



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 97 OF 2007**

*(Arising from Civil Case No. 663 of 2005 of the senior Resident Magistrate's Court at Mombasa: H.M. Adika – R.M.)*

**MAINA MUTURI.....APPELLANT**

**=VERSUS=**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

**JUDGEMENT**

The Appellant **MAINA MUTURI** has filed this appeal against the decision of **HON. ADIKA**, learned Senior Resident Magistrate in Mombasa **SRMCCNO. 663 of 2005: MAINA MUTURI –VS- KENYA REVENUE AUTHORITY**.

The genesis of this appeal is that on 3<sup>rd</sup> March 2005 the Appellant filed a suit against the Respondent in which the main prayer was an order of a mandatory injunction to compel the Respondent to effect a transfer of a certain motor vehicle Registration No. Ex GK 105N Land-Rover Caravan in the Appellant's favour. Before this suit could be heard the Appellant on 10<sup>th</sup> August 2006 filed an application seeking to amend his plaint and substitute the prayer for a mandatory injunction with a claim for the sum of Kshs.450,000/- being the value of the above mentioned vehicle. This application was opposed by the Respondent who argued that the Appellant's suit was statutorily time-barred the same having been filed in the year 2005 whilst the cause of action arose in the year 2000. The learned trial magistrate in his Ruling dated 12<sup>th</sup> June 2007 agreed with the Respondent that the suit was filed out of time and dismissed the same and awarded costs to the Defendant (the Respondent herein). Being dissatisfied with this decision the Appellant filed this appeal.

By consent it was agreed that the appeal be argued by way of written submissions. **MR. KIOKO**

Advocate appeared for the Appellant whilst **MS. ODUNDO** appeared for the Respondent. Both counsel filed their submissions as required by 1<sup>st</sup> April 2011 and the matter is today listed for judgement.

I have carefully perused the written submissions filed by both counsel in this matter. In his brief submissions the Appellant raised the following three grounds of appeal:

- (1) That an application for amendment is one which the court should allow as of right
- (2) That the learned trial magistrate erred in law and infact by finding that the suit was filed out of time
- (3) That the question of limitation is one of fact which can only be canvassed at a full hearing.

With respect to the first ground of appeal with respect I cannot agree with the Appellant's contention that an application for amendment should be allowed as of right. If this were the case then there would exist no need for a party to apply before a court for leave to amend its pleadings. One need only effect the proposed amendment and serve it on the other side by passing the court completely. The requirement that leave be sought to amend pleadings was placed in our Civil Procedure for a reason. A court is required to examine the proposed amendment and make a determination on whether it is proper in the circumstances or whether it raises a totally new and different cause of action in which case such proposed amendment may be rejected. In other words the court has the discretion to decide whether or not to allow any amendment after considering each individual case. No party has a **right** to amend pleadings at will. I therefore dismiss this ground of appeal with the contempt it deserves.

Grounds 2 and 3 will be considered together. The Appellant argues that the trial magistrate erred in dismissing his suit as he did at the application stage on the basis that his suit was time-barred. He argues that limitation is a question of fact and can only be canvassed at a full hearing. In determining this question it is necessary to examine the facts closely. The original suit was filed in the year 2005, on 3<sup>rd</sup> March 2005 to be precise and the Defendant in the Plaintiff was named as the "**Kenya Revenue Authority**". The Defendant is a body corporate and S. 3(2) (a) of the Kenya Revenue Act Cap 469 Laws of Kenya provides:

***“(a) Suing and be sued; provided that any legal proceedings against the Authority arising from the performance of the functions or the exercise of any of the powers of the Authority under Section 5 shall be deemed to be legal proceedings against the Government within the meaning of the Government Proceedings Act”***

That being the case then S. 3(1) of the Public Authorities Limitation Act Cap 39 Laws of Kenya come into play. S. 3(1) provides:

***“3(1) No proceeding founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued”***

Nothing could be clearer than this. For purposes of suing or being sued any proceedings brought against the Defendant shall be deemed to be proceedings against the Government. Any proceedings found on tort (as the present suit was) **shall** not be brought against the Government after the end of twelve months from when the cause of action accrued. Para (3) of the Plaintiff filed by the Appellant states:

***“(3) That sometime in the year 2000 [my emphasis] the plaintiff tendered for and bought a motor***

**vehicle LAND ROVER CARAVAN EX GK 105N at the District Tender Board Mombasa”**

The plaint clearly provides that the cause of action arose in the year 2000. It is trite law that a litigant must be bound by their own pleadings. In any event the proposed amended plaint still retained clause 3 as it was giving the year of purchase of the vehicle in question as year 2000. That being the case any suit ought to have been brought not later than the year 2001. A suit filed five (5) years later in 2005 is clearly barred by S. 3(2) of the Public Authorities Limitation Act. There can be no argument on this.

The limitation is reinforced by S. 4(2) of the **Limitation of Actions Act Cap 22 Laws of Kenya** which provides:

***“An action founded on tort may not be brought after the end of three years [my emphasis] from the date on which the cause of action accrued”***

Here again the Appellant’s suit having been filed in 2005 for a cause which accrued in the year 2000 is two years outside of the limitation provided by this Act. Any which way you look at it the Appellant’s suit is time-barred. This is not a question that requires an evidential hearing to determine. A clear look at the law will suffice. The question of limitation is one of law and not one of fact to be argued about. The statutes quoted above are clear on the issue. That being the case the trial magistrate would have had no reason and indeed no business continuing to entertain the suit. He rightly gave it a **‘technical knock-out’**. No further arguments could be advanced in favour of the suit and there was no way to legally sustain the same. I am guided in this finding by the decision of the Court of Appeal in the case of **THURANIRA KARAURI –VS- AGNES NCHECHE CIVIL APPEAL NO. 192 of 1996** where their Lordships held:

***“As the issue of limitation goes to jurisdiction (Again my own emphasis) .... The defence of limitation raised by the defendant in his defence stood and the plaintiff should have been nonsuited forever. In view of this failure, the Plaintiff’s suit was incompetent and should have been struck out. This finding alone is sufficient to dispose of this appeal ...”***

It is clear from the above decision that the question of limitation is one of jurisdiction and goes to the heart of the matter. A suit brought out of time is incompetent and must be struck out and the party remains nonsuited forever. As such I find no error on the part of the trial magistrate in dismissing the Plaintiff’s suit and I do hereby confirm that decision. This appeal has no merit and is hereby dismissed in its entirety with costs to the Respondent.

**Dated and Delivered in Mombasa this 6<sup>th</sup> day of June 2011.**

**M. ODERO**

**JUDGE**

In the presence of:

Mr. Nganga holding brief for Ms. Obuodha for Respondent

Mr. Were holding brief for Mr. Kioko for Appellant