



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 688 OF 2012

GREGORY MBURU.....APPELLANT

- V E R S U S -

THIKA DISTRICT HOSPITAL.....RESPONDENT

(Being an appeal from the judgement of the Chief Magistrate's court at Thika case no. 838 of 2011 delivered by Hon. A. N. Oganda on 13th November, 2012)

JUDGEMENT

1) Gregory Mburu the appellant herein, instituted a suit against Thika District Hospital the respondent herein for damages arising out of professional negligence of the respondent employees/servant. The appellant alleged vide the plaint dated 29th November, 2011 where it was alleged that the respondent mismanaged his injuries causing him to suffer amputation of his right lower limb. The respondent filed a notice of preliminary objection dated 9th May, 2012 in which he sought to raise the issue of statutory limitation of the appellants' claim.

2) The appellant then filed an originating summons dated 4th August 2012 seeking extension of the limitation period as well as leave to amend the plaint and correct the name of the appellant which was indicated as Gregory instead of Geoffrey. In the end Hon.A.N Ogonda, the learned trial magistrate, dismissed the application dated 4th August 2012 on the basis that the claim was time barred and thus no relief could be granted by the court on account of statutory limitation.

3) Being aggrieved by the dismissal order, the appellant preferred this appeal and raised the following grounds on appeal in its memorandum

- 1. That the learned Resident Magistrate erred in both facts and law in determining an ex parte application inter parte.***
- 2. That the learned magistrate erred in law in applying wrong principles when dealing with the application before her.***
- 3. That the learned magistrate erred in law and fact in determining an issue in the plaint i.e. contractual obligation in a summary manner .***
- 4. That the learned magistrate erred in law and fact in finding that the relationship between doctor and patient is not contractual.***
- 5. That the learned magistrate erred in law and fact by disregarding evidence before her of the plaintiff continued disability.***
- 6. Other grounds and reasons to be adduced at the hearing hereof.***

4) When the appeal came up for hearing, learned counsels appearing in this matter consented to have the appeal disposed of by written submissions.

5) I have re-evaluated the arguments presented before the trial court. I have also considered the rival written submissions. It is the appellants' submission that after being involved in a motorbike accident on 14th March 2010 he was taken to the respondent's health facility where he was found to have suffered a fracture of the right tibia fibula. The appellant was discharged but when he felt some tightness around the ankle, he went back to the respondent's facility where he was turned away and told he could only be seen after 2 weeks. This forced the appellant to visit another medical facility namely AIC Kijabe hospital, where his right lower limb was amputated. This prompted the appellant to file the suit before the trial court on 30th November 2011, grounded on breach of duty of care and breach of implied contractual terms.

6) The appellant submits that there existed an implied contractual obligation to ensure its safety by the respondent whereby the respondent mismanaged the appellant leading to the amputation of his lower limb. The suit is grounded both on negligence and contract. The appellant

stated that he was unable to file suit in good time and should be allowed to continue with the suit because he was under a medical physical disability.

7) The respondent also submits that the preliminary objection was raised first by the respondent and the application for extension of time was a response to the same by the appellant. The learned magistrate was right in determining the application interpartes since it was based on preliminary objection raised by the respondent. The respondent submits that the suit was founded on the tort of professional negligence and not breach of contract. The respondent argued that it is as a result of the tort of professional negligence that the respondent raised a preliminary objection on the ground that the suit was time barred.

The view of this court is that the relationship between patient and doctor is that of duty of care imposed by law, in that the respondent was under statutory obligation to ensure that its employees would apply the standard of care expected from professionals in a similar field. The appellant suit was time barred and its explanation for delay in filing the suit is not a ground for extension under the limitation clauses.

8) The appellant was injured in a motor cycle accident and went to the respondent medical facility for attention. He was later seen at AIC Kijabe Hospital where his right leg was amputated. The relationship between the respondent and the appellant was that of a duty of care to ensure his illness was managed and from that duty of care the appellant lost his leg and filed a claim for compensation grounded on the tort of negligence as expounded in its plaint under the particulars of negligence.

9) The law applicable in a cause of action founded on tort, is that time starts to run when the negligent act or omission occurs, or on the date when the negligence is unearthed. In a cause of action founded on contract, the time starts to run when the defendant breaches the terms of contract or on such date when the breach is discovered.

10) According to the discharge summary from AIC Kijabe Hospital, the appellant was discharged on 8th May 2010, which can be deduced as to date when time started running. The suit was filed on 3rd November 2011, which was over 12 months from the date when time begun to run.

11) The respondent is a body established under the Ministry of Health, therefore the provisions of the Public Authorities Limitation Act, Cap 39 is applicable. Section 3(1) of cap 39 states that:

“No proceedings founded on to it shall be brought against the government or local authority after the end of 12 months from the date on which the cause of action accrues.”

Section 3(2) of the CAP 39 states that proceedings founded on contract should be brought before the end of 3 years from the date of accrual of the cause of action. The suit ought to have been filed by 9th May 2011, but was filed on 3rd November 2011, the claim was therefore statute barred.

12) The appellant sought for extension of time on account of physical disability after amputation. Section 5 of CAP 39 allows extension of limitation period in case of disability.

Section 2(2)(c) of Cap 39 states that:

“A person is under disability while he is a minor or of unsound mind or is detained in pursuance of any written law which authorises the detention of persons suffering from mental disorder or unsoundness of mind.”

13) Physical disability is not covered under CAP 39. The appellant’s delay is not covered under this ambit and as such, extension of limitation time on this account cannot suffice.

14) On the basis of the above stated grounds, I find no merit in this appeal. The appeal is hereby dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 16th day of February, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent