



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL APPEAL NO. 53 OF 2006

MATHEW OYOO OGONDO.....APPELLANT

V E R S U S

PIUS MUKANZI (suing as the Administrator of the estate of Desterio.....RESPONDENT

Mukanzi and Florence K. Imbenzi)

J U D G M E N T

1. This Appeal is predicated on only two grounds of Appeal viz;

i) *The learned trial magistrate erred in failing to hold that the respondent's suit was barred by limitation of Actions Act Cap 22 Laws of Kenya.*

ii) *That the learned trial magistrate erred in failing to find that the respondent had not shown that he obtained leave to file the suit out of time.*

2. There were two other grounds relating to quantum of damages but they were abandoned, at the hearing of the Appeal.

3. The genesis of the dispute is that by a Complaint dated 12.10.1998, the present Respondent, (*suing as the administrator of the estate of the late Desterious Imbenzi Mukanzi and Florence Kwayumba Imbenzi*) sought special and general damages as a result of an accident on 24.1.1995 in which Desterious and Florence aforesaid suffered fatal injuries. It was the case by the Respondent that the Appellant had so negligently controlled motor-vehicle registration number KYE 961 on the material date that it hit a bicycle on which the two persons were riding and they died as a result of the injuries.

4. In his judgment delivered on 14.6.2006, M.N. Gicheru Esq., Senior Principal Magistrate found that the claim had been proved on a balance and in awarding damages he rendered himself as follows;

<i>“For loss of dependency, I award Desterio’s estate</i>	
<i>4880 x 12 x 14 x 2/3</i>	<i>546,540.00</i>
<i>Add loss of expectation of life</i>	<i>60,000.00</i>
<i>Add pain and suffering</i>	<i><u>10,000.00</u></i>
<i>Total</i>	<i><u>616,560.00</u></i>
<i>Under the same heads I award Florence’s</i>	
<i>estate the following</i>	
<i>3340 x 12 x 20 x 2/3</i>	<i>534,400.00</i>
<i>Add loss of expectation of life</i>	<i>60,000.00</i>
<i>Add pain and suffering</i>	<i><u>10,000.00</u></i>
<i>Total KShs.</i>	<i><u>604,400.00</u></i>
<i>Total KShs.1,220,960.00 in general damages</i>	
<i>I also award the plaintiff KShs.40,000.00 as special damages</i>	
<i>The plaintiff will also have the costs of the suit and interest.”</i>	

5. On ground (i) and (ii) of the Appeal, it is submitted on behalf of the Respondent that although the suit before the lower court may have been filed out of time, leave to do so was granted and so the issue is moot. That in fact, there was sufficient evidence put before the court to show that such leave was obtained and the Appellant’s appeal was therefore without substance and should be dismissed with costs.

6. As I understand it, an action relating to an alleged tort must be brought to court within three (3) years of the cause of action arising. **Section 4 (2)** of the Limitation of Actions Act, Cap 22 Laws of Kenya provides as follows in that regard;

“S. 4 (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.”

7. In the instant case, the accident occurred on 24.1.1995 but the suit was filed on 12.10.1998 and therefore it was out of time by 8 months and 16 days. From the judgment, the learned magistrate was alive to the issue because he stated partly as follows;

“In his submissions, counsel for the defendant has challenged exhibit No. P13 on the ground that it is a mere application seeking an order to file a suit out of time but not an order itself. He has cited the case of Direcon Limited vs Shirinkhanu Sadrudin Samani Civil Appeal No. 142/97 (Nairobi) I do not find that authority similar to this case because the facts in the two cases are dissimilar. While the reason for seeking extension in the authority cited was ignorance by the applicant of her rights under the Law Reform Act due to illiteracy the reason given by the plaintiff herein is delay in the issuance of Letters of Administration.”

8. I have also taken time to look at P.Exh.13, it is an Application by way of Originating Summons under Order XXXVI Rule 3(1) of the Civil Procedure Rules seeking orders that *“the application be and is hereby granted leave to file intended suit herein out of time.”* The summons was undated but was filed (from the court stamp on it) on 22.7.1998. There is no record anywhere that the said summons was ever heard and there is no specific order *“for leave to file intended suit ...out of time”* as was prayed. Can the mere filing of an application for certain orders be deemed to be grant of such orders? Of course

not. Orders are granted upon parties being heard and an order is extracted upon being granted and not upon an application being filed. The decision of the Court of Appeal in Divecon Ltd. Vs Samani C.A. 142/1997 (U.R.) was in tandem with the present suit because in it, the Court of Appeal held that where a suit was filed out of time, it was not open to the trial court to condone a breach of statute in that regard.

9. In the present case, the learned magistrate glossed over the issue as if it did not matter yet the mere production of P. Exh.13 was no reason to presume that in fact an order to extend time was thereafter granted.

10. In submissions before me, the advocate for the Respondent has made the following point;

***“With respect, it is our submission that the suit was properly filed given that before filing the suit, the Respondent sought and obtained leave to lodge it out of time.*”**

While giving his testimony, the Respondent was categorical that he sought and obtained leave to file suit out of time. He gave particulars of the case in which leave was sought and obtained. The same was produced as Exh. No.13. If the Appellant was doubting that leave was so granted the easiest option available to him would have been to call evidence through production of the Court file in respect of Exh. No.13 and demonstrate that no such leave was obtained. He opted not do so. He cannot be allowed to contend that no such leave was granted. He should be stopped from raising the issue through submissions.”

11. The above submission is misplaced. It was the Respondent who had the duty to produce evidence that he obtained leave to file the suit out of time. When was it granted? By which judge and where is the extracted order? To my mind, it was not open to the Respondent to shift the burden in answering those questions to the Appellant. He failed to produce that evidence and may have been failed by his advocates but as was said in Divecon (supra), ignorance of the law can never be the fall back position in such matters.

12. Lastly, one may sympathize with a party who has been waiting for all these years (from 1995 to 2011) to get some form of justice in an accident that left the children of the deceased persons as orphans at an instance. However, the sword of justice is often times quite merciless and this case is proof of such fact.

13. Once a suit is filed out of time, and there being no proper order to extend time for filing it, the merits of the case do not matter as the doors of justice have been shut.

14. Both grounds of appeal as filed are clothed with merit and the Appeal must be allowed with the consequence that the suit before the subordinate court is struck off and the judgment and decree thereby set aside.

15. The nature of the case necessitates that each party should bear its costs of the suit and of the appeal.

16. Orders accordingly.

Delivered, dated and signed at Kakamega this 14th day of April, 2011

ISAAC LENAOLA

J U D G E