



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO. 6 OF 2016**

**UNITED MILLERS COMPANY LTD.....APPELLANT**

**VERSUS**

**CYRUS MUDAVADI SALAGU.....RESPONDENT**

**(Being an Appeal from the Ruling of Hon C.N. Njalale R.M in Winam PMCC No.26 of 2015 delivered on 30th October 2015)**

**JUDGMENT**

**Cyrus MudavadiSalagu(hereinafter referred to as respondent) sued United Millers Company Ltd(hereinafter referred to as appellant) in the lower court claiming damages for injuries allegedly suffered on 9th June 2010 while the respondent was lawfully working for the appellant.**

Defendants/appellants filed a statement of Defence and denied the claim and urged the court to dismiss the respondent/plaintiff's claim with costs.

On 16th June 2015; the appellant filed a preliminary objection on the ground that the respondent's suit was time barred. In a ruling delivered on **30th October 2015**; the learned trial dismissed the preliminary objection.

**The Appeal**

The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 26th January 2016 which set out 4 grounds that:-

- 1. The Learned trial Magistrate erred in law and in fact in failing to adequately consider and apply all the materials placed before her and the law in this matter while arriving at her ruling**
- 2. The Learned trial Magistrate erred in law in finding that Order 37 of the Civil Procedure Rules,2010 provides for a period within which an application for extension of time for filing suit out of time may be filed**
- 3. The Learned trial Magistrate misdirected herself in law in finding that the issue of leave to file suit out of time, where a suit is time-barred should be ventilated during the hearing of the substantive suit**
- 4. The Learned trial Magistrate misdirected herself in law in dismissing the preliminary objection filed by the appellant to dismiss the respondent's suit for being time barred on the**

**grounds that it was premature**

**Plaintiff's suit**

At paragraphs 3-5 the plaintiff's claim is set out as follows:

**3. At all material times relevant to this suit, the defendant employed the plaintiff as a casual worker at defendant's premises**

**4. It was an implied and/or express term of the contract of employment between the plaintiff and the defendant and/or it was the duty of the defendant to take all reasonable precautions for the safety of the plaintiff, while engaged upon his work, not to expose him to risk of damage or injury, which the defendant knew or ought to have known, to prevent and maintain adequate and suitable measures to enable the plaintiff carry out work in safety and/or to provide and maintain a safe and proper system of work**

**5. On or about the 9th June 2010, the Plaintiff in the cause of his employment was engaged in his lawful duties of offloading 20 litres jerricans of cooking oil when he slid and fell inside the lorry, where the said jerricans fell on him sustaining injuries as a result thereof, he suffered pain, loss and damage for which he holds the defendant liable**

**PARTICULARS OF NEGLIGENCE/BREACH OF STATUTORY DUTY**

**a. Failing to provide and take adequate precaution for eth safety of the plaintiff while engaged in work**

**b. Exposing the plaintiff to risk of damage or injury, which defendant knew or ought to have known**

**c. Failing to take measures to prevent the accident**

**d. Failing to take adequate measures to ensure that the plaintiff's place of work was safe**

**e. Failing to provide plaintiff with any protective devices**

**f. Failing to provide a safe system of work**

In dismissing the preliminary objection on limitation, the trial court ruled as follows:

***“According to the plaint dated 20th March 2015, the cause of action arose on 9.6.10 when the plaintiff is said to have been injured. The case thus ought to have been filed by 8.6.14. This suit was however filed on the 30th March 2015. This was about 9 months outside the required period”.***

***A party can also be granted leave to file a suit out of time within the suit under rule 2 of Order 37***

***From the provision of Order 37, the law does not give the limit within which an application for leave to file suit out of time should be sought. It is therefore upon the plaintiff to regularize his position in accordance with the said provision.....***

***In the premises, I find that the preliminary objection raised by the defendant's counsel is premature and I therefore dismiss it.***

**SUBMISSIONS BY THE PARTIES**

## **Appellant's submissions**

On 28th February 2017; the court gave directions that the appeal be argued by way of written submissions to be filed on 28th March 2017. On 28th March 2017, only MsAngira, counsel for the appellant, appeared and confirmed having filed her submissions. The court set a date for judgment on 25th April 2017 and directed that the respondent be served with a notice to file submissions and a judgment notice. As at the time of writing this judgment; the respondent's submissions had not been filed.

The appellant submitted that the respondent's claim was founded on breach of statutory duty, and that being a claim in tort ought to have been filed within 3 years from the date the cause of action arose on 9th June 2010.

## **The issue for determination**

### **Whether the cause of action is based in contract or tort or both**

In this regard, the appellant relied on **Kiamokama Tea Factory Co. Limited v Joshua Nyakoni [2015] eKLR** which cited with approval **Robin Cahill & 9 Others v. T.S. Nandhra & 3 Others** Civil Appeal No. 57 of 2002 (cited in **Kenya Airways Corporation Ltd. v. Tobias Oganya Auma & 5 Ors.** Civil Appeal No. 350 of 2002) and argued that the respondent's claim for breach of statutory care is a claim in tort and was subject to the limitation period of 3 years under section 4 (1) the Limitations of Actions Act.

In **Robin Cahill & 9 Others v. T.S. Nandhra & 3 Others – Civil Appeal No. 57 of 2002** the Court of Appeal upheld the decision of Ringera J. (as he then was) when he held:

***“The claim in the present suit sounds in tort contrary to the opinion of the plaintiff's counsel. Breach of statutory duty of care is to my mind a claim in tort essentially, so is the claim in negligence and fraud.*”**

A perusal of the plaint shows that the respondent did not mention the term breach of contract as a basis of the suit so to give it the 6 year protection against the Limitation of Actions Act. The claim is purely presented as a breach of statutory duty and in negligence, and the particulars of the breach of statutory duty and the particulars of negligence are given in paragraphs 5. No particulars of breach of contract are given.

Section 4 of the Limitation of Actions Act (Cap. 22) provides:-

***(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued***

The word **may** gives a party who is caught up with time to apply for leave to file suit of time. The learned trial magistrate rightfully found that this suit was filed 9 months outside the 3 year period but ruled that the respondent could still be granted leave to file a suit out of time within the suit under rule 2 of Order 37.

Order 37 of the Civil Procedure Rules, 2010 provides:

***2. Any of the persons named in rule 1 may in like manner apply for and obtain an order for—***

***(a) the administration of the personal estate of the deceased;***

***(b) the administration of the real estate of the deceased;***

***(c) the administration of the trust.***

With respect, Order 37 rule 2 applies to administration of the estate of a deceased person and does not

afford the respondent an opportunity to apply for leave after filing suit out of time.

In the result and for the reasons given hereinabove, I find that the respondent's suit that was filed on 30th March 2015, on the cause of action in tort, which arose on 9.6.10 when the plaintiff is said to have been injured statutorily time-barred by virtue of section 4(1) of the Limitation of Actions Act.

The appeal succeeds and order of the trial Court is set aside and in its place an order upholding the preliminary objection dated 16th June 2015 is granted and the suit dismissed with costs.

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF APRIL 2017**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Clerk Felix

Appellant Mr. Oriero/Owiti

Respondent N/A