



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CIVIL APPEAL NO. 74 OF 2011.

MUMIAS SUGAR COMPANY LIMITED ::::::::::::::: APPELLANT.

VERSUS

C M S ::::::::::::::: RESPONDENT.

JUDGEMENT

INTRODUCTION.

1. On or about the 25th July, 1996 at around 5.30 p.m. an accident occurred at the Nucleus Area Upper Central Estate, Mumias within the Republic of Kenya. The accident involved motor vehicle registration number KAC 751 a Land rover and a child A W S (deceased) then aged 8 years. The vehicle hit the child who was walking as a pedestrian and the child suffered fatal injuries which led to his death.
2. His father C M S applied for letters of administration colligenda bona for the estate of deceased after which he filed Civil suit No. 501 of 2002 at Kakamega. In the plaint brought under the Law Reform Act and Fatal Accident Act he claimed for damages, costs and interest.
3. The defendants filed a defence and denied all the claims in the plaintiff's plaint and put him to strict proof. The case was heard and it is only the plaintiff who was heard and who called witnesses. The defendant failed to attend court or call witness.
4. In his judgment, the trial court found that the defendant was 100% liable for the accident and went ahead to award damages on the Law Reform Act and Fatal Accident Act totaling to Ksh. 498,770/= together with costs and interest.

The appeal.

5. The defendant was aggrieved and dissatisfied by the said judgment and filed the appeal herein on liability only and has set out the following grounds:-
 - (1) *That the trial magistrate erred in failing to hold that the respondent's suit was statute barred;*
 - (2) *That the trial magistrate erred in failing to hold that leave obtained by the respondent to file suit out of time was not valid and/or properly grounded in law;*
 - (3) *That the decision of the learned trial magistrate has occasioned a serious miscarriage of justice.*

6. The appellant prays that the appeal be allowed, judgment set aside and respondent's case be dismissed with costs.

7. The court gave directions that the appeal herein be disposed by way of written submissions which were to be served and exchanged between the parties.

Submissions.

8. The appellant submitted that since the claim by the respondents herein was based on the tort of negligence and the statutory period applicable to me for the claim is 3 years, the respondent filed their claim out of the statutory period. He adds that lower courts operate under the mistaken view that once leave is granted to file suit out of time, all the requirements of the law have been met and the defence of limitation ceases to apply.

9. He further submits that the only explanation given by the plaintiff/respondent for failure to file his suit in time was a promise by the appellant that they would settle the issue. There was no documentary proof of the alleged promise. The appellants also challenge the order granting the plaintiff leave to file suit out of time because it does not disclose the reasons why or on what grounds the leave was granted. They add that the application for leave and the affidavits referred to in the order are not part of the record.

10. They further claim that the reason given by the plaintiff do not fall within the strict provisions of Section 27 (2) of the Limitation of Actions Act as more specifically shown in the case of **JOSEPH NJIHIA NJUGUNA VS. ELDORET MUNICIPAL COUNCIL ELDORET H.C.C.C/ NO. 79 OF 1987.**

11. He opines that when leave has been granted or time extended, the defence of limitation remain alive and available to the defence. He argues that for leave an order of extension of time to be valid the reasons given by the applicant/plaintiff must meet the strict requirements of sections 27, 28 and 30 of the Limitations of Actions Act. On this issue appellant relies on the case of **JOSEPH NJIHIA NJUGUNA VS. ELDORET MUNICIPAL COUNCIL ELDORET H.C.C.C. NO. 79 of 1987.**

12. The respondent submits that the court prior to granting leave, was satisfied that the laid down procedures and provisions had been adhered to and therefore leave was properly granted to them. They add that the appellant had a chance to seek review of the order granting leave but failed to do so. They maintain that the trial magistrate arrived at his decision after carefully analyzing the evidence adduced.

Issues for determination.

13. From the grounds of appeal the only issue that this court is tasked to determine is whether leave obtained by the respondent was valid and its effect. It is common ground that the suit herein was filed after the time for filing the same had lapsed. According to the plaint the cause of action arose on the 25th day of July, 1996 but the case lodged in court on 27th November, 2002 about six (6) years later.

14. Before filing the case, the plaintiff who is now the respondent herein filed an O.S. seeking leave to file his suit out of time which orders were granted and which gave him the authority to now file the suit. It has been held that the effect of the statute of limitation is that certain causes of action may not be brought after the expiry of a particular period of time. In other words the act bars the bringing of particular actions after the specified period of limitation but does not necessarily extinguish such causes of action. See the case of **Rawal vs. Rawal [1990] KLR 275** where the court stated:-

“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.”

15. It means 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 said section

clearly stipulates the circumstances under which the court may extend time for bringing an action barred by Limitation. 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)

16. Where the defendant or his representative such as the insurance company or the appellant herein leads the plaintiff to believe that the claim is capable of being settled and in reliance thereof the plaintiff or his advocate refrain from filing the suit until after the limitation has run its course, that may constitute a good ground for extending time notwithstanding the provisions of section 27 aforesaid. At the time of the application for extension of time there the court assumes that the facts as deposed in the supporting affidavit are true. It was therefore upon the defendant/appellant at the hearing to challenge the grounds upon which the order extending time were granted.

17. I am therefore unable to find that the order extending time to file suit was not properly granted. The appellants/defendants did not appeal or seek for review of the said orders. The appeal therefore cannot stand and the same is dismissed with costs to the respondent.

DATED at KAKAMEGA this 22ND day of NOVEMBER, 2016.

C. KARIUKI

JUDGE.

In the presence of:-

.....**N/A**.....**for the Appellant.**

.....**RAUTO****for the Respondent.**

.....**ANUNDA**..... **Court Assistant.**