REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Appeal 94 of 2008

VINU K. PATEL…….
……..APPELLANT

VERSUS

SHIVA CARRIERS LTD……....……..
……..RESPONDENT

JUDGMENT

1. On 9th February, 2000 at about 4.00p.m., the Respondent's director parked the Respondent's car at Rockwell Shopping Centre in Mkomani Estate, Mombasa. Shortly thereafter, the Appellant drove into the Respondent's motionless car, causing extensive damage. The evidence in the lower court showed that the police were called, and this being a non injury accident, the parties were left to sort out the issue of damage with their insurers. The police however, made a record in their Occurance Book.

2. The Respondent contacted their insurers, First Assurance, who sent an assessor to assess the damage. The Respondent's director then took the vehicle to DT Dobie for repairs. He paid the expenses, as they were less than the insurance excess he would have paid to the insurance company. The same was refunded by the Respondent's insurance company, which then instituted proceedings to recover the said amount, exercising their subrogation rights. They obtained *exparte* leave to file the suit out of time in Misc Civil Application 135 of 2003, and the suit was filed on 29th March, 2004.

3. The lower court found for the Respondent in the sum of Kshs. 131,260/=. It declined the Appellant's argument that the suit was time barred under the Limitation of Actions Act (Cap 22) having been brought over one year out of time.

4. The Appellant's appeal, essentially, concerns the following matters:

- That the suit in the lower court was time barred in that the accident or cause of action took place on 9th February, 2000, but the suit was not filed until 29th March, 2004, which was out of time.

- That the *exparte* order made in Miscellaneous Application 135 of 2000 granting leave to file the suit out of time should be rescinded on two grounds: The leave was only provisional in nature the

Appellant having never been heard thereon; and that Section 27 of the Limitation of Actions Act does not apply to the facts of this case since the Plaintiff (Respondent herein) was not throughout the relevant period ignorant of material facts of a decisive character relating to the cause of action in terms of that section.

5.The Appellant cited the following authorities in its submissions.

- **Mweu vs Kabai and Anor** [1972] EA 242 where the Plaintiff sought leave to file a suit out of time. The application was dismissed and it was held as follows:

"(i) Knowledge of possible legal liability is knowledge of a decisive character.

(ii) the Applicant knew that the other driver could be sued

(iii) ignorance of the statutory period of limitation could not be a material fact within the section."

- HCC Number 348 of 1996 **Re Andrew Gorge Opiyo** [1996] LLR 532 (HCK) where Waki J, as he then was, dismissed an application for extension of time because the facts clearly showed the Applicant would not fall within Section 27 and 28 of the Limitation of Actions Act.

- Civil Appeal Number 233 of 1998 **Crispin Ned Ngari and Nduati Muiruri vs Churchill Odero** where the Court of Appeal referred to Section 27 and 28 of the Limitation of Actions Act and stated:

"It can be seem straightaway that the requirements of the two sections of the Act are stringent. If the court is satisfied on evidence before it that the said requirements are met, it has no option but to grant the application. If those requirements are not met the court must reject the application."

6. The Respondent persuaded the lower court, that:

- the action brought by the insurance company in exercise of its subrogation rights was an action to recover the damages amount from the Defendant by way of an action.

- such an action was equitable in nature and therefore its limitation period was six years as provided under Section 4(1) of the Limitation of Actions Act.

- there was never any need for the Respondent to seek extension of time under the Limitation of Action Act.

- Finally, that under Section 27(1) and 3(a) leave to file suit out of time was properly obtained.

7. In the appeal the Respondent argued in the alternative that Section 26(c) of the Limitation of Act applied to cure the Respondent's failure to file suit within the limitation of time under Section 4(2) on account of **"mistake"** which excuses such error by Respondent.

8. Upon careful consideration of the submissions of counsel, and on perusal of the record of appeal and the authorities cited, I find as follows:

It is trite that an action founded on tort is statute barred under the Limitation of Actions Act under Section 4(2), after the end of three years from the date on which the cause of action accrued.

In this case, an action to recover damages arising out of the accident which occurred on 9th February, 2000 was statute barred as from 10th February, 2003.

However, exceptions would 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, or if

c) As argued by the Plaintiff, the action filed in exercise of the insurance company's subrogation rights was an action claiming equitable relief under Section 4(1) (e) for which no other period of limitation is provided by the Limitation Act or other written law.

9. I take the above three categories or situations as establishing the issues upon which I must find and make a determination in this suit.

Does this case fall under mistake under (Section 26 (c)?

I have perused the evidence on record in the lower court. PW2 was the Police Inspector. His evidence did not touch on mistake. PW3, the Loss Assessor, merely spoke about the assessment of the Plaintiff's vehicle for repairs. The evidence of PW4 the insurance company's officer shows nothing about mistake. PW1, the Plaintiff Respondent's director said in his evidence:

"I am not aware that a suit based on tort is to be filed within three years…. The police came and investigated the accident on the same day… The motor vehicle was taken to DT Dobie [for repair] a day or 2 after the accident."

I do not see anything in the evidence that suggests that the Plaintiff was acting under a mistake, or that the cause of action is for relief from the consequences of a mistake which the Plaintiff has discovered or could be discovered by reasonable diligence so as to delay the commencement of the limitation period. Accordingly, Section 26 (c) does not avail the Respondent herein.

