REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO.29 OF 2014

BETWEEN

MOHAMED NOOR …….1ST APPELLANT

MUMIAS SUGAR CO. LTD…….…….2ND APPELLANT

AND

FREDRICK ONJIRO NASAYE ……RESPONDENT

(Being an appeal arising from the judgment of the Learned S.P.M, Hon. L.M. Nafula delivered on 25th February 2014 in Mumias SPM CC No.1053 of 2006)

J U D G M E N T

Introduction

1. The Respondent herein was granted leave to file his suit on the 13th October 2006 by Hon. S.N. Abuya after his application dated 29th August 2006 was allowed. He filed a plaint on the 31st October 2006 where he sought for judgment against the appellants jointly and severally for:-

a) General Damages

b) Special Damages

c) Costs and interest

d) Any other just relief that this Honourable Court may deem fit to grant.

2. After the close of pleadings the case was heard and judgment was entered in favour of the Respondent. The appellants were jointly and severally found to be 100% liable for the accident that occurred on 4th of March 1998 along Sabatia Mumias Murram Road. Quantum of damages was assessed at Kshs.100,000/= general damages and Kshs.3,500/= for special damages together with costs to the Respondent.

The Appeal

3. Being aggrieved and dissatisfied with the judgment of the Senior Principal Magistrate Mumias delivered on 25th February 2014 and the decree drawn thereafter the appellant appealed on liability only. The appeal is premised on the following:-

1. THAT having agreed with the appellants/defendants that at the time the respondent/plaintiff instituted his suit it was time barred the learned trial Magistrate erred in law and fact in finding in favour of the respondent/plaintiff and holding the appellants/defendants liable.

2. THAT the learned trial Magistrate erred both in law and fact in holding that merely because the respondent/plaintiff obtained leave to institute the proceedings out of time the issue of limitation was cured.

3. THAT the learned trial Magistrate erred both in law and fact in not following the strict provisions of law contained in the Limitation of Actions Act and the equally strict requirements that must be met for a party to benefit therefrom.

4. THAT the learned trial Magistrate erred both in law and fact by holding that merely because leave had been obtained to institute proceedings out of time and that the said leave formed part of the Court record and that the same was within the knowledge of the defence, that constituted the appellants/defendants acceptance of the leave and that the appellant therefore could not rely on a specific provision of the law in its defence.

5. THAT the learned trial Magistrate erred both in law and fact in not addressing herself at all and completely ignoring strict provisions of the law governing limitation despite the leading authority on the issue having been brought to her attention.

6. THAT the Honourable trial magistrate's findings were totally against the law, an abuse thereof, was biased and constituted a miscarriage of justice.

4.The Appellants therefore pray:-

a) That this appeal be allowed.

b) That the judgment and decree of the Lower Court be set aside.

c) That the Respondent be condemned in the costs of this appeal and of the Lower Court.

d) Any other or further relief the Honourable Court may feel inclined to grant.

Submissions

5. The appeal herein was agreed to be canvassed by way of written submissions but only the appellants filed their submissions. It is the appellant's case that the Respondent's suit was filed out of time after he was granted leave to file the same by the trial Court on the 13th of October 2006. The orders granting leave were obtained exparte. The suit filed by the Respondent, being Mumias SPMCC No 1053 of 2006 was a tort based action, following an accident which occurred on 4th March 1998 wherein the Respondent was injured and for which he held the appellants liable in negligence. The suit was then filed on 31st October 2006 some eight years after the accident.

6. The appellants submit that since the respondent's suit was filed out of the statutory time, it was time barred and was bound to fail from the start. They maintain that the leave obtained by the Respondent was not final in curing time limitation under the Limitation of Actions Act. The appellants rely on the persuasive authority in **Eldoret H.C.C.C. No.79 of 1987, Joseph Njihia Njuguna –vs- Eldoret Municipal Council** where Justice D.K.S. Aganyanya quoted Lord Denning's words in **Cozens –vs- Devon Hospital Management Committee & Another [1966] 2ALLER 799** who stated that…."even when the Judge grants leave, there is nothing final about it, it is merely provisional……."

7. The appellants have also raised issue with the affidavit filed in support of the application seeking leave to file the suit out of time, stating that the respondents did not illustrate or meet the requirements of Section 27(2) of the Limitation of Actions Act. They submit that for that reason the learned trial

Magistrate ought to have dismissed the plaintiffs case and ought not to have held the appellants liable for the claim. It is the appellants contention that the Respondent was well aware of all facts of decisive nature relating to his case well before filing the application for leave. They add that the Respondent's suit having been incompetent by virtue of the Limitation of Actions Act from the start, they could not be held liable at all.

Determination

8. This Court has keenly studied the submissions by the appellant and the authorities relied on. It is on record that leave was granted to the respondent to file his suit within 21 days from the date thereof which he did. The suit as earlier stated was filed though out of time. The Limitation of Actions Act provides for time frames within which various actions can be brought before Court failure to which they become time barred.

9. The effect of the statue is that certain causes of action may not be brought after the expiry of a particular period of time. The Act bars the bringing of particular actions after the specified period of limitation but does not necessarily extinguish such causes of action. As held in **RAWAL –VS- RAWAL [1990] KLR 275** "The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims" See also **DHANESVAR V MEHTA –VS- MANILAL M. SHAH [1965] E.A 321**. This was also the position taken in the case of **IGA –VS- MAKERERE UNIVERSITY [1972] E.A 65** to the effect that: "A plaint barred by limitation is barred by law and must be rejected; and further that "such a plaint should be rejected even though an interlocutory judgment has been entered."

