REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 116 OF 2011

PATRICK S.K. KIMITI……..……APPELLANT

VERSUS

JOHN NGUGI GACHAU ……..1ST RESPONDENT

JOSEPHINE NDIKO NGUGI..…..2ND RESPONDENT

JUDGMENT

This appeal arises from the judgment and decree delivered /issued by A.K. Ndungu, Esq. Senior Principal Magistrate (as he then was)at the Nairobi Milimani chief Magistrates court on 23rd February 2011 in CM CC 3537 of 2005.

The respondents herein John Ngugi Gachau and Josephine Ndiko Ngugi were plaintiffs in the lower court. They filed suit against the appellant herein Patrick K. Kimiti vide plaint dated 12th January 2005 claiming for a refund of kshs 910,000/- allegedly received by the defendant(appellant from the respondents) plaintiffs for onward transmission to third parties for purchase of land parcel No. Nairobi/Block 110/846 which transaction could not be completed as the title documents used for the transaction were alleged to have been forgeries and that the alleged executors of the transfer documents were impersonators. The respondents/plaintiffs also claimed for damages for professional negligence against the appellant who is an advocate of the High Court of Kenya. They also prayed for costs of the suit and interest at 24%.

The appellant advocate filed defence dated 12th July 2005 denying the claim by the respondents. He contended that the suit was statute barred.

In his judgment delivered on 23rd February 2011 the trial magistrate allowed the respondents' claim as prayed, stating that the respondents had proved their case and that leave to file suit out of time was obtained before the suit was instituted against the appellant.

Being dissatisfied with the judgment and decree of the trial court, the appellant lodged this appeal vide Memorandum of Appeal dated 10th March 2011 and amended on 20th March 2013 pursuant to Order 42 Rule 3(1) of the Civil Procedure Rules.

The amended Memorandum of Appeal sets out 20 grounds of Appeal namely:

1. That the Learned trial magistrate erred in law and fact by holding that the appellant was

negligent in the manner he drew up the agreement relative to the suit before the court notwithstanding that the same was in conformity with the instructions given by the respondents.

2. That the Learned magistrate erred in law and fact in holding that the appellant should have contracted or added to or varied what (sic) the parties to the agreement complained of had already agreed on and thereby contravened Section 97 and 98 of the Evidence Act, Chapter 80, Laws of Kenya as read with Section 3 of the Law of Contract Act Chapter 23 Laws of Kenya.
3. That the Learned trial magistrate erred in law and fact in granting the respondents' claim yet the green card(extract of title) the title deed and the official search produced before him involving the subject land parcel number Nairobi/block 110/846 were in tandem with the agreement complained as respects the names of the proprietors/vendors.
4. That the learned magistrate further erred in law and in fact in failing to appreciate that the loss, if any, arising from an unfounded suspicion of forgery or impersonation was not foreseeable by the appellant more so because the executors of the transfer were known to Mr Waweru Gatonye an advocate of the High Court who gave a statutory certificate that he knew the vendors.
5. That the learned magistrate erred in fact and law in failing to appreciate that the suit was based on alleged forged documents and impersonation which were not proved.
6. That the Learned trial magistrate further failed to appreciate that the suit was filed prematurely since the registration of the transfer was shown to have been pending awaiting the completion of investigation by Criminal Investigation Department (CID).
7. That the respondents stand to have double benefit if the prayers sought in the suit are given and it turns out that the transfer is or will ultimately be registered in their favour.
8. That the appellant having been used as a conduit for delivering the respondents cheque to the vendors' advocates, which he did, cannot in law be called upon to make a refund for the proceeds of the cheque to the respondents.
9. That the learned magistrate erred in law and in fact in failing to appreciate that the plaint was not in conformity with the then Order VII Rule (e) since it failed to disclose the existence of previous proceedings in Miscellaneous case No. 332 of 2004 which is mandatory requirement.
10. That the third parties who claim to hold another title deed and whose signatures were allegedly forged were not called to testify against the statutory certification by Mr. Waweru Gatonye.
11. That the learned magistrate erred in law and in fact in failing to appreciate that the appellant was not acting for the vendors and therefore could not be able to interview or identify them.
12. That the learned magistrate erred in speculating that the proceedings exhibited purporting to extend the limitation period was an order therefore.
13. That the alleged order extending time was irregularly obtained in a Miscellaneous Application as opposed to an Originating Summons as required by Order xxxvi Rule 3C.
14. That the learned magistrate erred in law and in fact in failing to appreciate that the respondents' claim was time barred by the Section 4 of the Limitation of Actions Act, Cap 22 , Laws of Kenya.
15. That the learned magistrate erred in law in failing to disregard, set aside or otherwise deal adequately with the issue of the court's jurisdiction to have purportedly granted and alleged order for extension of time in a matter that did not fall within the law allowing for such extension
16. That the learned magistrate further erred in accepting extension of time in a matter not involving personal injury as stipulated in Section 27 of the Limitation of Actions Act, Chapter 22 Laws of Kenya.
17. That the learned magistrate erred in law in failing to appreciate that the authorities/cases cited by the appellant before him were binding on him and that he had no power to overturn the same.
18. That the learned magistrate erred in speculating the status of the registration of the transfer at the lands registry as the time of filing suit and the time of hearing and delivery of judgment by relying on a 1998 extract of title an exhibit seven years before the suit was filed.
19. That the learned magistrate erred in law in failing to address himself to each of the issues raised by the appellant in the court below and state his findings/decision thereon in terms of Order 21 Rules 4 and 5, Civil Procedure Rules .
20. That the learned magistrate generally misdirected himself in granting the respondent's claim on

the basis of extraneous matters in respect of which he did not afford the appellant an opportunity of being heard.

