**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Civil Appeal 53 of 2003**

**MARANIA LIMITED……..……....……APPELANT**

**VERSUS**

**M'MUTIGA M'MWIMBI. ……..…… RESPONDENT**

**LIMITATION OF ACTIONS LAW**

**v Suit brought after expiration of prescribed – period-**

**v Leave to commence such suit to be challenged at the trial**

**v The intention of Legislature under the Limitation of Action Act is to discourage discharge of ex-parte orders – to do so would render an ex-parte order nugatory.**

**_____(Appeal from the decision of N. ITHIGA Senior Principal Magistrate in Meru Chief Magistrate's court Civil Case No. 623 of 2002)**

**JUDGEMENT**

Mr. M. Mutiga M. Mwimbi M'Mboroki (The Respondent herein) was an employee of Marania Farm Ltd (the Appellant herein). According to the plaint dated 19.09.2002, and filed on 23.09.2002 the Respondent sued the Defendant/Applicant for inter alia special and general damages, costs of the suit and interest on the special and general damages at court rates. The Plaintiff/Respondent also sought such further relief as the court may deem fit to grant.

The events which gave rise to the suit occurred four (4 years) earlier on 20.05.1995. The Plaintiff Respondent pleaded that on the night of that date at about 9.00 pm he went to assist some of the Appellants sheep deliver new kids. In tending to the sheep, the Plaintiff/Respondent fell into a ditch and/or hole which had been covered by growing grass and which he could not be expected to have seen or by any other reasonable worker on the farm. Arising from that accident the Plaintiff/Appellant sued the Defendant/applicant for special and general dmages on the grounds of negligence the particulars of which are set out in paragraph 7 of the plaint and need no in repetition here.

The plaintiff/respondent also sought terminal benefits from the Defendant/appellant for wrongful termination of his services on 26.10.2001, and claimed shs 3,150/- per month for two months.

Knowing or being properly advised by counsel that his action on negligence being a tortuous action was time-barred, the plaintiff applied for and obtained leave to file action out of time in terms of sections 27, 28 and 30 of the Law of Limitations Act. The Appellant raised this argument in its Defence dated 18th October 2002, and also pleaded negligence on the part of the Plaintiff/Respondent. In reply to the defence dated 8.11.2007, the Plaintiff denied any negligence on his part, and also denied the application of the doctrine of **res ipsa loquitur** to the case.

In the event the matter proceeded to hearing. Both parties called evidence, and the trial court delivered its judgment on 23.05.2003, apportioned negligence on 50:50% basis and awarded to the plaintiff respondent damages in the sum of Ksh.200,000/- rreduced by 50% leaving a balance of Ksh.100,000/- as the ultimate award to the Plaintiff/Respondent.

The Respondent/Appellant appeals against that award on five (5) grounds namely

**(1) That the learned magistrate erred in law and fact in refusing to look at the merits of the ex-parte leave granted to the Respondent to file suit out of time;**

(2) **The learned magistrate erred in law and fact in holding that the leave granted to the Respondent to file suit in the lower court was proper**.

**(3) The learned magistrate erred in law and fact in finding that the appellant was 50% liable for the respondents claim,**

**(4) The learned magistrate erred in law and fact by finding that the nature of injuries sustained by the Respondent merited general damages of Ksh.200,000/-**

(5) **The learned magistrate's judgment was contrary to law and against the weight of the evidence**.

Counsel for both the Appellant filed and relied upon written submissions together with annexed authorities.

The primary issue in this appeal is whether the trial court erred in law and fact in refusing to look at the merits of the ex-parte leave granted to the Respondent to file suit out of time. The other issues raised by the appeal are really subsidiary to this main issue. In point of fact counsel for the Appellant in their written submission of 22.05.2009 p.3 did submit that if that point failed then court should consider reducing the quantum awarded by the lower court.

I am of the considered view that the primary point of appeal must fail. **Firstly** because the leave having been granted by a court of cognate jurisdiction pursuant to a notice of motion dated 12.06.2002, the learned trial magistrate had no jurisdiction either to review or set aside the leave so granted. The proper course for the appellant was to apply to the High Court under its inherent jurisdiction to set aside the leave granted. **Secondly** the learned trial magistrate did actually consider the issue of leave to file suit out of time. At p. 65 -66 of the Record of Appeal the learned trial magistrate correctly observed "**I will not go to the merits or otherwise of the said leave. It was up to the court that granted leave in the ex-parte application . I have no reason to doubt that the court did consider the merits of that application before granting the said leave"**.

