS) DELIVERED

ON 13TH OCTOBER 2015 IN NBI (MILIMANI) CMCCC NO. 4139 OF 2014)

(CORAM: F. GIKONYO J.)

SICHUAN HUASHI ENTERPRISES CORP. LIMITED.....APPELLANT

Versus

MICHEAL MISIKO MUHINDI.....RESPONDENT

**JUDGMENT**

1. The Appellant herein was the Defendant in the trial Court whereas the Respondent was the plaintiff. The Respondent filed the plaint dated 23<sup>rd</sup> June 2014. It was part of the Respondents claim that he was a worker at the appellant's construction site when on 3<sup>rd</sup> June 2011 a stone fell on his back causing him injury. He therefore prayed for special and general damages for pain and suffering.
2. The Appellant filed its defence on 13<sup>th</sup> August 2014 denying the averments in the plaint. The Defence also raised a preliminary objection that the suit is time barred since the plaint was filed after the end of three years from the date on which the cause of action accrued.
3. The Appellant similarly filed application dated 8<sup>th</sup> April 2015 seeking the court to strike out the plaint. The Application was supported by the sworn Affidavit of Shen Wei, the appellant's site manager and on the ground that the cause of action accrued on or about 3<sup>rd</sup> May 2011 and the suit became time barred on 2<sup>nd</sup> May 2014. The plaint was filed on 18<sup>th</sup> July 2014 which was out of time.
4. The application was opposed by the Respondent vide Replying affidavit dated 29<sup>th</sup> June 2015 sworn by **James Ngochi Ngugi**, advocate for the Respondent who averred paragraph 4 of the plaint lay a foundation for a cause of action in contract. Thus, the action is not time barred for the limitation period expires on 3<sup>rd</sup> June 2017.
5. The application was canvassed by way of written submissions. The trial court delivered its Ruling on 13<sup>th</sup> October 2015 dismissing the Appellants application.
6. Being dissatisfied by the ruling of the trial court the appellant lodged this appeal and stated the following four (4) grounds of appeal;
  - a. **That the Learned Magistrate erred in law and fact by failing to evaluate the evidence before her to determine that the claim is founded on breach of tort and not contract.**
  - b. **The learned Magistrate erred in law and fact in failing to find that the cause of action is time barred.**
  - c. **The learned Magistrate erred in law and fact in that she disregarded the written submissions and judicial authorities submitted by the appellant on the cause of action being a tort and it being time barred thus resulting to a miscarriage of justice.**
  - d. **The leaned magistrate erred in law and fact by failing to evaluate the entire evidence on record thus arriving at an erroneous finding on the cause of action.**

Submissions by parties

7. On 23<sup>rd</sup> July 2019 this Court directed the parties to canvass the appeal by way of written submissions. Both parties have filed their respective submissions.

8. The appellant submits that the factual basis of the suit as set out in the plaint reveals a statutory duty of care imposed on an employer to his employee the breach of which is essentially a tort and not a term of contract. He relied on the cited authorities of **Kiamokama Tea factory Co. Limited vrs Joshua Nyakoni [2015] eKLR**, **Kenya Power and Lightning Limited v Collins Agumba Aboge [2016] eKLR**, **Francis Mugo Ndegwa vs. Amboseli Court Limited [2012] eKLR**.

9. The Respondent submits that the cause of action is founded on contract as seen in Paragraph 4 of the plaint which should be brought in six (6) years. He relied on the cited authority of **Ugwang v Kenya Cargo Handling Services Limited [Civil Appeal No. 64 of 1984]**

#### **ANALYSIS AND DETERMINATION**

10. As the first appellate Court, I will revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle &Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). I have carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties.

11. The Appellant pleaded limitation in the defence and gave notice that it shall apply to have it struck out. True to this notice, the Appellant filed the application dated 8<sup>th</sup> April 2015 seeking the court to strike out the plaint.

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

12. Limitation of actions occupied a central place in the trial court and in this appeal. It has been hotly contested in both courts. The question of limitation was raised at a preliminary stage through an interlocutory application. The trial court entertained the application and dealt with the question of limitation as a preliminary point and at a preliminary stage. Hence, the question whether the approach adopted by the appellant and entertained by the trial magistrate was the proper way of dealing with limitation of actions. This becomes a matter of great concern to this court.

13. The law as I understand it is that the defence of limitation of time is a matter for determination at the trial; it cannot be dealt with in a summary manner or at preliminary stage or as a preliminary objection. The court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial. On this see the case of **Oruta &Another vs. Nyamato [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”**

14. 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...”**

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

16. 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 to make limitation a matter for determination at the trial. The policy underpinning this position of the law is that a successful defence of limitation makes the claim not maintainable and the plaintiff is not entitled to a remedy. Doubtless, this is a matter that affects rights of the claimant and therefore substantial, for under the Constitution a right cannot be taken away in a summary manner especially where the law requires plenary hearing and determination of the issue. And in this mood, I hear repeated echoes of article 50 of the Constitution on fair hearing that:

**50.(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.**

17. See Order 2 rule 4 of the CPR below on specific pleading and effect of limitation:

**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. [Underlining mine]**

18. Therefore, the issue of limitation is a substantial question of law and fact which must be decided in a substantive process and manner at the trial. 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.

19. In addition, extension of time may be sought and obtained after commencement of suit in the particular suit filed which makes it absolutely necessary to avoid dealing with the issue at preliminary stage.

20. In light of what I have stated, the trial court erred in determining limitation of actions at a preliminary stage. Such decision is irregular and should be set aside *ex debito justitiae*; not in exercise of discretion but as a matter of judicial duty to uphold the integrity of the judicial process itself.

21. Consequently, I set aside the ruling dated 13<sup>th</sup> October 2015 in **NBI (MILIMANI) CMCCC No. 4139 of 2014**. The original trial court's file shall be remitted back to the trial court for hearing and disposal. Limitation of actions shall be determined as one of the issues at the trial upon evidence. With the foregoing restatements and orders, I am not the poorer; I do not wish to fall into error; accordingly, I decline to strike out the suit in a summary or preliminary manner as was invited to do by the Appellant.

22. Given the orders I have made, I order each party to bear own costs of the appeal. It is so ordered.

**Dated and signed at Nairobi this 15<sup>th</sup> day of October 2019**

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**F. GIKONYO**

**JUDGE**

**Dated, signed and delivered in open court at Nairobi this 28<sup>th</sup> day of October, 2019**

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**L. NJUGUNA**

**JUDGE**