



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 366 OF 2014

DANIEL SEBASTIAN ANGWENYI.....APPELLANT

VERSUS

**1. EVEREX TRAVELLERS LTD
2. THE HON. ATTORNEY GENERAL.....RESPONDENTS**

*(Appeal from the ruling and order of Hon. P. W. Wasike delivered on 15th February, 2013 in Nairobi
CMCC No. 8447 of 2000)*

JUDGMENT

1. This appeal has been filed on the following grounds:-
 - i. *That the learned trial magistrate erred in law and fact by declining to exercise his discretion most judicially by failure to validate the suit against the 2nd Respondent to his prejudice.*
 - ii. *That the learned trial magistrate grossly misdirected himself in fact by failure to consider the fact that the Appellant as a lay person did not understand the law of limitation and the ignorance of the law and delay obtaining trade dispute proceedings were material facts that ought to have been considered in the grant of leave as of raising the fees to file suit out of time.*
 - iii. *That the Appellant was not guilty of inordinate delay in bringing the suit against the 2nd Respondent.*
 - iv. *That the application for validation of the suit as against the 2nd Respondent amounted to addition of a party to the suit which had been filed within time in respect to the 1st Defendant.*
2. By a motion dated 15th August, 2005, the Appellant sought that his suit against the 2nd Respondent be validated as filed within time. The application was on the basis that the Appellant being a layperson did not know that he was to file the suit against the 2nd Respondent within one year from the date of the cause of action.
3. In response to the Appellant's application, the 2nd Respondent filed a preliminary objection dated 7th July, 2004 on grounds that; the suit was premature, un-maintainable and bad in law as it contravened the mandatory provisions of the Government Proceedings Act Cap 40 and that the suit against the 2nd Respondent was statutorily barred by virtue of the provisions of the Public Authorities Limitation Act, Cap 39 and ought to be struck out with costs.
4. It was the Appellant's submission that although the procedure with which he should have moved court was by originating summons, this was a procedural technicality which was not fatal as it could not oust the court's jurisdiction and further that the 2nd Respondent could not prejudice by the technicality. To buttress this argument the Appellant relied on the Court of Appeal decision in **Chogera v. Kimani & Others., COA Appeal No. 322 of 2003** where the court held as follows:-

"Regarding the procedure, the issue of trust had arisen from the pleadings and in the evidence adduced. Moreover, the issue of the wrong procedure did not invalidate the proceedings because it did not go to the jurisdiction of the court and no prejudice was caused to the appellant."

5. It was the Appellant's contention that since the plaint had been filed and the 2nd Respondent already made a party to the suit, the 2nd Respondent would not be prejudiced in any way. That the 2nd Respondent would be given the opportunity to cross-examine the Plaintiff. That since the court exercised its jurisdiction to allow an amendment to enjoin the 2nd Respondent as party, it should do the same and extend time and validate the suit under Order 37 rule 6 (2) of the Civil Procedure Rules.
6. This being a first appeal, I am called upon to re-evaluate the facts afresh, re-assess this case and make my own independent conclusions as was held in ***Peters v. Sunday Post (1958) E.A. 424 at 429 where Sir Kenneth O'Conner said:-***

"It is a strong thing for an appellate court to differ from the finding on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

7. Section 3(1) of the Public Authorities Limitation Act (Cap. 39) Laws of Kenya provides as follows:-

"S 3 (1) No proceeding founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued."

8. Ordinarily therefore, the time limit within which to sue the Government is one year of the accrual of the cause of action and any action brought thereafter is statute barred. The alleged cause of action against the Government arose in the year 1998 while the application seeking to validate the suit was filed on 15th August, 2005. **The object of limitation has been discussed vastly. In *Rawal v. Rawal (1990) KLR 275, Bosire, J* (as he then was) 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 along lapse of time. It is not to extinguish claims".

The said position was affirmed in ***Iga v. Makerere University [1972] EA 65*** in which it was held:-

"A plaint which is barred by limitation is a plaint "barred by law."A reading of the provisions of sections 3 and 4 of the Limitation Act (Cap 70) together with Order 7 rule 6 of the Civil Procedure Rules seems clear that unless the appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the court "shall reject" his claim...The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time-barred, the court cannot grant the remedy or relief".

9. The application was brought under Section 27 of the Limitation of Actions Act (Cap 22.) Laws of Kenya. The issue that arises in this appeal is whether ignorance of the law and lack of funds can constitute a material fact of a decisive nature within the meaning of section 27 of the Act. Section 27(2) of the Limitation of Actions Act which is a proviso on extension of limitation period in case of ignorance of material facts in action for negligence provides as follows:-

“(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to the cause of action were included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which:-

(a) either was after the three – year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

(b) in either case, was a date not earlier than one year before the date on which the action was brought.” (emphasis mine)

10. Clearly, from a reading of section 27 (2) an applicant should satisfy the court before being granted such leave. Material facts stated under section 27 (2) fall under the interpretation provided under section 30 of the Limitation of Actions Act. The said section provides as follows:-

“In sections 27, 28 and 29 of the Act, any reference for the material facts relating to a cause of action is a reference to one or more of the following:-

(a) the fact that personal injuries resulting from the negligence, nuisance or breach of duty constituting that cause of action ;

(b) the nature or extent of the personal injuries resulting from that negligence, nuisance or breach of duty;

(c) the fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable.”

11. The Appellant had full knowledge (actual or constructive) of the tortfeasors. Material facts were within the actual knowledge of the Appellant within the prescribed period and was expected to file the suit within the prescribed time. He did not however take reasonable steps to seek legal advice during the intervening period. Further, ignorance of the law and lack of funds were not a material fact of a decisive character relating to the cause of the intended action and do not avail him of the interpretation of sections 27 and 28 of the Limitation of Actions Act. In the circumstances I find and hold that the trial magistrate did not misapprehend the law. This appeal has no merit and is dismissed.

Dated, Signed and Delivered in open court this 30th day of July, 2015.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant.

..... for the 2nd Respondent.