



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NUMBER 147 OF 2009

LEONARD GWARO MWAMBA.....APPELLANT

VERSUS

LEE EDWARD ROSE1ST RESPONDENT

J.E. ROSE T/A ROSE BROTHERS.....2ND RESPONDENT

(Being an appeal from the ruling of Wilbroder Juma Hon. Chief Magistrate in Nakuru Chief Magistrate's Civil Case No.1055 of

2003)

JUDGMENT

1. The appeal before the court is against the trial court's ruling dated 10th June 2009 – whereof the court dismissed the entire lower court suit with costs to the defendants upon a preliminary objection that the claim was time barred under the **Limitation of Actions Act, Section 27(a)**.

The genesis of the suit in the trial court is a traffic road accident that took place on the 7th March 2003. The plaintiff sued Lee Edward Rose for negligence and sought compensation for injuries he sustained.

On the 21st July 2003, the plaintiff amended his plaint by adding Rose Brothers Agricultural Contractors Limited as the second defendant.

By a further Amended plaint dated 1st March 2007 and filed on 2nd April 2007 the plaintiff substituted the second Defendant to read J.E.Rose T/A Rose Brothers.

Upon being served with the Further Amended plaint, the Defendants filed a Further Amended statement of Defence on the 2nd April 2007 and raised a defence of Limitation under the provisions of the **Limitations of Actions At, Cap 22 Laws of Kenya** and sought dismissal of the suit.

2. A perusal of the proceedings show that on the 13th February 2004 a consent order was recorded that:

“By consent, Amended Defence dated 12th February 2004 be deemed properly filed and served on the defendant. The plaintiff is given leave to file Further Amended

Defence.”

It is pursuant to the above consent that the Further Amended Plaintiff was filed on the 2nd April 2007, and the Further Amended Defence filed.

3. When the suit came up for hearing the Defendants raised an oral preliminary objection. It was argued by the defendants Advocate, Mr Muchela that the cause of action having taken place on the 7th March 2003, and the claim being based on the tort of negligence, it was time barred by the virtue of **Section 27 (4) of the Limitations of Actions Act**. He further submitted that the further amendment brought in a new defendant and new suit out of time and without leave of court. It was his further submission that the further amended plaintiff was not endorsed with the order of the court granting leave and therefore offends the provisions of **Order VIA Rule 7 (now Order 8 Rule 3 of Civil Procedure Rules, 2010)**.

4. In response to the application, the plaintiff through his Advocate, Mr. Ombui submitted that the Further Amended plaintiff was filed by consent of the parties as recorded in court, that the intention was to substitute the defendant but not the cause of action, and therefore the claim was not time barred.

Relying on provisions of **Order 1 Rule 10 of Civil Procedure Rules**, it was urged that the court has power to order amendment of pleadings and that the original cause of action remains notwithstanding the amendments.

5. In the court's ruling under attack in this appeal, the trial Magistrate held that the suit against the second Respondent was brought well after the three years limitation period and without leave of court for extension of time, and that although parties consented to the Further amendment of the plaintiff, that consent did not amount to the suit against the second respondent being filed out of time. The court proceeded to strike out the entire suit with costs.

6. The issues for the court's determination arising from the submissions are two fold:

(1) *whether the trial magistrate erred in law in upholding the preliminary objection and striking out the entire suit.*

(2) *whether the plaintiff(appellants) claim against the Respondents was time barred.*

7. Limitation of actions is provided for under the **Limitation of Actions Act, Cap 22 Laws of Kenya Section 4(2)** states:

“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 original claim by the appellant was against the Defendant, Lee Edward Rose. The cause of action arose on the 7th March 2003. It would have become time barred by virtue of **Section 4(2) of the Limitations of Actions Act**, on the 6th March 2006.

On the 21st July 2003, the appellant amended his plaintiff and added the second defendant as a party to the suit. This was within the stipulated time.