The Court went further and stated thus:

> ***"The wording of the Limitation Act, s.4 is mandatory, action shall not be brought save within the prescribed period of time. If action is brought out of that period then before entering judgment on the claim so made the court must be satisfied the case comes within one of the exceptions provided by the Act extending the period of limitation. The court, in the present case having raised the issue that for the apparent reason the claim was barred by the Act and therefore could not be entertained by the court, it was open to the plaintiff to apply for leave to amend the statement of claim to show that the right to sue was preserved by coming within one of the exceptions. The plaintiff not having shown the right to sue was so preserved I hold the Court had no jurisdiction to entertain the suit."***

10. What this means is that a cause of action that is time barred may in certain cases be revived if the conditions set out in Section 27 of the Limitation of Actions Act Cap 22 Laws of Kenya are fulfilled. The provisions in the said Section stipulate the circumstances under which the Court may extend time for bringing an action barred by limitation statute. Mbito J. dealt extensively with the issue in **LUCIA WAMBUI NGUGI –VS- KENYA RAILWAYS & ANOTHER NAIROBI H.C.M.A. No.13 OF 2009** in which the learned Judge expressed himself as follows:- "When an application is made for leave under the Limitation of Actions Act, a Judge in chambers should not grant leave as of course. He should carefully scrutinize the case to see whether it is a proper one for leave. Since it has been decided that the defendants have no right to go back to the High Court to challenge such orders it is particularly important that when such an application is made, the order should not follow as a matter of course. The evidence in support of the application ought to be very carefully scrutinized, and, if that evidence does not make quite clear that the plaintiff comes within the terms of the Limitation of Actions Act, then either the order ought to be refused or the plaintiff ought perhaps to be given an opportunity of supplementing his evidence. It must be of course be assumed for the purposes of the exparte application that the affidavit evidence is true; but it is only if that evidence makes it absolutely plain that the plaintiff is entitled to leave that the application should be granted and the order made, for, such an order may have the effect of depriving the defendant of a very valuable statutory right. It is not in every case in which leave has been given exparte on inadequate evidence that the defendant will be able to mitigate the injustice which may have been done to him by obtaining an order for the trial of a preliminary issue…….Section 27 of the Limitation of

Actions Act ……provides that limitation period under Section 4 (2) of the said act can be extended in certain circumstances and by the provisions of Section 31 of the said Act all limitation periods prescribed by any other written and is extendable by the provisions of Section 27 of the said Act. Consequently this application can only succeed if the applicant can avail herself of the provisions of Section 27 of the act as read with Section 31 thereof which enact that the limiting provision shall not afford a defence to an action founded on tort where the Court gives leave on account of the appellants ignorance of material facts relating to the cause of action which were of decisive character…….although what amounts to ignorance of material facts of decisive character "is not always easy to distinguish by Section 30(1) of the Limitation of Actions Act. When read with sub section (2) thereof, material facts of decisive character are said to be those relating to a cause of action which would enable a reasonable person to conclude that he had a reasonable chance of succeeding and getting damages of such amount as would justify the bringing of the action." I fully agree.

11. Therefore extension of time applies only to claims made in tort and even then the claims must be in respect of personal injuries arising from negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law).

12. However, even if the foregoing conditions are satisfied, time will not be extended unless the applicant proves that material facts relating to that cause of action are facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the Plaintiff. To prove this, the applicant is expected to show that he did not know the fact that in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for purposes of ascertaining it, and that in so far as there existed and were known to him, circumstances from which with appropriate advise, that fact may have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before the time for purposes of obtaining appropriate advice with respect to those circumstances.

13. In Section 30(5) "appropriate advice" is defined as meaning in relation to any facts or circumstances advice of a competent person qualified in their respective spheres to advise on the medical legal or other aspects of that fact or those circumstances as the case may be.

14. In this particular case, the Respondent averred in his affidavit in support of the Summons for Leave to file suit out of time that on 30th May 1998, he instructed the firm of M/s MUTAKHA KANGU & Co. ADVOCATES to take up the matter and file suit on his behalf and recover damages (see paragraph 5 of the Affidavit). He also deponed that thereafter the said firm of Advocates sent him for medical examination for a Medico-legal report, which report was prepared on 15th April 1999. The Respondent alleged that as at 29th August 2006 and further that since 1998, he had made several trips to the said firm of advocates to confirm whether or not a suit had been filed. Whether or not a suit had been filed on his behalf and was assured that it had been done. That in or about the year 2004, the advocate who had been handling his case left the firm of MUTAKHA KANGU & Co. ADVOCATES and that thereafter he still made trips to the said office until March 2006 when he demanded for his file from the said firm. That is was at that time in March 2006 that he learnt that no suit had been filed on his behalf.

15. It is to be noted that a copy of the ruling allowing the Respondent leave to file suit out of time does not form part of the Record of Appeal, but even if the same had been availed, it is my considered view that the Respondent acted with extreme lethargy in this matter and in my considered view, the Respondent's averments did not bring him under the ambit of the exemptions under the Limitation of Actions Act. He had in fact obtained all the appropriate advice pertaining to his case. It follows therefore that though leave was granted, it was provisional. The trial Court had no option but to reject the plaint which had been filed out of time and give the Respondent liberty to apply to amend in order to comply with the law. In view of the fact that the law was not followed in this case, this appeal must succeed.

Conclusion

16. In conclusion, I am satisfied that this appeal is merited. The same is hereby allowed. The judgment and decree of the Lower Court be and is hereby set aside with costs to the appellant. Regarding costs of

this appeal each party shall bear its own costs.

17. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 22nd day of July 2016

RUTH N. SITATI

J U D G E

In the presence of:

Miss Wilunda For Appellant

M/s Anyona (absent) but represented present For Respondent

Mr. Lagat - Court Assistant