



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL APPEAL NO. 105 OF 2006

*(Arising from RMCC.1071 OF 2005 of the Resident Magistrate's Court at Mombasa: **R.N. Makungu – R.M.**)*

POSTAL CORPORATION OF KENYA APPELLANT
VERSUS
SEMCO SERVICES RESPONDENT

JUDGEMENT

The Appellants herein **POSTAL CORPORATION OF KENYA**, have filed this appeal against the ruling of **HON. R.N. MAKUNGU**, the learned Resident Magistrate sitting at Mombasa Law Courts dated 5th July 2006. The Respondent **SEMCO SERVICES** have opposed the appeal. **MR. MUTUGI**, advocate appeared for the Appellant whilst **MR. OUMA**, appeared for the Respondent. It was agreed by consent that the appeal be argued by way of written submissions. The Appellants duly filed their submissions on 2nd June 2010 whilst the Respondent filed their submissions on 17th June 2010. Judgement was reserved for 11th October 2010.

The brief history of the case is as follows. The Respondent filed an ex-parte application by way of Chamber Summons dated 24th June 2005 in **RMCC No. 1071/2005** seeking an extension of time to file suit. The learned trial magistrate heard the application ex-parte and allowed the application. The Appellant thereafter filed a Notice of Motion dated 10th June 2006 seeking to set aside the ex-parte orders. This too was heard by Hon. R.N. Makungu, Resident Magistrate who delivered a ruling on 5th July 2006 dismissing the same. The Appellants have now come to the High Court seeking to set aside the orders of the lower court granting the Respondents an extension of time in which to file suit.

I have perused and given careful consideration to the record of the proceedings before the lower court, the submissions of learned counsel as well as the cases cited in support thereof.

Counsel for the Appellant argues in his written submissions that the learned trial magistrate erred in entertaining the application for extension of time on an ex-parte basis. I have looked at O 36 r(3) (2) and it specifically provides that applications of this nature may be brought ex parte. Moreover at the time such an application is being brought to court no suit as yet exists and thus there exists no Defendant as yet to be served. I do therefore reject this ground of the appeal.

I have considered S. 27(1) of the Limitation of Actions Act Cap 24 Laws of Kenya. This section provides an exception to S. 4(2) of the same act and provides

“27(1) Section 4(2) does not afford a defence to an action founded on tort [my emphasis] where”

This section **only** makes an exception for suits founded on the law of torts. In the present suit the Respondent is claiming payment for fuel consumed by the Appellant's agent therefore it is a suit based on the law of Contract. As such S. 27(1) would not be applicable to provide an exception to S. 4(2).

The learned trial magistrate relied on the case of **ORUTA & ANOTHER –VS- NYAMATO [1988] KLR 590** in which the Court of Appeal held that there was no provision in Cap 22 for an application to set aside an order to allow an extension of time. I do however agree with counsel for the Appellant that this case referred to a suit based on tort, specifically a suit for damages for personal injuries whilst the present case relates to a suit based on the law of contract. The trial magistrate excused the Respondent's failure to file suit within the time limit provided by S. 4(2) of Cap 22 on the basis that the parties were engaged in negotiations over the debt. In my view that ought not have prevented the Respondent from filing his suit even pending the outcome of those investigations. Similar arguments would apply with respect to the case of **MARY WAMBUI KABUGU –VS- KENYA BUS SERVICE LTD APPEAL NO. 195 of 1995**. This again referred to a suit based on damages sought for personal injuries which is a suit based on the law of tort. Such suits are the only ones exempted from the operations of S. 4(2) of the Limitation of Action Act. I therefore find that the learned trial magistrate erred in finding that the instant suit fell within the exemptions provided for by S. 27 of Cap 22.

I have also addressed my mind to S. 24 of the Postal Corporation Act No. 3 of 1998. S. 24(b) provides that no action shall be brought against the Corporation unless

“(b) The action or legal proceeding shall not lie or be instituted unless it is commenced within 12 months next after the act neglect or default complained of”

In this case the debt complained of accrued in the year 2002. The application seeking extension of time was not made until the year 2005 a full three (3) years after the fact and well beyond the 12 month period provided for by the Postal Corporation Act. The learned trial magistrate did not address her mind to the provisions of this Act at all. Cap 22 cannot be read in isolation. The Appellant was the Postal Corporation of Kenya and as such the court was under an obligation to take into account the provisions of its parent Act. In the case of **JOEL KIPRONO LANGAT –VS- KENYA POSTS AND TELECOMMUNICATION CORPORATION**, the Court of Appeal held that a suit brought in contravention of S. 109(a) and (b) of the [then] Kenya Posts and Telecommunications Act Cap 411 Laws of Kenya was incompetent and was dismissed on that ground alone. Cap 411 has since been repealed and replaced by the Postal Corporation Act No. 3 of 1998 of which S. 24 is the relevant section which corresponds to S. 109 of Cap 411.

The learned trial magistrate erred in failing to take into account the provisions of S. 24 of the Postal Corporation Act and further misdirected herself in considering only the provisions of the Limitation of Actions Act, thereby giving precedence to one Act of Parliament over another. In my own view greater weight ought to have been accorded to the provisions of the Postal Corporation Act since it is the parent Act which legislates on all matters involving the Postal Corporation of Kenya. For the above reasons I find that the present suit does not fall within the ambit of S. 27 of the Limitation of Actions Act. I further find that the suit is filed in direct contravention of the provisions of S. 24 of the Postal Corporation Act 1998 and as such is incompetent and does not lie. I do hereby allow this appeal and reverse the orders of the learned trial magistrate given on 5th July 2006. Costs in the cause.

Dated and Delivered in Mombasa this 11th day of October 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-
Mr. Arombe holding brief for Mr. Mutugi for Appellant
No appearance for Respondent

M. ODERO
JUDGE
11/10/2010