



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT BUNGOMA**

**Civil Appeal 92 of 2007**

***(Appeal arising from BGM CM CC No.369 of 2005)***

**PATRICK WEKESA NAKHALONDO :::::::::::::::::::: APPELLANT**

**~VRS~**

**NZOIA SUGAR CO. LTD :::::::::::::::::::: RESPONDENT**

**JUDGMENT**

The Appellant Patrick Wekesa Nakhalondo appeals against the decision of Bungoma Chief Magistrate Civil Case No.369 of 2005. The Appellant was the Plaintiff in that suit where he had sued the Respondent herein, Nzoia Sugar Company Ltd for both special and general damages in compensation of injuries sustained by him as he worked for the Respondent. In his memorandum of appeal the Appellant had eight grounds.

Mr. Onchiri for the Appellant argued the grounds in two limbs namely liability and quantum. He submitted that the trial magistrate failed to consider the evidence of the Appellant on negligence against the Respondents. The Respondents admitted that he did not provide the Appellant with protective gear and this should have formed a basis for finding the Respondent liable for breach of contract. On liability, the magistrate assessed the damages at Ksh.50,000/= in the event that an appeal court may overturn his decision. The Appellant contends that the general damages did not match the injuries sustained and now urges this court to give an award of Ksh.250,000/=.

The appeal was vehemently opposed by the Respondent. The counsel Mr. Makokha argued that the Appellant's suit was time barred. Although leave for extension of time had been obtained before filing, the reasons given for the delay were not sufficient. The counsel referred this court to the case of **DEVCON LTD OTHERWISE KNOWN AS DIVING CONTRACTORS -VS- CHIRINKKHANJI SADRUDIN SAMANI** where the Court of Appeal nullified the leave for extensions of time on the ground that it was not obtained using sufficient grounds. Mr. Makokha urged the

court to nullify the leave granted to the Appellant. The only ground the Appellant gave was that the delay was caused by the time he spent trying to negotiate the claim with insurers. It was argued by the Respondent that no correspondence were annexed to the ex-parte application to show that there were any such negotiations.

Mr. Makokha submitted the Appellant did not need to be provided with protective clothing since he was not working inside the Respondents factory. He was just a cane cutter and his job required no protective clothing. The damages were adequate based on the nature of injuries sustained.

On the issue of leave, I agree with the defence that orders can be raised during the hearing or an appeal. The Court of Appeal so held in the cases of **NOTH DEVON HOSPITAL ALL E.R. 1966 pg 799 and in that of YUNES ORUTA – VRS- SAMUEL NYAMATO CIVIL APPEAL NO.96 OF 1984 (Unreported)**. It was further held that such an order made by a judge of the Superior Court may be nullified or upheld by another judge.

In the case before me, the order granting leave for extension of time was granted by my brother Justice Serгон on the 18<sup>th</sup> July, 2005. The cause of action arose on the 10<sup>th</sup> July 1999. In his plaint dated 25<sup>th</sup> July 2005, the Appellant based his action on negligence and breach of contract. The limitation of Actions Act Cap 22 gives limitation of time for filling actions based on tort as three (3) years and those based on contract as six years. The Appellants suit was filed on 2<sup>nd</sup> August 2005 after the time of six (6) years had elapsed on 9<sup>th</sup> July 2004. The act allows extension of time by the court within twelve months after the lapse of the prescribed period. The application for extension of time is dated 10<sup>th</sup> July 2005 although the date of filing is not shown. Nevertheless, this means that the application was not filed earlier than its date. The order was issued on 18<sup>th</sup> July, 2005. This was definitely after the twelve (12) months had expired from the date the six (6) years lapsed. This is an application that ought not to have been extended in the first place for the reason that it was filed late.

It is not disputed by the Respondent that in the supporting affidavit to the application the only reason given for delay is that the Appellant was negotiating settlement with the Respondent. I agree with the Respondent's counsel that in the absence of any documentary evidence to support that averment, the Appellant cannot prove that ground. There ought to have been letters between the parties showing when the negotiations started and when they collapsed resulting into the decision to file the suit.

Section 27 and section 30 of the Limitation of Actions Act requires that the Appellant establishes the cause of action and includes material facts in his affidavit to show the date and nature of accident or injury and to attribute negligence or breach of contract to the employer. In the absence of these facts, there can be no sufficient ground to obtain leave to extend time. In the case of **DEVCON LTD –VS- SHRINKANYI SARUDIN SAMANI** where the Court of Appeal nullified leave for extension of time for want of sufficient ground to justify the granting of the orders for extension. Further that the application for leave was outside the limited period of six (6) months. For these reasons, I

find that there was no valid extension of time to file this suit. The suit was therefore time barred and any orders given therein are null and void *ab initio*. The learned magistrate declined to deal with this issue on grounds that she could not have overturned the decision of a high court to grant leave. I totally agree with her sentiments. The suit is now in this court which has jurisdiction to deal with the matter. I hereby order the suit dismissed. As such, there is no appeal for me to hear. Due to the unique nature of this case and the relationship of the parties, I order that each party meets their own costs of this appeal.

**F. N. MUCHEMI  
JUDGE**

Judgment dated and delivered on the 9th day of June 2010 in the presence of Mr Onchiri for Appellant and Mr makokha for Respondent.

**F. N. MUCHEMI  
JUDGE**