



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.106 OF 2011

FRANCIS NDEGWA KUNG'U.....1ST APPELLANT

HOTEL KUNSTE.....2ND APPELLANT

VERSUS

STEPHEN OMITTO.....RESPONDENT

(An appeal from the judgment of Hon. E. Tanui, Resident Magistrate dated 25th March, 2010 in Nakuru CMCC No.2167 of 2006)

JUDGMENT

FACTS

1. The Respondent was a passenger aboard motor vehicle registration number KAH 239G and sustained injuries occasioned by a road accident and the Respondent attributed negligence to the 1st Appellant. The Respondent filed civil suit CMCC No. 2167 of 2006 before the subordinate court seeking general damages and special damages as a consequence of the road accident on 3rd February, 1997.

2. The suit was heard and judgment was delivered on 25/03/2010 in favour of the Respondent against the Appellant in the sum of Kshs.256,600/= for damages plus costs and interest.

3. The Appellants being aggrieved by this decision duly filed an appeal. In the Memorandum of Appeal, the Appellants faulted the decision and listed six grounds of appeal *inter alia*;

a) The learned magistrate erred in law and in fact and misdirected herself in holding that the Respondent had proved his case as against the appellants to the required standard.

b) The learned magistrate erred in law and in fact and misdirected herself in evaluation of the evidence adduced by appellants.

c) The learned magistrate erred in law and in fact and misdirected herself in disregarding the evidence of the appellants in deciding upon the issue of quantum.

d) The learned magistrate erred in law and misdirected herself in relying on the wrong principles to arrive to her judgment.

e) The learned magistrate erred both in law and fact in disbelieving and discrediting the

evidence tendered by the appellants

F) The learned magistrate erred both in law and in fact by not considering the submissions and authorities tendered on behalf of the appellant.

4. Learned counsels **Mr. Kisila** and **Mr. Machafu** for the Appellants and Respondent, respectively, agreed to file written submissions and on the 16/07/2014 highlighted the submissions.

APPELLANTS SUBMISSIONS

5. There were six grounds of appeal and the Appellant chose to consolidate them all and argue them as one ground of appeal.

6. Counsel submitted that the cause of action accrued on the 3/02/1997 and the suit was filed in October, 2006. The issue of Limitation was raised in the Defence and the propriety of extension of time appeared in cross-examination. That Section 27 (2) of the Limitation of Actions Act sets out the requirements before an order for extension of time is granted.

7. That a trial court is obligated to interrogate the process even after the order for extension is granted. Reference was made to the case of **Divecon Ltd V. Shirinkhanu Samani**, HCCC No.995 of 1997.

8. It was Counsel for the Appellants submission that on the issue of limitation that the learned trial magistrate mentioned this issue only in passing and stated that the suit was properly before the court and gave no explanation.

9. The Appellants prayed to court that the issue of limitation be considered by the appellate court as it would decisively dispose of the matter. Their prayer was that the appeal be allowed and the subordinate court's decision be set aside and the Respondent be condemned to pay costs of this appeal and the costs in the subordinate court.

RESPONDENT'S SUBMISSIONS

10. Counsel submitted that the Accident occurred on the 3rd February, 1997 whilst he was on duty and in the course of his employment with the 2nd Appellant. Before filing suit the Respondent filed Misc. App. No. 29 of 2006 and leave was granted for expansion of time within which to file the suit. The Respondent's stated that the delay in filing suit was attributed to the Appellants continued promise to settle the matter out of court.

11. On liability, the Respondent attributes negligence to the 1st Appellant who had admitted in evidence that he had been charged for careless driving vide Traffic Case No 805/2007.

12. On quantum, the Respondent produced medical documents which included treatment cards, Discharge Summaries and a Medical Report to prove the injuries he sustained.

13. The injuries sustained were;

- a) Fracture of the right Humerus
- b) Cut wounds on both knee joints
- c) Soft tissue injuries on the thorax and abdomen

14. Counsel submitted that the award for general damages was on the lower side with respect to the injuries sustained by the Respondent and prayed for the enhancement of the award and further prayed that the appeal be dismissed with costs and the decision of the lower court be upheld.