The parties agreed to dispose of the appeal by way of written submissions with some brief oral highlights reiterating the field submissions.

In his written submissions filed on 19th December 2014 the appellant contents that he was approached by the respondents in the company of their friend a Mr Kimani, to draw a sale of land agreement which he did and that whether or not the title documents were forgeries or that the vendors who executed the documents of transfer were impostors, he would not know and neither would he be responsible as he acted in accordance with the respondent's instructions and terms and conditions of the sale agreement.

The appellant condensed grounds 12,13,14,15, 16 of appeal into one , dealing with the issue of whether the suit as filed was statute barred pursuant to Section 4(1) (a) and 4(2) of the Limitation of Actions Act.

The said Section provides that:

1. The following actions may not be brought after the end of six years from the date in which the cause of action occurred.

a. Actions founded in contract

2. An action founded on tort may not be brought after the end of three years from the date in which the cause of action occurred.

According to the appellant, the proceedings produced as P Exhibit 7 at page 180 of the record of appeal was not an order extending the limitation period. That in the absence of an order which is extracted and sealed by the court, whatever was produced in the name of proceedings was not proof of leave having been granted to extend the limitation period hence the suit was incurably incompetent.

The appellant further submitted that it was incumbent upon the respondents to produce an application allegedly filed in Miscellaneous Application 332/2004 plus any supporting affidavits and that the so called order stating "orders as prayed" was insufficient to prove what was prayed for and or what had been sought.

In addition, the appellant submitted that the respondents did not plead in their plaint that they had been granted leave extending the time for filing suit.

Further, that the application for leave should in any event have been made by way of originating summons as required by Order XXXVI Rule 3 (c) (1) now Order 37 Rule 6(1) of the Civil Procedure Rules, which Order and Rule is couched in mandatory terms. The appellant relied on the case of **Ngethe V Gitau [1999] 1 EA 225 and Kenyega Vs Obwori [2001] KLR 103** that failure to file suits by way of originating summons as mandatorily required by Order XXXV1 Rule 3(1) of the Civil procedure Rules rendered the claims irretrievably non –starters and incontestably bad in law.

The appellant also submitted that the claim based on contract was statute barred under Section 4 (1) of the Limitation of Actions Act as six years had elapsed from 1994 to 2005 when the suit was filed. In his view, since the claim was based on contract, it could only have been brought less than 6 years. He also submitted, relying on the case of **Clark & another V Kilby Smith [1964] me ch 506** where it was held that:

"Liability of a solicitor to his client for negligence was a liability in contract and not in tort where the solicitor had failed to carry out the client instructions."

The appellant distinguished between torts and contracts under the Limitation of Actions Act and submitted that in contracts, the limitation was 6 years and only extendable upon fraud or nuisance being pleaded and proved which was not the case here contrary to Section 26 of the Act. Further, that the respondent's exhibit 7 does not disclose whether the leave granted applied to contract or tort. Relying on the case of **Mary Wambui Kabungua V Kenya Bus Service Ltd** the appellant submitted that the trial magistrate who hears the suit was the one to deal with the issue of exparte leave granted extending the limitation period but that in the instant case there was no material upon which the trial magistrate could have adequately addressed the objection raised on the leave since it was not clear what the respondents submitted on and or whether they were alleging that the appellant herein is the one who forged some document or whatever it was.

In the appellant's view, the exparte leave obtained was obtained by deception and hence the trial magistrate should have vacated that purported order extending limitation, since the basis of the suit was different from what the application for leave was. In the appellant's view, the trial court rather dealt with the said issue of limitation casually, noting that the respondent's counsel's submissions in the said application were vague and only referred to forged documents, which fact of forgery or fraud was never pleaded in the substantive suit. For that reason, it was argued that the exparte leave obtained by deception had to be vacated. Further, that PW1's evidence at page 156 lines 7,8 and 9 gave reason for delay as ***" because I was waiting for CID officers to complete investigations."*** It was further submitted that nonetheless, those reasons did not meet all the requirements under Section 27(2), 28 and 30 of the Limitation of Actions Act in that it was not proved that delay was due to ignorance of material facts relating to the cause of action which were of a decisive nature and which were at all material times outside the knowledge(actual or constructive) of the plaintiff until a later date.

On the merits of the claim, the appellant submitted that the judgment granted the prayer for kshs 910,000 yet there was no money received from the respondents by the appellants capable of being refunded save for kshs 152,400 which was paid to the vendor's advocate and a cheque for 819,000 in favour of Waweru Gatonye advocates for the vendor who acknowledged receiving it. The appellant relied on the case of **General Accident Fire and Life Assurance Corporation Ltd & Another V Midland Bank Ltd & Others [1940] KB.**

On the issue whether the appellant committed any professional negligence, the appellant submitted that there was no such proof of registration of respondents as owners of the land and no evidence was adduced to show that the transfer of land instrument was rejected when it was presented since even stamp duty was paid. The appellant contended that he carried out the transaction to the best of his ability and that there was no evidence that the money (consideration) for the transaction was paid to impersonators since parties agreed to have the money paid out and all other provisions specifically negotiated between parties and that the appellant even asked the respondent as to why he wanted to part with the money urgently.

On the issue of liability, the appellant submitted that the court had to look at the cause of the injury and that in his view; he was not the cause thereof. He relied on **Buckner V Estiby & Horn [1941] 1KB**. In his view, no loss or injury was foreseen since to date the Land Registrar has not rejected or returned the transfer form. He urged the court to allow the appeal with costs.

On behalf of the respondent, it was submitted by Mrs Guserwa, relying on the written submissions filed on 5th February 2015 that the appellant failed to exercise due care in conducting the sale of land transaction on behalf of the respondent client, the duty of ensuring that the consideration was paid to the correct people. That the appellant advocate failed to cushion the client with a security clause in the agreement to protect funds as the transfer process progressed and as a result, it turned out that vendors were not actual owners which fact only came to light after the monies were paid out. That it was the appellant's duty to state whether or not documents of transfer came back from Land Registrar since he was the respondent's advocate.

On the issue of limitation, Mrs Guserwa submitted that they had produced the order or proceedings with the citation showing the details of the cause wherein leave was granted and if they were in doubt,

they would have looked for the court to file to establish the truth. Counsel for the respondents also contended that it was not raised at the trial that the grounds on which leave was granted was invalid hence the appellant was estopped from raising that issue now and that in any event, albeit the issue of time bar was raised, the trial magistrate made reference to forgery issues that delayed the filing of suit. In her view, the respondents were correct in seeking for extension of time as the contractual breaches gave rise to professional negligence specified in paragraph 8 of the plaint and that the appellant was negligent in relying on the professionalism of Mr Gatonye advocate in that he should have caveated the cheque and neither did he call Gatonye as his witness nor join him as a third party. That failure to provide safety valves for the money and call the Land Registrar to explain the position rendered the appellant liable as an advocate and that therefore the loss suffered was occasioned by the professional negligence of the appellant who failed to include a security clause in the sale agreement, which factor the trial magistrate considered but which had not been challenged or faulted in this appeal.

The respondent's counsel further submitted that the authorities relied on by the appellant can be distinguished as the first one related to premiums paid in respect of a life policy. She concluded that there was no denial that the cheque was received by the appellant and that he should have ensured that the sale was completed before the money was released to the seller.

In a brief rejoinder, the appellant's counsel Mrs Kimani submitted that there was a restriction on the title and that there was no evidence of return of the transaction documents.

I have carefully considered the appeal herein as filed through a Memorandum of Appeal, the written and oral submissions by both parties counsels, the authorities relied on and the record as a whole.

In my view, the issues that emerge for determination are:

i. Whether the respondent's suit was competently filed or whether it was statute barred.
ii. Whether the advocates duty of care to a client is a contractual duty and where such duty is breached leading to professional negligence and loss to a client, whether the claim would be based on tort or contract.
iii. Whether the respondents proved their case against the appellant on a balance of probabilities.
iv. Whether non compliance with procedural requirements invalidated their suit.
v. What orders should the court make.
vi. Who should bear the cost of this appeal and the court below?

This being the first appellate court, this court is bound by the duty imposed on it by Section 78 of the Civil Procedure Act to approach the whole of the evidence on record from a fresh perspective and with an open mind. The court is enjoined to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at its own independent conclusions. However, in doing so, the court must bear in mind that it did not have the full benefit of hearing and seeing the witnesses as they testified and must therefore give due allowance to that effect. This principle of law was well settled in the case of **Selle V Associated Motor Boat** Company **Limited [1968] EA 123** where Sir Clement De Lestang stated:

> ***" This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears neither that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally. (Abdul Hammed Sarigf V Ali Mohammed Solan [1955] 22 EA CA 270."***

Applying the above law and principles, the respondents' case in the lower court wherein they were plaintiffs was that they are husband wife and they spotted a plot advertised in the Daily Nation in

April 1997 and a telephone number given. The 1st respondent called the number and one a Mr Kimani answered. The said Kimani took the 1st plaintiff to the site and told the plaintiff that he had the authority to negotiate the price. They agreed at the purchase price of kshs 910,000 and the 1st plaintiff went to the appellant who was his lawyer and instructed him and introduced Mr Kimani to him as the agent for the owner. The agent had a copy of title deed which he showed the appellant. It was relating to Nairobi Block/110/846. The 1st respondent was also shown the original title. The 1st respondent told the appellant that he had not met the vendors and that Kimani was to avail them to the appellant's office. A sale agreement was later drawn and signed. The 1st respondent did not meet the sellers whom the appellant stated they had their own lawyer. The respondents paid the 10% required as deposit = 91,000 in one cheque together with legal fees and other cheques as balance was to be paid after exchange of documents and as per clause 5 and 6 of the agreement. The vendors' advocates gave a duly executed transfer and all necessary consents and clearance certificate and the appellant asked the 1st respondent to draw a cheque in favour of Waweru Gatonye Advocates cheque No. AP/BP/00815 Q for kshs 819,000. The 1st respondent was then given transfer form and he left and waited for 2 months and called the appellant who assured him that documents had been lodged with the Land Registrar but that the transfer was never registered. The appellant gave him a go ahead to fence the plot in December 1997 since he had cleared the purchase price. Later in February 1998, a caretaker called the 1st respondent and informed him that some people had destroyed the fence.

The 1st respondent reported to the District Officer Kasarani and confirmed that there had been a complaint and on 25th February 1998 two people came Stephen Kuria Mwangi and Lydia Wanjiku Nduba the title deed holders who produced the original title deed to the plot and an allotment letter showing they were owners thereof. The 1st respondent informed the appellant of the development and they visited the lands office and obtained a green card wherein they found a caution so he reported the matter to the CID for investigations. As he had not met or known the vendors/ impersonators, the investigations could not go far and so he decided to sue his advocate for professional negligence and for failing to put a security clause that the money would only be released to the vendor after transfer was registered in their names hence he failed to protect his client's interests by being quick to release the money to the vendor's lawyers and that he did not act on the authority to identify the alleged vendors on behalf of the respondents.

The 1st respondent also testified that he filed suit after lapse of 6 years after seeking leave of court. That the reason for the delay was because he was waiting for the CID officers to complete investigations.