For the appellant to expect more from the learned trial magistrate would be to ask him to sit on appeal or review on his own ruling or that of his colleague of cognate jurisdiction.

The Court of Appeal had a similar situation in the case of **YUNES K. ORUTA & ABSOLOW OMBONG VS SAMWEL MOSE NYAMATO** (Civil Appeal No. 96 of 1984) Gachui JA while considering section 27 and 28 of the Limitation of Actions Act (under which leave may be granted to file suit outside the limitation period) and after setting out the said sections observed that they were actually in pari materia with the Limitation Act 1963, which itself was an Amendment Act of the Laws of England and Wales 1939, ss. 1 and 2(1) thereof and the interpretation of those sections in England would

be very persuasive to our courts in Kenya. He therefore referred to the English decision in the case of – **COZEN VS NORTH DEVON HOSPITAL MANAGEMENT COMMITTEE, HUNTER VS TURNESS (SOHAM) LTD [1966] 2 All ER. 276** where at p. 180 letter F. Thompson J. said-

**The Judge in Chambers accordingly is required to form on the evidence laid before him on behalf of the Plaintiff, a prima facie case as to matters which the Act contemplates will be decided (if leave be granted) only in the action itself. These matters are**

**(i) Has the plaintiff a good cause of action?**

(ii) **Does the plaintiff fulfill the requirements of sub-section (3) of Section?**

In our law, subsection (3) of Section 1 is the same as subsection (2) of Section (2) of section 27 of the Limitation of Actions Acts, (Cap 22, Laws of Kenya).

The decision of Thompson J. was upheld by the English court of Appeal in **COZENS VS NORTH DEVON HOSPITAL MANAGEMENT COMMITTEE OF ANOTHER [1966]2 ALL E.R. 799** where the majority of the court **(Lord Denning MR AND DANCWARTS LJ**) in dismissing the Appellant's appeal against the refusal to set aside the ex-parte order (as in the present appeal) held –

"**Although it was a general principle in regard to ex-parte orders that the party affected by the order could apply for it to be discharged, yet it would be contrary to the intention of the Limitation Act 1963 to allow a defendant to apply before the trial of the action, to set aside an ex-part order obtained under section 2(1) giving leave for the purpose of section 1(1) (a)".**

In this case therefore, the appellant properly queried the grant of leave at the trial but the order granting leave having been granted by a court of cognate jurisdiction as stated above, the trial court could not deal with the matter and the decided the case on the evidence, and therefore material before him.

I have considered the evidence before the trial court and I am persuaded that the trial court came to a correct decision in law and fact in finding liability for negligence for the Respondent's injuries to the extent of 50% to the Appellant and 50% to the Respondent.

The Respondent was a watchman in a farm with a herd of sheep and other animals. It is his duty to acquaint himself with the general layout of the farm, know the pits and the ridges both for the benefit of the farm animals, and also for the watchman's own welfare. It would be his duty at night to ensure that no animal jumped over the fence or fell into a hidden pit and got lost in the night. It would equally be the duty of the employer or farm management to ensure that a watchman is equipped for night duties, that he has adequate protective clothing, and means to see at night and locate his sheep and other animals; that he is supplied with an additional lantern or good bright torch with regular and adequate supply of batteries should electricity light be disrupted.

In this case, it was the Respondent's evidence that the grass was overgrown in some parts of the farm where the sheep grazed or were kept for the night. While going to help one of the sheep in distress of giving birth to a new kid, the respondent fell into one of those hidden holes and suffered a fracture of the left fibula bone. A farm owner has a general duty of care to his workers including watchmen that his grounds are not traps for the unwary, and where a watchman suffers injury as a result of negligence of that duty the farm owner like any other occupier will on proof such negligence be liable for the injury or injuries sustained by the worker. That is what the learned trial magistrate found.

Being therefore of that mind, I am unable to say as the appellant suggests, that the learned Magistrate's judgment was contrary to law or that it was against the weight of the evidence.

The Appellants Memorandum of Appeal dated 4th June 2003 and filed in court on 6th June 2003 is therefore dismissed with costs in appeal and also in the lower court.

I further direct that the moneys held  in the Advocates joint bank account be released to the Respondent's Advocate for onward payment to the Respondent.

There shall be orders accordingly.

Dated, delivered and signed this17th .day of Julyf 2009

**ANYARA EMUKULE**

JUDGE