ISSUES FOR DETERMINATION

15. After hearing the submissions of both Counsel the issues found for determination are;

i) Whether the suit was statute barred and whether the ex-parte leave granted to expand time for filing the suit was in accordance with the provisions of **Sections 4(2) and 27(2) of the Limitation of Actions Act**

ii) whether the trial magistrate erred in law and in fact and misdirected herself in finding that the suit was properly instituted.

ANALYSIS

16. It is the duty of the first appellate court to re-assess and re-evaluate the evidence adduced before the trial court and arrive at its own independent conclusion.

17. The accident occurred on the 3/02/1997 and the Plaintiff was filed the 2/10/2006 which translates to eleven years from the date of occurrence of the accident. Section 4(2) of the Limitation of Actions Act provides that any action in Tort must be brought before the end of three (3) years from the date when the cause of action arose. The provisions of Section 27 (2) allows a party to seek leave to file the intended suit and sets out the requirements which is that, such leave may be granted if the person demonstrates that the material facts related to the cause of action were at all times outside the knowledge of that party.

18. From the pleadings and the evidence adduced at trial the Appellants were within their right to challenge the leave to expand time for filing. It is noted that this was done in their defence, the issue was also raised at the hearing of the suit lastly in their final written submissions before the trial magistrate retired to write her judgment.

19. The Appellants defence reads as follows at paragraph 3;

“3. The 1st and 2nd defendants aver that the plaintiffs claim is time barred under the provisions of the Limitation of Actions Act Cap 22 Laws of Kenya, it is therefore incompetent and bad in law and in the premises the suit should be struck out.”

20. Upon perusal of the court record at page 17 the evidence of the Respondent is as follows;

'..... I didnt institute this suit earlier as the defendants had promised to pay my dues without having to bring this matter to court....'

21. Lastly the Appellants Counsel went to great lengths to submit on the issue of limitation in the written submissions filed in the subordinate court and had also placed reliance on the authority of **Divecon (supra)**.

22. This court notes that the trial magistrate did not address the issue of limitation in her judgment and only made the following remarks'

'.....I find that the plaintiff had leave of the court to file this suit out of time hence the suit is properly before court.....'

23. Going back to the Limitation of Actions Act, this court reiterates that even though the application for extension of time is applied for ex-parte the law requires that the fulfilment of the requirements of Section 27 (2)

24. The Respondents's evidence adduced for the delay was due to a compensation promise made by the Appellants.

25. It cannot be said that the Respondents excuse for not bringing his action in time was matter that was at all times outside the knowledge of the Respondent.

26. This court opines that since the Appellants had gone to great lengths to challenge the Respondents pleadings and had raised it at the hearing and also in submissions it was incumbent upon the trial magistrate to address the propriety of the extension and ought to have made a reasoned finding on this issue.

27. In conclusion this court observes that from the reading of Section 27(2) for leave to have been granted to the Respondent it ought only to have been granted if the Respondent had established that the material facts were outside the Respondents knowledge. Reference is made to the **Divecon case (supra)** where it was held that the Respondent must have proved that the material facts relating to the cause of action were outside his knowledge. From the evidence adduced this was not the case and therefore this court is satisfied that the extension was not within the parameters of the Act and finds the leave granted was invalid thus making the suit incompetent.

FINDINGS

28. For the reasons stated above this court makes the following findings;

29. This court finds that the leave granted was not valid as it offended the provisions of Section 27(2) of the Limitation of Actions Act as the material facts were within the knowledge of the Respondent.

30. This court finds that the trial magistrate erred in law and fact and misdirected herself in finding that the suit was properly instituted.

DETERMINATION

31. The appeal is hereby found to be meritorious and is hereby allowed.

32. The Plaintiff is hereby struck out and the judgment of the subordinate court is hereby set aside.

33. Each party to bear their own costs of this appeal and in the subordinate court.

It is so Ordered.

Dated, Signed and Delivered at Nakuru this 31st day of July, 2014.

A. MSHILA

JUDGE