In cross examination the 1st respondent stated that the money was released to Waweru Gatonye Advocates and that it was to be held pending successful registration. He stated that he had not checked with Waweru Gastonia whether the money was transferred to the vendors. He also identified a letter from Waweru Gatonye asking the release of shs 810,000. He admitted that a search on the property was conducted and that the transfer form signed indicated that Waweru Gatonye knew the vendors but the 1st respondent maintained that he gave the appellant instructions to indentify the vendors and that the appellant met the vendors twice, taken to him by the agent Kimani and that the appellant called and informed him so.

In re-examination the 1st respondent stated that he used to receive correspondence from the appellant; the appellant never told him that funds were released to the vendors and that the appellant had not enjoined the firm of Waweru Gatonye as interested parties.

The defendant/appellant testified as DW1 and stated that he was an advocate of the High Court of Kenya. That he received instructions to act for the respondents in a sale of land transaction in 1997 and drew a sale agreement. That the respondents approached him with a lot of anxiety, introducing to him a Mr Kimani whom they identified as their friend and agent for the sellers and that they had agreed on all the terms. The appellant then drew the agreement in terms of the instructions of the 1st respondent and when he questioned the 1st respondent why he wanted to part with the money urgently, the 1st

respondent said that he wanted to have immediate possession of the property in July to plant K-apple seedlings, taking advantage of the moisture. That the 1st respondent also stated that the vendors were poor and he was advancing them some kshs 30,000 to facilitate obtaining rates and land rent clearances certificate and all that was included in the voluntary agreement. The appellant conducted a search and denied authorizing Gatonye to release money. He submitted a duly signed transfer form for registration and kept a certified copy produced in evidence signed by all parties and that the original had never been returned to him. He did not investigate signatures.

In cross examination, the appellant stated that the respondents sought his professional advice and paid for it. He stated that the respondents asked him to get details for vendors and that he was to act for both purchasers and vendors but the vendors chose to engage Waweru Gatonye. That the vendors were identified by Mr Kimani. He admitted receiving kshs 910,000 and more from the respondent with the cheque in favour of Waweru Gatonye in favour of Stephen K. Mwangi and Lydia Nduta and passed it over to Waweru against the completion documents, in accordance with paragraph 5 of the agreement.

In re-examination the appellant stated that Mr Gatonye was to hold the money for 7 days to facilitate registration and on being questioned by the court, the appellant stated that if the registration was not successful Mr Gatonye would refund the money but Mr Gatonye released the money to the vendors before registration.

The parties' advocates filed written submissions which are essentially the same as what has been submitted before this court on appeal, with some modifications.

In the lower court, the appellant who was the defendant submitted urging the court to dismiss the suit on the grounds that:

1. The plaint offended Order VI Rule 1 (e) of the Civil Procedure Rule since it did not disclose the existence of previous proceedings in Miscellaneous 332/2004 which is a mandatory requirement.
2. The suit was filed out time and the order extending time was given without jurisdiction and is therefore a nullity.
3. The order extending time was obtained in a Miscellaneous Application as opposed to an originating summons as required by Order XXXVI Rule 3C of the Civil procedure Rules.
4. The suit is based on alleged forged documents and impersonation which were not proved.
5. The suit was filed prematurely since the registration of the transfer was and perhaps is still pending awaiting the completion of CID investigations which are now said to be complete.
6. The plaintiffs stand to have double benefit if the prayers sought in the suit are given and it turns out that the transfer is registered in their favour .
7. The defendant having been used as a conduit for delivering the plaintiff's cheque to the vendors advocates which he did, he cannot in law be called upon t make a refund for the proceeds of the cheque.
8. The loss, if any, arising from un unfounded suspicion of forgery or impersonation was not foreseeable by the defendant more so because the executors of the transfer were known to Mr Waweru Gatonye an advocate of the High Court who gave a statutory certificate that he knew the vendors.
9. The third parties who claimed to hold another title deed and whose signatures were allegedly forged were not called to testify against the statutory certification by Mr Waweru Gatonye not withstanding that the plaintiffs knew their whereabouts and yet no attempt was made to summon them.

The appellant also relied on several decisions all considered.

The respondent who were plaintiffs framed and submitted on two issues in the lower court namely:-

a. Whether there was any negligence on the part of the defendant towards the plaintiff in the sale

transaction touching on NRB/Block/110/846 and if so, to what extent?

b. Whether the plaintiffs are entitled to any relief against the defendant and if so, to what extent?

The plaintiffs' submissions concluded that on the two issues, they had proved that the defendant was under a duty of care and to exercise due skill and diligence in drafting the sale agreement between the parties to protect the plaintiff's interests which he failed to do so as he did not insert any security clause to protect release of purchase price upon successful registration of the transfer in favour of the plaintiffs and that clauses 5 and 6 of the agreement did not make adequate safeguards in protecting their interests since the plaintiffs did not know the vendors and entrusted the defendant to identify them.

On issue No. 2 the plaintiffs submitted that because they had lost all the money paid towards the transaction, they were entitled to a refund by the defendant who was the cause of the loss by reason of his negligent handling of the transaction.

