



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 187 OF 2013

JAMES KAMORE KAHONDE.....APPELLANT

VERSUS

PETER WANJOHI MWANGI

JOHN M. MAINA.....RESPONDENT

*(Being an appeal from the original judgment and decree of Hon. T.W.C. Wamae in Milimani
Commercial Court CMCC No. 2187 of 2012 delivered on 25th March, 2012)*

JUDGEMENT

1. By a notice of motion dated 12th April, 2012, the Appellant sought leave to file the suit out of time before the trial court for recovery of damages following a road traffic accident that was alleged to have occurred on 22nd Feb, 2008. In his supporting affidavit, the Appellant explained that after the occurrence of the accident the Respondent removed the subject motor vehicle from the road and he was therefore unable to trace the Respondent. That it was in February, 2012 that his advocates informed him that they traced the Respondent in Ngara within Nairobi and it is then that he sought leave of court. He also stated that he had spent over KShs. 1 Million in treating the injuries sustained in the alleged accident and that he is still bed ridden. For the said reasons he urged the court to allow his application.
2. Hon. Ms. A. Atambo who heard the application granted leave sought by the Appellant.
3. The matter then went for full trial and the trial magistrate dismissed the Appellant's claim on the basis that he had with him material particulars less than a year after the accident to enable him file the suit before the lapse of the three (3) years prescribed.
4. It is that decision that the Appellant has appealed against on the following grounds:-
 - i. *The learned magistrate erred in law in ruling against the defendant on grounds that the suit was filed out of time yet leave had been granted under the Limitation of Actions Act Cap 22 Laws of Kenya to allow the Appellant to file the suit out of time.*
 - ii. *The learned magistrate erred in law and in fact in finding that the Appellant did not give reasonable explanation as to why he filed the suit out of time yet leave granted was never set aside nor was it challenged by the Respondent.*
 - iii. *The learned magistrate erred in fact and in law by failing to consider the court order granting leave to the Appellant to file the suit out of time exhibited before the magistrate during trial.*
 - iv. *The learned magistrate erred in fact and in law in considering the issue of time bar which was not an agreed issue for determination before her.*

5. This being a first appeal I am guided by the principle laid in **Selle v. Associated Motor Boat Co. Ltd 1968 E.A 123.** I am therefore required to re-evaluate the facts afresh, assess it and make my own independent conclusions.

6. It was the Appellant's submission that since the order granting leave exhibited in the application having not been contested by the Respondent and the magistrate who granted the order having critically scrutinized the issue of leave, the issue of leave had been settled and the trial magistrate had no jurisdiction to delve into it. It was argued that the matter could only be revisited during the trial. The Appellant cited **Nairobi HMCA No. 213 of 1989., Lucia Wambui Ngugi v. Kenya Railways & Another** quoted in **Charles K. W. Masinde v. Intergovernmental Authority on Development (2014) eKLR.** Mbitio J., in the Lucia case (supra) stated as follows:-

"When an application is made for leave under the Limitation 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...The evidence in support of the application ought to be carefully scrutinized, and, if that evidence does not make quite clear that the plaintiff comes within the terms of Limitation 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, of course be assumed for the purposes of the ex parte application that the 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."

and argued that his case was a proper one and the leave granted was justifiable and should have been dealt with at the trial stage only. The Appellant further cited **Mary Nabwire Omalla v. David Wachira & 2 Others (2011) eKLR** where court held a similar opinion.

7. The Appellant argued that the issue of leave should not have been delved into by the trial magistrate since the Respondents did not raise it during the hearing.

8. The Respondents on the other hand contended that the Appellant did not file a reply to defence denying the allegation that the suit was misconceived, incompetent and bad in law and is an abuse of the court process as alleged in the defence. It was argued that the averment in the defence was a challenge of facts during trial. It was submitted that in the Respondents' submission before the trial court, the Respondents referred the court to Section 27 (1) of the Limitation of Actions Act and stated that the requirements of the said section were fulfilled in that material facts relating to the cause of action were not outside the Appellant's knowledge. It was the Respondents' position that the requirements set out in Section 27 (1) and 28 (2) of the Limitation of Action Act for grant of leave were not fulfilled. The Respondents analysed the authorities cited by the Appellant. Particularly, it was stated that it was clear from the case of **Ngari and Ndai** (supra) that the conditions set out in Section 27 and 28 of the Limitations of Actions Act must be satisfied but that the Appellant herein did not satisfy the said conditions.

9. It is worth noting that the Respondents did not adduce any evidence during the trial challenging the issue of time bar, rather it was raised in their submissions. It is trite law that a grant of leave to file a suit out of time can only be challenged during the trial, **See Divecon Limited v. Shirinkhanu Sadrudin Samani Civil Appeal No. 142 of 1997 (UR).** Having so said, I find and hold that the trial magistrate erred in delving into the issue without hearing the parties first. In the end I find that this appeal is merited. It is allowed. The order dismissing the Appellant's suit is set aside. The suit to be heard afresh before another magistrate of competent jurisdiction other than Hon. T. W. C. Wamae. Costs of the appeal to await the outcome of the suit.

Dated, Signed and Delivered in open court this 22nd day of April, 2015.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent