



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

NYERI HIGH COURT CIVIL APPEAL NO. 21 OF 2012

ABDI ABDILE HASSAN APPELLANT

VERSUS

LAIKIPIA NATURE CONSERVANCY 1ST RESPONDENT

HON ATTORNEY GENERAL 2ND RESPONDENT

(An appeal from the ruling in original Nanyuki Chief Magistrate's civil case No.134 of 2013 delivered on 25th January, 2012 by Hon J N Nyaga Chief Magistrate)

JUDGMENT

The appellant Abdi Abdalla Hassan was working for the 1st Respondent Laikipia Nature Conservancy taking as a security guard. On 6/7/2007 a rhino was shot within the conservancy and the appellant was suspected to have been involved. The matter was reported to Ol Moran Police Station and appellant was charged in Nyahururu court in Nyahururu Principal Magistrate **CR 2331/2007** with unlawful hunting of game animal contrary to section **34(1)** of the wild life conservation and management **Act Cap 376** Laws of Kenya.

After trial he was acquitted of the charge under section 210 criminal procedure code on 21st August, 2009. He then filed a civil suit in Nanyuki CM CC 134/2010 on 24/8/2010 claiming general damages for unlawful arrest, illegal confinement and malicious prosecution. The Respondent filed a preliminary objection challenging the jurisdiction of the court to entertain the suit and that the suit was time barred by virtue of the Public Authority Limited Act (cap 39) in respect of the 2nd Respondent the Hon. Attorney General. The trial magistrate by ruling dated 15/2/2012 upheld the preliminary objection by respondents and finding that the suit was filed in a court which did not have jurisdiction to entertain and hear it and secondly it was filed outside the time prescribed and therefore time barred.

The appellant though was dissatisfied with the ruling and preferred this appeal through his counsel M Wanjohi & Co. advocates who filed his memorandum of appeal dated 27/2/2012 faulting the ruling on 3 main grounds.

- 1. The learned senior principal magistrate erred in law and fact in holding that the trial court has no jurisdiction whereas the cause of action arose in Laikipia well within the jurisdiction of the Honourable court.***
- 2. The learned Senior Principal Magistrate erred in law and fact in holding that the provisions of order 50 rule 4 were not applicable in the Instant case and misinterpreting the same.***
- 3. The learned Senior Principal Magistrate erred in delivering a ruling which in effect dismissed the matter.***

Counsel for both parties filed respective written submissions. M/s G. N Wanjohi counsel for the appellant submitted that Nanyuki Law Courts is within Laikipia County where as Nyahururu court is not and the only reason why the appellant was charged in Nyahururu court was because it was near Ol Moran police station where the matter was reported. He therefore submitted that Nanyuki Law Courts has jurisdiction to entertain the suit; and in any case a Resident Magistrate court has jurisdiction throughout Kenya.

He relied on the High Court decision in Bungoma HCCAPP No.50 of 2001 John Mireki Wekesa – vs – Patrick Wafula Otunga, in support of his submissions.

On the question whether the suit time was time barred, counsel submitted that the 1st respondent is being a public authority which would be scheduled by Public Authorities Limitation Act.

Mr. Kariuki Mwangi for the 1st respondent submitted that section 15 of the civil procedure Act leaves no doubt as to the place of suing and that in this case the cause of action arose at Ol Moran where the 1st respondent carries on business and that the appellant was charged in Nyahururu court and that the correct place of suing was Nyahururu court. Counsel referred me to the decision in **POWER SOLUTIONS LTD – vs – CMA CGM KENYA & 2 OTHERS NBI HCC 589/2012** in support of his contention.

On the issue of the suit being time barred counsel submitted that the suit was filed over one year after the date of occurrence of the cause of action and therefore time barred against the 2nd respondent and 3 years had lapsed where a suit was to be filed against the 1st Respondent. The appellant did not seek leave of court to file suit out of time or for extension of the limitation period. He referred the court to the decision in Asica Mogendi & Another – vs – Shem Magara 2012 KLR where the court had held that when a suit is time bared, the court cannot grant the relief or remedy sought.

Mr. C Masaka litigation counsel for the 2nd Respondent filed his submission. He submitted that the 2nd Respondent had given notice of the issue of limitation of action in its defence and that the appellant need not to have waited till the conclusion of the trial to sue for alleged illegal arrest and confinement; as time started to run from date of arrest and not date of acquittal (Johnson Kobia – VS – KRA & Another NBI HCC 587/2007). On the issue of place of suing the counsel submitted that the appellant had notice of the intended objection but ignored the provisions of section 15 of the civil procedure Act and took refuge in the provisions of section 3(2) of the magistrate's court Act.