The trial magistrate vide his judgment delivered on 23rd February 2011 framed no issues namely, whether the suit was time barred and the effect of leave of the court to file suit out of time and secondly, whether the defendant was professionally negligent in the manner he handled the transaction. On the issue of limitation the trial court found that there was an order dated 14th December 2004 wherein the plaintiffs obtained leave to file suit out of time and in relying on the case of **Mary Wambui Kabugua V KBS Ltd CA 195/95** that ***" there was nothing final about an order of leave obtained exparte as the defendant would have every opportunity to challenge the facts and the law afterwards at the trial and the judge trying the case would rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar and is the least bound by the provisional view expressed by the judge in chambers who gave leave."*** He then stated:

> ***" I am satisfied that in view of the convoluted issues of forgery that arose and the uncertainty about the outcome of the CID investigations, the plaintiffs had sufficient reason to bind their time before resorting to the civil process. Leave granted herein is sound and founded. The fact that the order was obtained through a Miscellaneous Application and not in an Originating Summons is in my view just a want of form which is not fatal to the order obtained . This suit is properly before the court."***

On the second issue, the trial magistrate found the defendant negligent for failure to put a safety clause in the agreement or obtain a professional undertaking from the vendors' advocates and having failed to do so, was liable for the loss and he therefore entered judgment for the plaintiff in the sum claimed.

That is essentially the record that provoked this appeal.

<u>Determination of the issues framed herein</u>

Whether the respondent's suit against the appellant was statute barred and therefore incapable of being revived by way of extension of the limitation period.

The Limitation of Actions Act, Cap 22 Laws of Kenya provides 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 periods of limitation. It does not necessarily extinguish causes of action.

And as was stated by Bosire J (as he then was) In **Rawal V Rawal [1990] KLR 2**

> ***" 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."***

The same position was earlier stated in **Dhamesar V Melita V Manilal M Shah [1965] EA 321** and **Iga V Makere University [1972] EA 65**. In the latter case, the court held:

> ***" A plaint which is barred by limitation is a plaint 'barred by law". A reading of the provisions 5 of Sections 3 and 4 of the Limitation Act (Cap 70) together with Order 7 Rule 6 of the Civil procedure Rule 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 of action itself, but operates s to bar the claim or remedy sought for, and when the suit it time barred, the court cannot grant the remedy or relief."***

What the above principles espouse is that a cause of action which is barred by statute may in certain cases that are specifically provided for, be revived if the conditions set out in the Act are satisfied or fulfilled.

Section 4 of the Limitation of Actions Act Cap 22 Laws of Kenya enacts that :-

"Actions of contract and tort and certain other Actions.

1. The following actions may not be brought after the period of six years from the date on which the cause of action accrued.

a. Actions founded in contract;
b. Actions to enforce a recognizance
c. Actions to enforce an award.
d. Actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture .
e. Actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

2. An action founded on tort may not be brought after the end of three 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 twelve months from such date.

3. An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action….
4. …….
5. …….
6. …….

The provisions relating to extension of periods of limitation can be found in part III of the Act, Sections 22,25,24,25,26,27,28,29,30 and 31 of the Limitation of Actions Act.

Under Section 22 of the Act, If, on the date when a right of action accrues for which a period of limitation is prescribed by this Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of six years from the date when the person ceases to be under a disability or dies, whichever event first occurs, notwithstanding that the prescribed period of limitation has expired.

Provided that:

i. ……..
ii. ……..
iii.…….

iv. ……
v. In actions for damages for tort-

a. This section does not apply unless the plaintiff proves that the person under disability was not at the time when the right of action accrued to him, in the custody of this parent; and
b. This section has effect as if the words "six years" were replaced by the words" three years."

In this case, the respondents claim against the appellant, as per their plaint is as follows, material to this appeal:

1.……

2.……..

3. At all material times relevant to this suit, the plaintiffs instructed and retained the defendant who agreed to act as their lawyer in the purchase and transfer of land parcel No.Nairobi/Block 110/846 situated in Nairobi.

4. In the premises, it was an implied term of the said agreement and also a duty of the defendant to exercise all due care, skill and diligence in handling the sale transaction.

5. The plaintiffs on lodging the transfer documents for registration discovered that the registration of the transfer could not be effected in their favour as the presented title deed was not only forged but the executors of the transfer document were impersonators and or unknown as per the official records at the lands registry.

6. The defendant is held by the plaintiff to be in breach of the aforementioned duty or term of the agreement and by reason of negligence in the part of the defendant, his servants or agents, the defendant failed to exercise any adequate skill and due diligence or professionalism in the handling of the conveyance aforesaid.

7. The defendant is held professionally negligent to the plaintiffs.……"

Arising from the above pleadings, the plaintiffs/respondents claimed that they lost kshs 910,000 being purchase price, stamp duty and registration fees of shs 36,400 and refund of legal fees paid to the defendant.

But before detrmining the issue of limitation, I must first determine certain important ancilliary questions arising from the issue of limitation. The first ancillary question that must be answered is whether the relationship between the appellant and respondents was one of contract and if so, whether the claim for professional negligence as expressed in the pleadings was a claim based on contract or in tort. Secondly, is such a cause of action whether founded in contract or tort capable of being extended once it is caught up by the limitation period?

It is not in dispute that as pleaded by the respondents in paragraph 5 of their plaint, that the appellant was retained on or about 23rd July 1997 upon which he was instructed to draw a sale agreement between the respondents and third party vendors and that money to the tune of kshs 910,000 being the purchase price was given to the appellant for onward transmission to the aforementioned third parties through Waweru Gatonye advocates. It is also not disputed that suit was filed in 2005 nearly 7 1/2 years later.

From the foregoing, it is clear to me that the relationship between the advocate and client was a contractual one. Nonetheless where the advocate acts negligently in performing the said contract, then he could be held liable for professional negligence for breach of duty, which is a tort. In **Kinluc Holdings Ltd V Mint Holdings Ltd & another [1998] e KLR,** the Court of Appeal per Tunoi, A.B. Shah and E. Owuor JAA stated:

" What the learned Judge did not consider was " what is the duty of an advocate owes to his client when he is asked to see to it that he has the money in his client's account before effecting registration of transfer? Had the learned judge considered this he would well have said that the client (vendor) has a cause of action against the advocate. What we have so far saind shows, at least prima facie, that the vendor has a cause of action against the advocate for breach of contract as well as a possible negligence and we are not prepared to say at this stage that the advocate was not negligent or that he was in no breach of duty. That must be a matter for the trial court after a full hearing."

