



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 261 OF 2011**

**AMOS PETER OMUSOTSI ..... APPELLANT**

**VERSUS**

**BULLEYS TANNERIES LIMITED (UNDER RECEIVERSHIP)..... 1<sup>ST</sup>  
RESPONDENT**

**NDERITU WACHIRA (RECEIVER & MANAGER OF BULLEYS TANNERIES LTD ...2<sup>ND</sup>  
RESPONDENT**

*(Being an appeal from the judgement and order of the Senior Resident Magistrate at Thika Hon. B.A. Owino delivered on 16.5.2011 in Thika Senior Resident Magistrate Court case no. 582 of 2010)*

**JUDGMENT**

The appellant brought this suit against the respondents following injuries sustained from a motor machine while in the employment of the first respondent. He blamed the 1<sup>st</sup> respondent for breaching express and or implied terms of employment under the contract of employment. The injuries were sustained on 12<sup>th</sup> July, 2004 but the suit was not filed until 19<sup>th</sup> May, 2010 by a plaint dated 5th May, 2010.

The respondents filed a defence in which it was stated that the suit is statute barred and all allegations of injuries were also denied. It was also pleaded that there had been previous proceeding between the same parties over the same cause of action which had been determined and therefore this was an abuse of the court process. That allegation was however denied by the appellant.

After the hearing, the appellant’s suit was dismissed hence this appeal. In the memorandum of appeal the appellant complains that the lower court was wrong in dismissing his suit because the claim was based on a contract of employment and the period of limitation could only expire after six years. The lower court was also faulted for selective analysis of the evidence and that it was wrong to make findings against the weight of evidence.

In the judgment dismissing the appellant’s suit, the trial magistrate said in part as follows,

**“The plaint essentially is premised on negligence by the defendants. Indeed the plaintiff is seeking for an unliquidated amount of damages which is not exclusively the breach of contract of employment between them. It is a suit based on tort. Clearly the plaintiff’s suit was filed out of time and without leave of court. On this ground alone I would find that the suit is incompetent and cannot be entertained.....**

**The plaintiff’s suit be and is hereby dismissed for being an affront to the Limitation of Actions**

**Act (Cap 22) . Each party to bear its costs”**

I have gone through the record of the lower court and submissions by both learned counsel. It is true that the appellant may have been injured in the course of employment. It is clear that the blame was on the 1<sup>st</sup> defendant and from the pleadings there is negligence presumed on its part. But that was then is a suit based on tort whose period of limitation is limited to three years.

The plaintiff’s case is not about dismissal from service or claim for emoluments. For as long as negligence is presumed on the part of the 1<sup>st</sup> defendant then clearly that is an action in tort.

Section 4 (2) of the Limitation of Actions Act Cap 22 Laws of Kenya provides as follows,

**“(2) an action founded on tort may not be brought after the end of 3 years from the date on which the cause of action accrued.**

**Provided that an action for libel or slander may not be brought after the end of 12 months from such dates.”**

The appellant’s claim going by the above provision was clearly out of time and statutorily barred. There is another issue. The 1<sup>st</sup> defendant was under receivership. No claim can be brought against the company under receivership without leave of the court. If any authority is required in that regard see: **Civil Appeal No. 172 of 1998 Official Receiver and Provisional Liquidator Nyanyo Bus Corporation Vs Firestone EA Limited.** Leave having not been sought and granted in this matter, the suit was incompetent *ab initio*. This appeal therefore is dismissed. Each party shall bear their own costs.

***Dated, signed and delivered at Nairobi this 30<sup>th</sup> Day of November, 2016.***

**A. MBOGHOLI MSAGHA**

**JUDGE**