The main issue in this appeal as can be discerned are twofold 1) whether the place of suing was outside the jurisdiction of the court where the suit would be entertained 2) whether this suit was time barred.

On the issue of the place of filing suit, reliance has been placed on the provisions of section 15 of the civil procedure Act. The section provides broadly where suits would be filed a) where the defendant ordinarily resides or carries on business; b) where one of the defendants carries on business or personally works for gain (c) where the cause of action wholly or in part arises. In the plain filed the 1st respondent is described as a limited liability company whose address of service is Box 164 Kinamba. This description is admitted by the 1st defendant in paragraph 1 of their defence. It is not also disputed that the incident which gave rise to this action was reported to Ol Moran Police Station and appellant tried in Nyahururu court. It is not in contention that Ol Moran is in Laikipia County so is Kinamba where the 1st defendant carries on his business. The fact that the appellant was charged in Nyahururu court, which was to the convenience of the police and in particular given that criminal jurisdiction is not defined by County or administrative boundaries does not in my view mean that the civil suit will have to be filed in Nyahururu. I therefore hold that the filing of the suit in Nanyuki was within the provisions of section 15 of the civil procedure Act as the defendant carries on business in Kanamba which is in Laikipia. It is my finding therefore that the suit was properly filed in Nanyuki court and the court had jurisdiction to entertain and hear the suit in Nanyuki.

The second issue for determination is whether the suit was time barred as against the 2nd respondent when in was filed on 6/10/2010 by virtue of section 3(1) of the Public Authorities Limitation Act. Cap 39 laws

of Kenya Sec.3 (1) provides.

“3(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of 12 months from the date on which the cause of action occurred”.

It is common ground that the appellant was charged in Nyahururu SPM Criminal case No2331/2007 and was acquitted on 21st August, 2009 under section 210 criminal procedure code. He filed this suit on 24/8/2010, which was 12 months and 4 days after acquittal. It is also not in dispute that the suit was filed 4 days after the date provided for suing for public authority under section 3(1) of the public authority limitation Act. It is the contention of the 2nd Respondent the Hon Attorney General, that the suit having been filed 4 days outside the limitation period is therefore statutorily barred. Mr. Wanjohi counsel for the defendant submitted in the trial court and before me that the issue of limitation should be determined first against the 1st defendant and then as against the 2nd defendant which is a public authority. He further submitted that in computing time the provisions of order 50 rule 4 of the civil procedure code should be taken into account. The issue of the suit being statute barred was raised by 2nd Respondent who in paragraph 10 of the defence gave notice that they will raise a preliminary objection the issue which they did and the trial court determined giving rise to this appeal. The trial court found that the suit was filed 4 days outside the limitation period of 12 months since the claim accrued.

Counsel for the appellant urged the court to consider in computing time the provision of Order 50 rule 4 of the civil procedure rules. Order 50 rule 4 provides

“except where otherwise directed by a judge for reasons to be recorded in writing the period between twenty first day December in any year and the thirteenth day of January in the year next following both days included shall be omitted from any computation of time (whether under these rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act provided that this rule shall not apply to any application of a temporary injunction”.

Pleading is defined in section 2 of the act as

‘pleading’ includes a petition or summons and or statements in writing of the claim or demand of any plaintiff and of the defence of any defendant thereto and of any reply of the plaintiff to any defence or counter-claim of a defendant”.

It is clear that the provisions of order 50 rule 4 which counsel for the appellant has submitted to be considered in the computation of time to be relevant in this appeal. The learned trial magistrate in his ruling stated that the rule cannot be used to oust this express provisions of the public authority limitation Act. He was however of the opinion that the order will only apply if the limitation period was ending in the period between December 21st to 13th January. With respect, I do not think so. There is no contradiction between the Public Authorities Limitation Act and Order 50 rule 4. While section 3 provides for time within which to file the suit, order 50 rule 4 explains on computation of time of the 12 months stipulated and specifically provides that the period between 21st December and 13th January

“Shall be omitted from any computation of time (whether under these rules or any order of court) for the amending, delivering or filing of any pleading or doing of any other act (underline mine).

It is therefore my finding that the period envisaged under order 50 rule 4 was relevant in filing of the plaint. The same ought to have been omitted in computing time and had the trial magistrate considered this, then he would have found that the suit was not time-bared as he did.

In view of the above finding, I allow the appeal and set aside the order of striking out of the suit and direct that the suit do proceed to hearing before the Magistrate Court at Nanyuki.

Dated and signed at Nyeri this 16th day of May, 2016

S RIECHI

JUDGE