The above case also set out obligations of an advocate arising out of a retainer as set out in **Cordery's Law Relating to Solicitors, 7th Edition page 150** where the Learned authors say:-

B: Obligations arising out of retainer.

1.70 BE SKILLFUL AND CAREFUL

" At common law a solicitor contracts to be skilful and careful, for a professional man gives an implied undertaking to bring to the exercise of his profession a reasonable degree of care and skill. It follows that this undertaking is not fulfilled by a solicitor who either does not possess the requisite skill or does not exercise it. It is immaterial whether the solicitor is retained for reward or volunteers his services, or whether or not he has a practicing certificate in force at the time. A solicitor's duty is to use reasonable care and skill in giving such advise and taking such action as the facts of the particular case demand. The standard of care is that of the reasonably competent solicitor, and the duty is directly related to the confines of the retainer. It has been said that the court should beware of imposing on solicitors duties going beyond the scope of what they are requested and undertake to do. There is no such thing as a general retainer imposing on the solicitor a duty, whenever consulted, to consider all aspects of the client's interest generally. A solicitor is not bound to have a perfect knowledge of the law, but he should have a good knowledge. eg: <u>he should know about the statutes of limitation.</u> Although a solicitor is not liable for mistake as to the construction of a doubtful statute, difficult to interpret or unexplained by decisions he may be liable if he fails to realize that the statute presents difficulties of interpretation. On the question as to how far a solicitor may be liable in negligence for delay, it has been said that it would be wrong to hold a professional man guilty of negligence because everything is not dealt with by return of post."

The House of Lords **in Stevenson V Roward 6, English Reports. 668 1830** held that:

"if an agent departs from the usual practice of introducing the double manner of holding, and having neglected to procure confirmation, he would be bound to make good the loss."

The ratio decidendi of Stevenson case is that a law agent is bound to obey the instructions given to him by his employer /client and if he exceeds or falls short of these instructions, he may be justly made liable for the damages which result from his disregard of them. Although the appellant in this case submitted on the basis of **Clark & Another V Kirby Smith 1963 1158 CD** where the court held that the liability of a solicitor to his client for negligence was a liability in contract and not in tort, I find that decision, which has persuasive authority, not binding on this court. I find that the aggrieved client could sue either in contract or in tort or combine both.

Therefore, was the appellant liable to pay to the respondents the claimed sum of money? The respondents contended that had the appellant executed /discharged the retainer properly, they would not have lost the money to masqueraders. That he owed them a duty of care and skill. He therefore ought to put them back to the same position that they were in before they lost their money. That he failed to include a security clause to the sale agreement to cushion the purchase price until the sale was completed and by releasing the money, he was negligent.

The appellant maintained that he executed the instructions of the clients as detailed. In Kinluck Holdings (supra) case the Court of Appeal held:

> ***" We think, the Learned Judge, with respect, erred, when he said, A stakeholder can only make payments of what he has received from the purchase but not from his pocket. It is not as simple as that. A retainer binds an advocate to act for his client in such a manner as to protect his clients, interests and not to jeopardize his interests."***

In this case, I find that the appellant herein owed a duty of care and skill to his clients, the respondents who relied on his professional knowledge for advise on conducting and concluding a land transaction on their behalf. The appellant was therefore duty bound to consider all aspects of the client/respondents interests, taking such reasonable care and skill in advising, as a reasonable competent solicitor would, within the confines of the retainer.

In this case, however, there is no evidence to indicate that the appellant was part of the syndicate of fraudsters that defrauded the respondents of their money, since it is clear from PW1 that the appellant was his advocate and it is PW1 who approached the appellant to conduct for him the transaction. Nonetheless, the court finds that the appellant in conducting that conveyance on behalf of his clients owed them a greater duty of care. He ought to have ensured that the purchase price was secured by a clause in the agreement that would protect their money until the registration of the titles in the respondents' favour was completed. It was the appellant's duty to advise the respondents that inclusion of such a clause was necessary to protect their interests until the sale was completed.

Albeit the appellant contended that the agreement was voluntary and that he acted within his client's instructions, this court takes judicial notice that most litigants do not give their lawyers instructions in writing to act in a particular way and therefore it is upon the advocate retained to give the best legal advise expected of a reasonable solicitor, to protect his client's interests. In my view, a clause providing for ***"release of the balance of 90% to the vendor's advocates upon successful completion of the transfer in favour of the purchaser"*** would have sufficiently taken care of the interests of the respondents. The appellant should also have procured a professional undertaking from Waweru Gatonye advocates to hold the money as stakeholder prior to registration. Failure to do any of the above exposed the respondents to a very high risk of losing their hard earned cash to unsuspecting fraudsters.

I must re emphasize that the duty of an advocate in a conveyance transaction is to ensure that his client's money is protected at all times until the sale is complete. Failure to do so renders the advocate negligent and in breach of duty of care as set out in **Codrey's Laws Relating to solicitors**(supra).

It is for the above reasons that I find that the trial magistrate was not in error when he found that the appellant was liable in negligence for failure to secure the client's money. I therefore would uphold the trial magistrate's findings on liability and damages for the loss of shs 910,000/-

Nonetheless, this court must determine whether the primary suit subject of this appeal could be filed out of time with leave of court, whether the claim was based on contract or in tort.