On the 1st March 2007, a Further Amended Plaintiff was filed. The second defendant Rose Brothers Agricultural Contractors Limited were removed from the suit and substituted with another party named, J.E. T/A Rose Brothers. This was after a period of four years since the cause of action took place.

8. The court has perused the pleadings in the trial court. There is no record to indicate that leave of court was obtained to substitute the defendant with the party named as the second defendant in the further Amended plaint.

Proceedings of the 22nd February 2007 show that a consent order was recorded that the plaintiff be granted leave to file a Further Amended plaint within fourteen days and corresponding leave to the defence to file an amended defence if any. Pursuant to the leave, the Further Amended plaint was filed on the 2nd April 2007.

9. On the hearing date, the second defendant raised a Preliminary Objection premised on **Section 27(4) of the Limitation of Actions Act** that the suit against the second Defendant was time barred.

The original plaint had one defendant, Lee Edward rose. The Amended plaint dated 12th December 2004 added the second defendant to the suit. The Further Amended plaint, subject to this appeal, substituted the second Defendant with another party the second Respondent herein. In effect, the Further Amended Plaint retained two defendants, the first and the second Respondent. The suit against the first Respondent was filed within the statutory period of three years.

10. **Order 8 Rule (5) of the Civil Procedure Rules** allows a party, with leave of court to add or substitute a party or a new cause of action. However, if the amendment is made after any relevant period of limitation, the court may upon application grant such leave if it thinks just to do so.

As stated above, the intention and purpose of the amendment allowed by the trial court was to substitute the second defendant with another defendant, J.E. Rose T/A Rose Brothers This is allowed under **Order 8 rules 3(2) and (3) of the Civil Procedure Rules**.

In my considered opinion, the substitution effected by the Further Amended plaint removed the first second defendant and substituted it with the second defendant, a different party all together. The first Respondent remained a defendant in the suit.

11. Citing the case **Fidelity Commercial Bank -vs- Wordin Tours and Travel Ltd C.A No. 91 of 1998**, Justice Mohamed Ibrahim, J (as he then was) stated that for one to succeed in striking out amended pleadings must not only challenge the amended pleadings but must go further and attack the surviving or original pleadings.

I have looked at the original plaint and the amended plaint. Both were filed within the statutory period. In striking out the entire suit as against the first and second Defendants (now second Respondent), it is my finding that that was against the law as the claim against the first Respondent Lee Edward Rose was properly on record by dint of the original and Amended Plaint.

12. The case the trial Magistrate relied on the striking out the entire suit is distinguishable from the present suit and circumstances. In the said case **Mutuku and 3 Others -vs- United Insurance co. Ltd (2002) e KLR**, the court stated that where an amended plaint is struck out the party simply has no pleading left on record. The issue then was that the defendant had filed a defence and amended it later, and that the amended defence was not signed. Then to correct the mistake, the defendant filed a further amended defence without leave for court. Upon application, the court struck out the suit leaving the party without a valid pleading on record.

13. In the present case, there is a defendant on record, the first respondent. The trial court should have struck out the Further Amended Plaint against J.E Rose t/a Rose Brothers, and leave the suit against the first Respondent to proceed to full trial, as it was filed within the time stipulated by law.

To that extent, the trial Magistrate erred in the application of the law by striking out the

entire suit.

14. I have stated earlier that the claim against the first Respondent was filed within the statutory period allowed under the law. There would be no sound or legal basis upon which the claim against the said defendant could have been struck out. The upshot of the above is that the appeal succeeds. The suit against the second Respondent shall remain struck out as having been filed through the Further Amended Plaint out of the time and without leave of the court.

The suit against the first Defendant having been filed within the stipulated period under the Limitation of Actions Act is sustained. The ruling of the trial Magistrate dated the 10th June 2009 is set aside to the extent stated above. The suit against the first Respondent is hereby remitted back to the trial court for hearing and determination. There shall be no orders as to costs.

Dated, signed and delivered in open court this 28th day of April 2016

JANET MULWA

JUDGE