REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 175 OF 2012

DAVID MUGO MURURIA...APPELLANT

VERSUS

LE STUD LTD...RESPONDENT

JUDGMENT

The Appellant who was the plaintiff in cmcc No. 9579/2000 filed the plaint dated 3rd day of November 2000 against the Respondent/Defendant claiming special damages of ksh. 1,200, general damages and costs of the suit.

In the said plaint, it was pleaded that the plaintiff who was at all material times employed by the defendant was on or about 15th August, 1997 lifting the car up with a jack in order to wash underneath of the said car and in the course of his employment with the defendants, when an employee of the defendant one Ishmael Adika negligently pushed the jack that it collapsed, injuring the plaintiff's right index finger as a result of which the plaintiff suffered loss and damage.

It was averred that it was a term of employment contract and/ or an implied term and so also a statutory duty that the defendant would take reasonable care of the plaintiff whilst so employed not to expose him to a risk of bodily harm it knew or ought to have known and/or to provide safe means of work or a safe place of work.

The particulars of the alleged negligence were set out in paragraph 6 of the plaint whereas those of injuries and special damages were set out in paragraph 7.

The defendant filed a statement of defence dated 2nd February 2001 wherein it denied the claim, but in the alternative, it averred that even if an accident occurred as alleged, but which is denied, the same was occasioned entirely and/or substantially contributed to by negligence on the part of the plaintiff. The particulars of the plaintiff's negligence were set on in paragraph 5 of the defence.

The defendant further pleaded that the plaintiff has no cause of action under the tortuous law of negligence as his claim is statutory time barred and further that any claim under contract (workmen compensation Act) has fully been settled.

When the matter came up for hearing, the plaintiff testified as PW1 but did not call any other witness. It was his evidence that he was employed by the defendant since 1996. He produced an employment identity card. He told the court that on the 15/8/1997, he was washing a salon vehicle belonging to a

customer and had to use a jack as he had to wash underneath. He pushed the jack under the motor vehicle and knelt down to see how it was positioned while he held it. A fellow worker namely Ishmael Adha pushed the jack handle while the plaintiff was under the motor vehicle and as the said Ishamel put pressure on the jack to release it, the handle squeezed the plaintiff's forefinger and the tip got completely severed.

He was rushed to Guru Nanak hospital, then to Kenyatta National Hospital where the amputation was done.

He stated that they had not been given the elevation gadget or suspension hole where motor vehicle can stand and the under part be cleaned easily. He further stated that if his co-worker had not interfered with the jack, he would not have been injured. He admitted having been paid ksh. 49,200/= under the workmen's compensation Act.

In cross-examination, he admitted he filed the suit after three years because he was trying to give his employer time to settle the claim.

The defendant did not call any witnesses and while the matter was awaiting Judgment, Counsel for the plaintiff filed an application dated 23/10/2003 seeking that delivery of the Judgment be deferred pending prosecution of that application. The application sought to amend the plaint to read that the claim is for damages for breach of contract and not on tort of negligence. In support of the said application, Counsel for the plaintiff/Applicant argued that pleadings can be amended any time before or after Judgment or even at the Appeal stage. He relied on order VIA rule 3(l) of the Civil Procedure Act before it was revised in 2010. He further argued that Procedural rules should not remove a party from the seat of justice. He contended that a claim in contract was not time barred and that the defendant could be compensated by throw away costs.

In opposing the application, counsel for the defendant submitted that the application came too late in the day, in that, pleadings had closed and that the matter was awaiting judgment. She averred that though the court has jurisdiction to allow a party to amend its pleadings, such discretion should be exercised judiciously and should not prejudice any party.

Counsel contended that the suit by the plaintiff was purely based on negligence and the claim was time bared having been filed after three years had expired and that fact was pleaded in the defence but the plaintiff did not apply to amend the plaint until parties had filed written submissions. She submitted that even the claim under contract was time barred as the same ought to have been filed before 15th August 2003. She argued that allowing the amendment at that stage would mean giving leave to file a suit under contract out of time.

After hearing the application and the arguments by the parties, the learned magistrate dismissed the application and deferred the matter for judgment and in her decision, she dismissed the suit with costs to the defendant.

