



**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Commercial Courts)**

**Civil Appeal 619 of 2008**

**DANIEL KIRONUA .....APPELLANT**

**VERSUS**

**JOSHUA MUTENGI MULI ..... RESPONDENT**

***(From the Judgment and Decree of R.A. Oganyo, Senior***

***Resident Magistrate in Kajiado SRMCC No.118 of 2006)***

**J U D G M E N T**

This appeal arises from a judgment of the Senior Resident Magistrate at Kajiado. By a plaint dated 19.5.2004 and verified by a Verifying Affidavit sworn by the Plaintiff/Respondent, Joshua Mutengi Muli, the Plaintiff claimed special and general damages arising from an illegal assault and other tortious acts perpetrated by the Defendant, Daniel Kironua, on 20.11.2002.

There is some sketchy evidence on the record that as a result of the said offending conduct allegedly perpetrated by the Defendant, the Defendant had been arrested, prosecuted and convicted of a criminal offence for which he suffered punishment as authorized by law. However, little information of such criminal process aforesaid, was pleaded in the plaint.

In his statement of defence the Defendant/Appellant had averred first, that, the Plaintiff's claim was time-barred and was therefore fatally incompetent and secondly, that the plaint showed no legal cause of action. Thirdly, that the court had no jurisdiction as the plaint did not plead the place where the cause of action arose and fourthly, that the plaint was supported by a fatally defective Verifying Affidavit.

It is clear from the record that the trial magistrate allowed the parties to agitate the preliminary issues set out above. In his ruling of 9.10.2007 the honourable trial magistrate dealt with the issue.

He ruled that the suit was not time barred as the relevant time for the time began running for the tort of assault was when the criminal court convicted the Defendant and not when the Defendant had inflicted the injuries on the Plaintiff. On the question of the Plaint being supported by a fatally defective Verifying Affidavit, the court ruled that such a defect was curable and was therefore not fatal to the suit.

The court later granted the appellant leave to file this appeal on the above findings.

I have carefully considered the issues raised in this appeal. I will first deal with the competency of the suit in relation to the competency of the Verifying Affidavit.

There is no doubt and it not is not denied by the Respondent/plaintiff, that the Verifying Affidavit did not

carry the name of the maker or drawer of the same in accordance with the provisions of Section 34 and 35 of the Advocates Act. The requirement that the name of the drawer or the maker of an affidavit must be endorsed at the bottom thereof, is a statutory requirement. Indeed, failure to endorse the name of firm that drew it, offends the statutory requirement and amounts to a criminal offence. The latter consequence demonstrates that the requirement or failure to include such endorsements is a substantial failure and goes to the root of the issue. It is not a mere formality therefore as the trial magistrate thought.

It is my view and finding therefore, that the Honourable Magistrate should have struck out the verifying affidavit and at the minimum, for the purpose of saving the suit, should have ordered the Plaintiff to file a valid Verifying Affidavit within a prescribed time, or the suit would stand struck out, as well.

Turning to the issue of limitation of time, it is my view and finding that a tort such as the one before the court, would be time-barred if not commenced within a period of three years from the date when the assault was committed, which in this case was on 20.11.2002. It is the finding of this court accordingly, that the period within which the Plaintiff/Respondent should have filed the suit, was within three (3) years from 20.11.2002. The last date to do so therefore would have been about 20<sup>th</sup> November, 2005. It was instead filed on 18.5.2006, a period of about six months outside the limitation time.

The Plaintiff did not deny the fact that if time started to run on 20.11.2002, three years for a tortious act would end as stated above. But he insisted that time did not start to run until the criminal charge which was in court, was concluded. In this case the criminal case No.26 of 2003 was concluded on 5.2.2004.

I have carefully considered the issue. However, I do find that the honourable trial magistrate was not right. He should accordingly have found that the suit was time-barred and, should have dismissed the claim on that basis. He erred in not doing so.

It is possible to argue that the Plaintiff/Respondent could have most likely justified the claim if he had first sought and obtained leave of court to file the suit out of time on the basis that Plaintiff waited to see whether he had a reasonable cause of action at the end of the criminal proceedings. Whether he would have succeeded if he did so, but was challenged during the hearing of the suit, is another matter. More so because the Plaintiff knew the result of the criminal case over 18 months before the original time limitation closed and could have freely filed the case within time. Indeed it is difficult to understand why the Plaintiff did not file the suit between February 2004 and 20<sup>th</sup> November, 2005 before limitation time closed.

Be that what it may, I find that the lower court suit was time barred and should not have been filed without the leave of court.

For the above reasons I hereby order that the suit be and is hereby struck out with costs here and below.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of December, 2012.

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**D.A. ONYANCHA**  
**JUDGE**