REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 22 OF 2006

1. RIVER BANK ACADEMY

2. ANTHONY MAINA GACHERU.....APPELLANTS

VERSUS

JOHNSON KIMANI KARIUKI.....RESPONDENT

(Appeal from the original judgment of Hon. E.C. Cherono in CMCC No. 5911 of 2001 delivered on 15th December, 2005.)

JUDGMENT

1. This appeal has been filed on the following grounds:-

i. That the learned magistrate erred in law and in fact in failing to find that an objection as to the limitation of time on a suit filed out of time with leave can only be raised at trial by cross-examination and submissions.

ii. That the learned magistrate erred in law and in fact in finding that the Respondent had not met the requirement set out under Section 27 and 28 of the Limitation of Action as to the grounds for granting leave to file suit out of time.

iii. That the learned magistrate erred in law and in fact in finding that it had unfettered discretion to extend time on the issue of leave to file suit out of time which is contrary to Section 27 and 28 of the Limitation of Actions Act.

iv. The learned magistrate erred in law and in fact in failing to consider and find that the Respondent was personally not aware of the suit having expired.

v. That the learned magistrate erred in law and fact in failing to follow the judicial precedent set out on the issue of limitation of action in:

i. NBI. CA No. 122 of 1981 - Gathoni v. KCC Limited (1982)KLR 104

ii. NKR. CA No. 79 of 1982 - Gatune v. The Headmaster, Nairobi Technical High School and Another (1988 KLR,page 561)

iii. MSA. MISC. Civil Case No. 1 of 1990 - Nzoia Sugar Co. Limited v. Kenya Ports Authority.(1990 KLR Page 319)

vi. That the learned magistrate erred in law and in fact in failing to find that the ownership of the motor vehicle in question had not been established.

vii. That the learned magistrate erred in law and in fact in failing to find that the Respondent was entirely liable for the accident.

viii. That the learned magistrate erred in law and in fact by awarding KShs. 60,000/= as future medical expenses which was neither pleaded nor sought by the Respondent in evidence.

ix. That the learned magistrate erred in law and in fact by making an award on general damages that was manifestly excessive regards being to decided cases.

2. The Respondent sued the Appellants in Nairobi CMCC No. 5911 of 2001 claiming recovery of damages arising from an accident alleged to have occurred on 17th July, 1998. The 1st Appellant was sued as the owner of the accident motor vehicle (registration number KZQ 572) and the 2nd Appellant as the driver of the said vehicle. The Respondent attributed the occurence of the accident to the Appellants' negligence. The Appellants filed a defence in which they denied the Respondent's claim. The Appellants also stated that the Respondent's suit was fatally defective and shall move the court at the appropriate time to have it struck out. The trial court heard the matter and dismissed the Appellants' submissions that the Respondent's suit was time barred. Judgment was then entered in favour of the Respondent and liability was apportioned at the ratio of 10:90 between the Respondent and the Appellants.

3. From the grounds of appeal aforestated, the issues that arise are whether or not; the Respondent's suit was time barred, and whether ownership was established, or whether the Respondent was liable for the accident, or whether the award of KShs. 60,000/= as future medical expenses was an error and whether the award of damages was excessive.

4. **The object of limitation has been vastly discussed. 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 stated in **Iga v. Makerere University [1972] EA 65** in which it was held that:-

"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".

5. The Appellant contended that an objection as to the limitation of time on a suit filed out of time with leave can only be raised at trial by cross-examination and submissions. The objection to the grant of leave to file a suit after expiry of the time limit is based on sections 27 and 28 of the Limitation of Actions Act. This is an objection that ought to be raised at trial stage. In the case of **Mary Wambui Kabugu v/s Kenya Bus Service Ltd C.A. Civil appeal No. 195 of 1995,** Justice Shah J.A. stated as follows:-

"...In my humble view the only time when such a defendant can challenge the order granting extension of time is at the time of the trial, either on facts brought out at the trial, or by way of arguments at the trial if circumstances and facts allow such arguments at the trial, that is to say if there is no dispute as to facts..."

It is therefore clear that the said issue should have been raised at the trial stage.

6. From the pleadings on record, it clear that the suit is a claim of damages for personal injuries. It is therefore an action founded on tort to which section 4(2) of the Limitation of Actions provide as follows:-

> ***"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."***

7. However, exceptions lie from the statutory limitation as to causes of action as follows:-

> ***"a) time does not begin to run if, or upon, the claimant's falling within Section 26 Limitation Act in the case where the action is for relief from the consequences of a mistake which the Plaintiff had not discovered or could with reasonable diligence have discovered; or***
>
> ***b) time is extended upon application in court in the case of the Plaintiff's ignorance of material facts under Section 27 and 28 of the Limitation Act where the Plaintiff wholly complies with the conditions under those sections..."***

8. I therefore find that the trial magistrate did not err in extending time. On this point I adopt the holding in **Kenya Cargo Handling Services Limited Vs Ugwang KLR [1985] page 593** where the Court of Appeal held as follows:-

> ***"1. A claim for personal injuries arising in the course of employment may be the subject of an action either for a breach of an implied term in the contract of employment or in tort simpliciter, and a claimant may make an election as which of those actions he intends to pursue.***
>
> ***2. Section 27 of the Limitation of Actions Act (Cap 22) does not lay down any period of limitation. All it does is to state certain circumstances under which the period of limitation provided for actions in tort does not apply. That section does not affect actions for personal injuries founded on contract as it relates exclusively to actions founded on tort..."***

