



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 468 OF 2010**

**STANELY OMBEVA .....1<sup>ST</sup> PLAINTIFF**

**JOYCE MAPENZI OMBEVA ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**DR. NATHAN M. MURUGU .....1<sup>ST</sup> DEFENDANT**

**DR. LUCY MUCHIRI ..... 2<sup>ND</sup> DEFENDANT**

**DR. BLESSIE BYAKIKA .....3<sup>RD</sup> DEFENDANT**

**THE NAIROBI HOSPITAL ..... 4<sup>TH</sup> DEFENDANT**

**AAR HEALTH SERVICES .....5<sup>TH</sup> DEFENDANT**

**MEDICAL PRACTITIONERS & DENTISTS BOARD..... 6<sup>TH</sup> DEFENDANTS**

**RULING**

The plaintiffs sued the defendants jointly and severally vide a plaint dated and filed on 13<sup>th</sup> October, 2010. From this lengthy plaint containing 51 paragraphs, the plaintiffs alleged negligence on the part of the defendants relating to some medical procedure. That procedure is said to have taken place sometime in the month of February, 2005 or thereabout.

As a result of the said medical procedure the 2<sup>nd</sup> plaintiff suffered physically and psychologically and brought this suit claiming damages against the defendants, interest and costs. Paragraph 46 of the plaint sets out particulars of negligence attributed to the 1st to the 7<sup>th</sup> defendants irrespectively.

All the defendants filed defences denying the plaintiffs' claim which defences were subsequently followed by a preliminary objection at the instance of the 2<sup>nd</sup> defendant and supported by the rest of the defendants. The said preliminary objection is dated 21<sup>st</sup> April, 2015 wherein the 2<sup>nd</sup> defendant gave notice that at the first hearing of the suit, objection shall be raised against the entire suit on a point of law that this court lacks jurisdiction to hear this suit as the same is time barred by dint of Section 4 of the Limitation of Actions Act, Cap 22 Laws of Kenya.

The 2<sup>nd</sup> defendant filed submissions in support of the preliminary objection followed by all the other defendants, who have associated themselves with the 2nd defendant in support of the preliminary

objection and submitting that the suit should be struck out. The plaintiff on the other hand submitted that there is no basis for the preliminary objection and that the suit is properly before the court.

One of the leading cases relating to preliminary objections is **Mukisa Biscuit Manufacturing Company Limited Vs Westend Distributors Limited (1969) EA 696.** In that case, Law, J.A. observed as follows,

***“..... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration”.***

A common ground has been taken by the defendants jointly and severally that the plaintiffs suit is statute barred because it was based on an action founded on tort hence the plaintiffs should not be allowed to go beyond pleadings. Section 4 (2) of the Limitation of Actions Act, Cap 22 Laws of Kenya aforesaid reads as follows,

***“(2) An action founded on tort may not be brought after the end of three (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 date.”***

I have observed hereinabove that the alleged negligence on the part of the defendant upon the 2<sup>nd</sup> plaintiff is said to have taken place sometime in February or March, 2005. This suit was filed in October, 2010 which is well over 5 years from the date of the alleged cause of action.

The plaintiffs did not seek extension of time within which to file the claim and therefore at the expiration of three years they were locked out of any action against the defendants. There is sufficient authority to say that a claim which is barred by limitation is a claim barred by law and must be rejected. – **See Iga vs Makerere University [1972] E.A. 65.** In the same authority it was observed that 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.

The plaintiffs have sought in the submissions to invoke the provisions of Section 26 of the Limitation of Actions Act to have their claim sustained because the action is based upon the fraud on the part of the defendants.

It is provided there in that the period of limitation does not begin to run until the plaintiff has discovered the fraud or mistake or with reasonable diligence have discovered it.

The facts forming the cause of action according to the plaintiffs, became clear on 9<sup>th</sup> July, 2009 when the 7<sup>th</sup> defendant invited the plaintiffs to clear certain issues. It is their submission therefore that, they sought legal counsel thereafter and filed their suit about one year later. Regrettably however, the claim is lacking in details of the said alleged fraud and that fallback position does not aid the plaintiffs. It remains a case of negligence which should have been filed within three years from the date of the cause of action, and having failed to do so the suit is time barred.

Where a suit is time barred the court has no jurisdiction to entertain it. This is because jurisdiction is everything. In **Owners of Motor Vessels Lillian S. Vs Caltex Oil (Kenya) Limited (1989) KLR 1** Nyaragi J, said as follows,

***“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there will be no basis for a continuation of proceedings pending other evidence. A court of law drops tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

Having found that the plaintiffs' suit is time barred, I have no jurisdiction to go even one step further. It

follows therefore that the plaintiffs' suit is incompetent and therefore must be struck out. Costs follow the event and the suit having been struck out, the defendants are entitled to costs thereof. It is so ordered.

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of July, 2015**

**A. MBOGHOLI MSAGHA**

**JUDGE**