The defendant has now appealed to this court against both the ruling and the Judgment of the learned magistrate and in the memorandum of Appeal dated 3rd April, 2017, he has set out seven (7) grounds of Appeal. The said grounds, in summary, are that; the learned magistrate erred by failing to allow the appellant to amend the plaint, the learned magistrate erred by failing to apply the principles of law applicable in amendment of pleadings, the magistrate erred by failing to consider all the reliefs sought in the application, the learned magistrate erred by writing a ruling as opposed to a judgment, the magistrate erred by being too technical thereby failing to determine the dispute on merits, that she erred in her application of the law of tort of negligence and that of breach of contract and that she erred in her application of the law of limitation periods for causes of actions in contracts and/or negligence.

The Appeal proceeded by way of written submissions which this court has duly considered. I propose to consider all the grounds together.

The first three grounds are on the application for amendment and whether the learned magistrate exercised her discretion properly, whether she failed to apply the applicable law on amendment of pleadings and whether she erred by failing to consider all the reliefs sought in the application.

In his submissions, Counsel for the Appellant has argued that a party can amend its pleadings at any stage of the proceedings on such terms as to costs or otherwise. That the CPA does not state when an amendment may be refused and does not concern itself with whether the amendment will make the case or defence a success as long as it is for determination of the real questions in issue.

He submitted that it was, on the statute only, an error to hold as was held that;

> *"the plaintiff was fetching up his case after realizing what the defence had raised. The Appellant relied on the* ***cases of Kenya Cold Storage (1964) Limited Vs Overseas Food services (Africa) Limited 1982 KLR, Cooper Vs Smith (1984) 26 ch.D 700*** *Cited in the case of* ***Waljee (Uganda ltd Vs Ramji Punjambhai Bugerere Tea Estates Ltd (1971) E.A 188*** *and that of the* ***General Manager E.A.R & H.A.V Vs Thierstein 1964EA 354."***

The Respondent on its part argued that the amendments sought were coming too late in the day, that the Appellant was seeking to introduce a defective action under contract, that the Appellant was bringing a claim under contract which was not sustainable in law and that justice is two way and a party should be entitled to justice when the other party acts unfairly in its conduct. The Respondent relied on the case of **Joseph Ochieng Vs First National Bank of Chicago, Civil Appeal No 149 of 1991** which cited the case of **Ketteman vs Hansel Properties limited, (1998) ALL E.R**. It also relied on the case of **Divecon Limited Vs Shirinkhanu Sadrudin Samani, Civil Appeal No. 42 of 1997.**

The court has perused the draft amended plaint incorporating the amendments that the Appellant sought to introduce. Though the Appellant has argued that a party can amend pleadings at any stage of the proceedings, the Appellant's application was made too late in the day. It is noted that the issue of limitation was raised in the defence and that, ought to have put the Appellant on notice early enough and there is no good reason why he waited until a day before the judgment to apply to amend his plaint.

Secondly, the amendment sought to introduce a new cause of action in contract whereas the original cause of action was based on the tort of negligence. The two causes of action are separate and distinct. A cursory look at the plaint reveals that the cause of action was on negligence and indeed the particulars pleaded were that of negligence. I am more persuaded by the case of **Joseph Ochieng Vs first National Bank of Chicago (Supra)** that there is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time.

On the submissions by the Counsel for the Appellant that the suit was based on contract, I beg to disagree and in so doing, I would wish to borrow the wisdom of Judges of Appeal in the case of **Divecon Ltd Vs Shirinkhanu (Supra)** that the Appellant's plaint by which he is bound, leaves no doubt at all that the basis of his plaint was alleged tortuous negligence of the appellant and not a breach of any contractual relationship between them.

The court has also noted that the cause of action sought to be introduced was time barred. Under the Limitation of Actions Act, a cause of action based on contract should be brought within a period of six (6) years. The application to amend the plaint was filed after six years had expired and therefore, the claim was time barred and no useful purpose would have been served by the amendment, in any event. The learned magistrate was therefore right in disallowing the application.

The Appellant has also averred that the learned magistrate erred by writing a ruling as opposed to a Judgment. I do concur with the Counsel for the Appellant and find that it was erroneous on the part of the learned magistrate so to do, but on the other hand, I do not think that the Appellant suffered any prejudice as a result of the heading of the decision which read "Ruling" instead of "Judgment".

In the end, I find that the Appeal has no merits and it is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **22nd** Day of **November, 2017.**

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L. NJUGUNA

JUDGE

In the Presence of

..................................For the Appellant

..................................For the Respondent