The appellant submitted at length, both orally and in writing, citing several decided cases, in his proposition that the material upon which the trial court granted leave to file suit out of time were not sufficient and that therefore Section 27(2) of the Limitation of Actions Act were not fulfilled. On the other hand, the respondents through their counsel Mrs Guserwa maintained that the cause of action had been extended and that leave granted was sufficient.

The commencement point in answering the question of Limitation of Actions is Section 4(1) of the Limitation of Actions Act which expressly states:

1. An action founded on contract may not be brought after the end of six years from the date on

which the cause of action occurred.
2. An action founded on tort may not be brought after the end of three years from the date on which he cause of action accrued.

On whether an action founded in contract and which is statute barred can be extended, the relevant provisions are Section 22 of the said Act which provides s that:

> ***" If it is proved by evidence that on the date when a right of action accrues for which a period of limitation is prescribed by this Act, the person to whom it accrues is under a disability, in which case, the action may be brought at any time before the end of six years from the date when the person ceases to be under a disability or dies, whichever event first occurs, not withstanding that the prescribed period of limitation has expired."***

The exceptions to the above provisions include:

(IV) In actions for damages for tort

a. This Section does not apply unless the plaintiff proves that the person under the disability was not, at the time when the right of action accrued to him, in the custody of his parent; and
b. This Section has effect as if the words " six years" were replaced by the words "three years".

Section 23 of the Act also provides for an action, based on contract to accrue a fresh even if the same is caught by the limitation period, where there is acknowledgement or part payment. Section 23(3) provides:-

> ***" Where a right of action has accrued to recover a debt or other liquidated pecuniary claim or a claim to movable property……and the person liable or accountable therefore acknowledge the claim or makes any payment on respect of it, the right accrues on and not before the date of acknowledgement or the last payment….."***

Applying the above provisions to this case, and as earlier stated, it is not denied that the respondents retained the appellant to provide professional services of buying a property, to wit, land on their behalf and when they could not get the property transferred in their names after they had paid all the considerations (purchase price) due to the seller's advocates through the appellant, they now claim he owed them a duty of care and skill and that he breached that duty by failing to secure the purchase price or for failure to include a safety clause in the sale agreement.

As indicated earlier, that relationship between the appellant and the respondents was a contractual one but where that duty of care was breached, the respondents could still sue for professional negligence which is a tort.

The above provisions of Sections 22 and 23 of the Act notwithstanding, there is no evidence on record to show that the respondent's failure to file suit within, either 6 years for breach of contract, or within 3 years for professional negligence, was due to any of the conditions stated in Section 22 and 23 namely, any form of disability; acknowledgment or part payment.

Then there is this aspect where the respondents contend that the cause of action was based on the tort of negligence and therefore leave of court could be granted extending the limitation period.

Under Section 4(2) of the Limitation of Action Act, an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.

The exemptions to the above provision are Sections 22 where extension of limitation period can be made in case of disability and (v) in actions for damages for tort if the plaintiff proves that the person under disability was not at the time when the right of action accrued to him, in the custody of his parent; and the said Section has effect as if the words "six years were replaced by the words " three

years." Section 26 would also be applicable in the exceptions thus, where the action is concealed by fraud , mistake and ignorance of material facts.

Again, there was no material before the trial court to show that the right of action was concealed by fraud, consequences of mistake and or ignorance of material facts and or when such alleged fraud or mistake was discovered.

The law is clear that the burden of proof lies on he who alleges the existence of any fact; and who would fail if no evidence at all were given on either side see Sections 107-109 of the Evidence Act Cap 81 Laws of Kenya.

Albeit this court is bound by the principle that: " An appellate court will not interfere with the finding of fact by a trial court," in this case, the trial court's finding of fact of proof of leave granted was based on evidence that since leave was obtained before filing of suit, that was sufficient proof which in my view, was a misapprehension of the law and in so doing, the trial court arrived at a wrong conclusion.

In my view, the trial court also failed to take into account particular circumstances or probabilities of the case herein. He assumed that what the respondent needed to do was to merely throw to the court an order showing leave was granted to file suit out of time and no more which was and in the process arrived at a wrong conclusion. (See **Nkube V Nyamiro [1983] KLR 403].**

It is for those reasons that this court must interfere with the findings of the trial magistrate as to whether the 'leave ' granted was proper or not. The law that permits extension of limitation period places the burden of proof entirely on the person seeking extension to demonstrate that they had satisfied the conditions for granting of leave, in order for the order of leave to be accepted at the trial of the suit. It is for that reason that Section 27 of the Limitation of Action Act is clear that in case of ignorance of material facts in actions for negligence, the court may grant leave whether before or after the commencement of the action, but Sub Section (2) thereof sets out the requirements which must be fulfilled for leave granted to stand.

That notwithstanding for leave of extension to be granted, the applicant must not only satisfy the conditions that constitute ignorance of material facts including facts of a decisive character which were at all material times outside the knowledge (actual or constructive) of the plaintiff until that date, but that the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries and that those personal injuries were attributable to the negligence.

Thus, Section 4(2) of the Limitation of Actions Act does not afford a defence only where the provisions of Sections 27(1) and (2) of the Act are fulfilled. The above position is further fortified by the provisions of Section 28(2) (3) of the Limitation of Actions Act.

I reiterate that the court will only grant an application for leave to bring an action based on negligence after the expiry of the normal three years period of limitation if the plaintiff/applicant proves that material facts relating to his cause of action were or included facts of a decisive nature/character which were at all material times outside the knowledge of the plaintiff until a date which was either after the end of the three year period or not earlier than twelve months before its end and was, in either case, not more than 12 months before the date on which the action is brought.

Material facts are restricted to three categories of fact namely;

a. The fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting the cause of action.
b. The nature or extent of the personal injury so resulting.
c. The fact that the personal injuries were attributed to the negligence, nuisance or breach of duty or the extend to which they were attributable.