10. **Was the time properly extended under Section 27 and 28 of the Limitation Act?**

The court called for the lower court file Misc. Application Number 135 of 2003 in which the Respondent (Plaintiff therein) obtained the leave of the court to file the suit out of time. The application there was a Notice of motion filed under Section 3A, 3(e) and 95 of the old Civil Procedure Act, and Order 49 Rule 5 and Order 50 Rule (1). Those provisions are to the following effect:

Section 3A invokes the court's inherent powers.

Section 63 (e) empowers the court to make interlocutory orders in supplemental proceedings.

Section 95 is on the court's power to extend or enlarge time periods fixed or granted by the Court.

Order 49 Rule 5 Concerns the Court's power to enlarge time that has been fixed for doing any act or proceeding under the Rules or order of the court.

Order 50 Rule 1 Concerns the bringing of applications to court by motion.

It is evident from the above, that none of the provisions invoked in the motion were capable of empowering or imbuing the lower court with the mandate to grant the filing of a plaint out of time as prayed, except Order 49 rule 5.

11. The motion itself sought, *inter alia* the following orders:

"1….

2. The application and/or intended Plaintiff herein be granted leave to file the Plaint out of time.

3. That the draft plaint be deemed as duly filed and served within the prescribed time…"

The Respondent treated the application as one for extension of time for filing the Plaint, which was not possible on an *exparte* basis. As found later, this was not a cause of action for equitable relief. Thus, a Plaint that has not been brought within the time stipulated under statute can only be salvaged by compliance with the provisions for extension of time under the statute pursuant to which it was time barred. In this case, failure by the Respondent to bring the application under Section 26, 27 or 28 of the Limitation of Actions Act, Chapter 22 rendered the application nugatory and the Plaint null and void. There was therefore, no extension of time granted by the Honourable Magistrate under the aforesaid application.

12. **Was the action filed by the Insurance company under the principle of subrogation an action claiming equitable relief within the scope of Section 4(1) (e) of the Limitation of Actions Act?**

This is a question of law. In the lower court, the Respondent referred to Halsbury's Laws of England, Volume 25 paragraph 330 which states:

"…where the insurer pays for a total loss either of the whole or in the case of goods of any apportionable part, of the subject matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of casualty causing the loss."

13. In his judgment, the learned Magistrate referred to a book on contracts [this was Chitty on Contracts] and determined that:

"Subrogational rights are equitable in nature and are covered by Section 4(1) (e) of the Limitation of Actions Act"

On that basis, he found that the cause of action being equitable in nature, no leave to file out of time had been necessary as the statutory limitation for such cause of action was six years.

14. I think the learned magistrate misinterpreted subrogational rights as "equities" to mean that subrogation is an equitable cause of action. Chitty on Contracts 26th Ed. Vol II at page 963 paragraph 4273 says:

"…[In subrogation] it seems that an insurer has an equitable proprietary interest on the amounts."

It is to be noted that it is not that subrogation is or creates an equitable cause of action. This was more clearly put by Lord Blackburn in **Burnand vs Rodocanachi** (1882) 7 app. Cas 333 at 339 where he explained the principle or doctrine of subrogation in the following words:

"The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy or a policy against fire or land, or any other contract of indemnity) and loss happens, anything which reduces that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back."

Clearly, the position is that whilst equity does arise under the doctrine of subrogation for recovery from the assured what he has been paid, it does not make a claim under that doctrine an equitable cause of action.

15. **In Castellain vs Preston** (1883) 11 QBD 380, the doctrine of subrogation was elaborated by Bret LJ as follows (and I quote in *extenso*):

"Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of insurance must be carried to the extent to which I am now about to endeavor to express, namely, the underwriter is entitled to every right of the assured whether such right consists in contract fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be or has been excercised, or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured…

That seems to me to put this doctrine of subrogation in its largest possible form, and if in that form, large as it is, it is short of fulfilling that which is the fundamental condition, I must have omitted to state something which ought to have been stated. But it will be observed that I use the words 'of every right of the assured' I think, the rule does require that limit." (underlining mine)

16. From the above, the doctrine of subrogation allows the underwriter or insurance company to step into the shoes of the assured, subject to the limit that the insurer or underwriter shall have only every **"right of the assured."** In other words, if the assured could have exercised a certain right, and the exercise of such right is limited by statute, the underwriter cannot have any greater right than the assured would have have. The doctrine is not, and does not create a new cause of action of its own. It enables the insurer to, so to speak, **"run with the assured."**

17. In Halsbury's Laws of England Vol. 25 4th Edition paragraph 333, the following statement of limitation of the doctrine is found:

"The principle of subrogation is limited or qualified in its application by the following conditions:

(1) The underwriter is entitled only to those remedies, rights or other advantages which are available to the assured himself…

(2) The underwriter is subrogated only to those rights (and I might add, restrictions) possessed by the assured in respect of the thing to which the contract of insurance relates."

18. Given the above position, and in view of the rights and restrictions of the underwriter or insured under the doctrine of subrogation, I hold that what the assured could not have achieved in a suit in negligence because he would have been statute barred, the underwriter cannot achieve outside the time limitation. Accordingly, the Respondent was not entitled in law to recover outside of three year limitation period for tort in this case except if he could fall squarely within Sections 27 and 28 of the Limitation of Actions Act, which he did not.

19. In the result, I allow the appeal and set aside the judgment of the learned Honourable Magistrate in this matter. Costs shall go to the Appellant.

SIGNED BY:

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R.M. MWONGO
JUDGE

Read in open court on this 8th day of June, 2012

(BY HON. JUSTICE JOHN MWERA)

Coram:

1. Judge: Hon. John Mwera

2. Court clerk: T. Furaha

In Presence of Parties/Representative as follows:

a) …….

b) …….

c) …….

d)……