9. On the second and third issue, the Respondent (PW2) recounted that he was on the material day cycling on the left side of the road toward Mukurweini from Nyeri. He said that he was off the tarmac. That the accident motor vehicle which was coming from the opposite direction went to his direction and hit him. He stated that the driver of the vehicle was on the wrong for having left his lane and hit him yet he was on the correct lane. He on cross-examination stated that he was hit in the middle of the road. The Respondent named Stephen Maina and the 1st Appellant as the owners of the vehicle and produced a copy of records from the registrar of motor vehicles (P. Exhibit 2) to prove ownership and he stated that the driver was the 2nd Appellant. The Appellants closed their case without summoning any witness. According to the copy of records, the 1st Appellant was the owner of the vehicle. The police abstract on the other hand revealed that one Stephen Maina Kabona who had been sued jointly with the Appellants was the owner of the vehicle but is not party to this appeal. None of the Appellants tendered any evidence in rebuttal to the Respondent's claim as to ownership and liability. On the issue of ownership, the Appellants submitted that the copy of records tendered in evidence was not conclusive evidence as to ownership and they cited, **Samuel Mukunya Kamunge v. John Mwangi Kamuru Civil Application No. 34 of 2002** where Okwengu J. as she then was stated as follows:-

> ***"It is trite that a certificate of search from the Registrar of motor vehicle would have shown who was the registered owner of the motor vehicle according to the records held by the Registrar of motor vehicles. That however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the Traffic Act provides that contrary can be proved. This is in recognition of the fact that often times vehicles change hands but the records are not amended. Secondly it was argued that while the Respondent claimed that the 2nd Appellant was the driver of the motor vehicle, the police abstract produced did not indicate who the driver of the vehicle was."***

10. While I agree with the position that a copy of records is not conclusive evidence for the reason stated by Okwengu J in **Samuel Mukunya's** case (supra), it is worth noting that when such evidence is tendered and a defendant denies ownership, the burden of proving otherwise shifts to such a defendant. Mere denial in the statement of defence is not enough. The 1st Appellant failed to discharge that burden. It was expected to at least furnish a sale agreement to prove that it was no longer the owner of the said vehicle. I agree with the submission that the Respondent did not prove that the 2nd Appellant was the driver since the police abstract produced did not indicate his name. The issue of non suitedness of the 1st Appellant was brought at the submissions stage and cannot stand. The issue must be pleaded. I therefore find that the Respondent proved on a balance of probabilities that the 1st Appellant was the owner of the suit motor vehicle. He is absolved of any claim herein.

11. On liability again the 1st Appellant failed to rebut the Respondent's evidence as to how the accident occurred. It is trite law that mere filing of defence is not enough to disapprove a plaintiff's case. Evidence must be led in rebuttal. I am fortified by the case of **Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988** where he observed as follows:-

> ***"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."***

12. In the circumstances I find that the Respondent established on a balance of probabilities that the 1st Appellant's driver was negligent in his driving which act the 1st Appellant is vicariously liable. I however note that the Respondent stated on cross-examination that he was hit in the middle of the road. He too must therefore shoulder liability. I apportion liability at the ratio of 50:50.

13. The Respondent claimed that he suffered a fracture of left tibia and fibula bones-middle third, compound fracture right tibia fibule bones lower third, bruises on the left forehead and left shoulder and head injury with loss of consciousness for about 3 hours. Dr. Maina Raga (PW1) who examined the Respondent confirmed that the Respondent sustained the said injuries. He stated that metal plates were used to fix the Respondent's right tibia bone. That at the time of examination, the Respondent complained of pain on both legs. That on examination, he found that the Respondent had a scar above the left leg borrow and had a slight limping in the right leg. That the Respondent had a scar on the right leg and the said leg was tender. That the Respondent also had a swelling on the middle part of the left leg which was also tender. The Doctor stated that the Respondent still had a metal plate in his right tibia which would cost KShs. 60,000/= to remove. He produced receipts for KShs. 2,000/= and KShs. 5,000/= being his charges for medical report and court attendance. The Appellants took issue with the award of KShs. 500,000/= awarded to the Respondent as general damages and the future medical expenses and stated that the general damages was excessive and future medical expenses unwarranted. The Appellants relied on Jane Achieng' & 3 Others v. G. Mutua & Another Nairobi HCCC No. 3281 of 1987 where a plaintiff who suffered fractures of the left humerous, fractures of 2 ribs, multiple abrasions of the scalp and blunt chest injury was awarded KShs. 200,000/=. In assessing damages I am guided by the principles laid down in **Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C A No. 142 of 2003 (UR)** where it was held:-

> ***"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)***

14. A reading of the trial court's decision on damages reveal that the doctor's evidence on injuries was evaluated. Having said so, I see no action on wrong principles of law by the trial magistrate or any misapprehension of facts. In the end I see no reason to interfere with the trial court's decision on damages. In the end the appeal partially succeeds. For the avoidance of doubt, the order apportioning liability at the

ratio of 10:90 is set aside and is substituted with an order apportioning liability in the ratio of 50:50. A fair order costs is that each party meets its costs on appeal.

Dated, Signed and Delivered in open court this 25th day of September, 2015.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellants.

..... for the Respondent.