See **Bernard Mutonga Mbithi V Municipal Council of Mombasa CA 3/1992** Kwach, Muli and Gicheru JJA. The Court of Appeal also added that it is not sufficient that the facts unknown to the plaintiff should be material within the above definition. they must also be of a decisive character, that is to say, they must be such that a reasonable person, knowing them and having obtained appropriate advise with respect to them, would have regarded them as determining that an action would have a reasonable prospect of succeeding and resulting in the award of damages sufficient to justify the bringing of an action.

Finally, the plaintiff must prove that a material fact of a decisive character was outside his knowledge actual or constructive . The Court of Appeal in the **Bernard Mutonga Mbithi V Municipal Council of Mombasa** case also held that where the appellant claimed that he did not file suit in time is because the thought he was legally obliged to await the outcome of the inquest, and pleaded ignorance of the law, it held, relying on **Mweu V Kabai & Another [1972] EA 24**- that ignorance of the law did not constitute a material fact within the Section 27(2) of the Limitation of Actions Act. Relying on the dicta of Salmon L.J. and Cross JJ in **Drink Water V Joseph Lucas [1970] 8 ALL ER 769.**

In conclusion I am in agreement with the appellant's contention that there were no sufficient material before the trial magistrate upon which he could hold that leave to file suit out of time was proper. I am equally in agreement with the appellant that the proceeding or order thereof was insufficient to prove whether leave extended was in respect of a cause of action based on contract or tort. Since the scribbled proceeding does not even indicate what orders were being sought and what orders were being granted.

In other words, there was insufficient material upon which the trial court could hear submissions on whether or not the leave granted was deserved and therefore, in my humble view, the trial court erred in law and fact in accepting the "leave" granted exparte. The issue of whether or not the application for leave was brought by way of originating summons or Miscellaneous Application in my view, was indeed immaterial as that is only but an issue of form which is a procedural technicality. What is material is the justification for granting of such 'leave' which was not available to the court and therefore the trial magistrate should have rejected those scribbled proceedings that were not supported in any way. It was not for the appellant to fish around for the file upon which leave was granted. The order granting leave ought to have been explicit that the applicant had satisfied the condition for grant of leave as espoused in the Limitation of Actions Act. That ground alone is sufficient to dispose of this appeal which I find merited, that the suit in the court below was instituted out of statutory limitation period and I would proceed to strike it out as being incompetent, which holding settles issue No 1 as framed herein. I sympathize with the respondents who lost colossal sums of money. However, I have no discretion. See **Republic Vs Principal Magistrate P. Ngare Gesora & 2 others Exparte Nation Media Group Ltd [2013] e KLR** where Honourable Odunga J stated, and I agree that:

> ***"However, where a certain cause of action is disallowed by law, the issues of the path of justice being clogged does not arise since in that case justice demands that a claim should not be brought. Justice, it has been said time without a number, must be done in accordance with the law."***

Further that, *"……..It must be however remembers that what the law of Limitations Act provides 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 periods of limitation. It does not extinguish causes of action."*

I add that the effect of a Limitation enactment is to remove remedies irrespective of the merits of the particular case. It is intended to prevent a plaintiff from prosecuting stale claims. I am equally unable to find umbrage under Article 159(2) (d) of the Constitution that courts should endeavour to deliver substantive justice without undue regard to procedural technicalities. The said article in my view is not available to the respondents for reasons that if suits were to be filed prosecuted and decided outside the statutory limits without sanctions of the court, public policy would fly in the face of the statute of limitations as was espoused by the Court of Appeal in several cases among them, **CA Nairobi**

228/2013 Nicholas Kiptoo Arap Korir Salat V IEBC & Winfred Rotich Lesan & 2 Others per Ouko, Mohammed & Kiage JJA , **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others (2013) e KLR**, that:

> *"**the right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159(2) (d) of the Constitution. We do not consider Article 159 (2) (d) of the Constitution to be a panacea, nay , a general white wash, that cures and mends all ills, misdeeds and defaults of litigation".***

The same Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others CA 290 of 2012** (five Judge Bench) stated succinctly thus, concerning the issue of taking umbrage under Article 159(2) (d) of the Constitution.

> "***In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle of Section 1A and 1 B of the Civil Procedure Act Cap 221 and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a hand maiden of just determination of cases".***

In this case, it is my humble view that without leave to institute suit out of time, goes to the jurisdiction and root of the very statutory enactments incurable under the law.

It therefore matters not that the suit it was meritorious. In the above Nicholas Kiptoo case, the Court of Appeal emphasized that the greater the importance of a particular matter, the more the case and scrupulous attention an appellant (party) should take to ensure compliance with the Rules (Law) and the court must be seen to maintain that consistency.

Thus, despite the significance of this matter, where the respondents lost colossal sums of money to unsuspecting fraudsters due to the negligence of the appellant advocate, failure to file suit in time or with leave validly given by the court extending the limitation period invalidated the suit in limine and this court is therefore unable to save an incompetent suit.

The upshot of all the above is that his appeal is allowed. The judgment and decree of the subordinate court is set aside, and substituted with an order striking out the respondent's suit as against the appellant.

Costs follow the event and in any case, to the successful party. This court is aware that the appellant has expended resources to defend the suit from the subordinate court to this appellate stage. However, for reasons that the appellant was partly to blame for the misfortune that befell the respondents, and that the respondents relied on the professional advice to institute suit, I decline to grant the appellant costs of the suit in the subordinate court and of this appeal. I order that each party shall bear their own costs.

Dated, signed and delivered in open coaurt at Nairobi this 23rd day of October 2015.

R.E. ABURILI

JUDGE