



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

**Civil Appeal 50 of 2003**

**THE HON. THE ATTORNEY-GENERAL**

**SOSPETER KARIUKI KINARA..... APPELLANTS**

**-AND-**

**CHRISTINA KULOLA..... RESPONDENT**

*(An appeal from the judgment and decree of Principal Magistrate Mrs. L. Achode dated 21<sup>st</sup> March, 2003 in CMCC No. 3346 of 2000 at Mombasa Law Courts)*

**JUDGMENT**

After the learned Principal Magistrate rendered her judgment, the appellants moved this Court, thus contending:

- (i) that the trial Court erred in law, in not finding that the respondent's suit was time-barred, by virtue of the provisions of the Public Authorities Limitation Act (Cap. 39, Laws of Kenya);**
- (ii) that the learned Magistrate erred in fact and in law in finding that leave to file the respondent's suit out of time had been properly granted;**
- (iii) that the trial Court erred in fact and in law in finding that the appellants herein had not taken up the limitation issue during cross-examination;**
- (iv) that the trial Court erred in fact and in law, in placing upon the appellants the burden of showing that leave for suit to be filed out of time was not properly obtained;**
- (v) that the trial Court erred in law and in fact, in failing to appreciate the "clear evidence" that was before it;**
- (vi) that the trial Court erred in law and in fact in finding that the respondent's stated reason for**

***filing suit out of time was a material fact;***

***(vii) that the learned Magistrate erred in law and in fact in finding that the delay in issuing letters of administration was a good reason for granting leave to file suit out of time;***

***(viii) that the learned Magistrate erred in law and in fact in considering “totally irrelevant factors”;***

***(ix) that the trial Court erred in law and in fact, in “purporting to ignore the clear provisions of the Limitation of Actions Act (Cap.22), and [the] clear decisions [on the matter] of the Court of Appeal”;***

***(x) that the learned Magistrate erred in law and in fact “in awarding damages that were too high”;***

***(xi) that the Magistrate erred in law and in fact in awarding special damages of Kshs. 11,025/= when the same was not strictly proved as required by law;***

***(xii) that the learned Magistrate erred in law and in fact in allowing herself to consider “irrelevant factors” in awarding damages;***

***(xiii) that the learned Magistrate erred in law and in fact in failing to dismiss the suit with costs to the appellants.***

On the foregoing grounds, *inter alia*, the appellants were praying for an order reversing the judgment and decree of the trial Court; and in the alternative, the appellants were seeking an order setting aside the judgment and decree of the trial Court, substituting it with a decree dismissing the respondent’s suit with costs. The appellants were also seeking an order for the costs of this appeal.

***Mr. Mwangi Njoro***, the Principle Litigation Council in the Attorney-General’s Office, urged that since the suit was against the Attorney-General, it amounted to Government Proceedings under the Government Proceedings Act (Cap. 40, Laws of Kenya), and the applicable law on limitation of actions was to be found in the Public Authorities Limitation Act (Cap. 39, Laws of Kenya).

It was submitted that the plaint was dated 28<sup>th</sup> August, 2000 and filed on 30<sup>th</sup> August, 2000; and the cause of action, which was in tort, arose on 14<sup>th</sup> March, 1999; the amended plaint, which gave the date of the alleged tort as 14<sup>th</sup> March, 1999, ought to have been filed by 13<sup>th</sup> March, 2000: and so the suit was time-barred under s.3(1) of the Public Authorities Limitation Act (Cap. 39, Laws of Kenya) by some six months - a fact acknowledged in the judgment. This delay in filing suit was pleaded in the statement of defence (para.4); but no order extending time for filing suit was produced in Court. Counsel urged that this point was raised during cross-examination. The respondent’s answer had to do with the length of time that was taken to obtain letters of administration.

Counsel urged that the length of time taken to obtain letters of administration was not a reason envisaged under the extension-of-time provisions in Part III of the Limitation of Actions Act (Cap. 22, Laws of Kenya), which, by s. 6 of the Public Authorities Limitation Act (Cap. 39), applies to this other statute (Cap.39).

Counsel urged that no exception for delayed filing of suit could be made in the instant case, by virtue of s.27(2) of the Limitation of Actions Act: the plaintiff did not allege any lack of knowledge of material facts relating to the cause of action.

Learned counsel urged that the evidence in the affidavit supporting the application for extension of time was not produced as an exhibit, for consideration by the trial Court: and thus the Court had no basis for deciding that there was good reason for filing the suit out of time.

**Mr. Njoroge** further submitted that since the defendants had raised the limitation issue in the statement of defence, “the Court had no alternative but to be on the look-out for any evidence by the plaintiff justifying the filing of suit out of time.”

Counsel urged that the defendant should not be shouldered with the plaintiff’s burden of bringing herself within the exception – provisions of s.27 of the Limitation of Actions Act; and by that section, it is required that the material facts forming the cause of action, be not within the plaintiff’s knowledge, for her to obtain extension of time; but in this case, the plaintiff did not plead a lack of knowledge of the material facts.

Counsel submitted that the damages awarded were inordinately high based on a multiplier of 14 years, and a dependency ratio of two-thirds; the appellants had proposed a multiplier of 10 years, and a dependency ratio of one-third. It was urged that the trial Court failed to consider that the deceased was not the sole contributor to the family’s upkeep. The Court did not take into account the deceased’s widow’s admission that she had been running a shop which generated income for the family; and she also admitted that she was still earning income from the deceased’s rental houses in Mombasa and Voi.

Counsel urged that the trial Court had given Kshs. 11,025/= without a basis; it was not in the evidence, and was not mentioned at all, nor was any document produced to support it.

It was urged that the Court should have taken into account that the deceased was not a sole bread-winner; there was alternative income after his death: and these considerations should have lowered the dependency ratio.

Learned counsel **Mr. Omondi**, for the respondent, urges that the substratum of the appeal centres on the question of limitation; but he submits that “it is not in dispute that the respondent sought and was granted leave to file the suit out of time”, and the relevant application for leave [respondent’s Originating Summons of 17<sup>th</sup> August, 2000] is part of the appellant’s record of appeal.

Counsel urged that “once leave is granted, it is for the defendant to challenge it at the trial”; but that in the instant case “the appellant did not offer any challenge to the leave”. Counsel recalled the findings of the trial Magistrate, on the point (p.33 of the record of appeal);

***“Without evidence to challenge her position this Court finds that delay was attributable to the delay in the issuance of...limited [grant of] letters of administration. The court therefore finds that leave to file suit out of time was properly granted.”***

Counsel submitted that the level of damages awarded by the trial Court was reasonable. The deceased was a civil servant aged 36 years, at the time of his death, occasioned by a motor vehicle belonging to and managed by a Government Department. It was urged that the multiplier of 14 was reasonable as the deceased would have retired at the age of 55 years; and the multiplicand of 4,235 was based on figures shown on the deceased’s payslip.

Counsel submitted that the dependency ratio of two-thirds, applied by the Court, was fair – considering that the deceased was a married man, with two school-going children; he also had parents, for whom he provided support; and the respondent too, depended upon the deceased. It was urged that a dependency ratio of two-thirds was the conventional one for a married man with children – and thus, to adopt the lower ratio of one-third, “would result in grave injustice”.

Of the sum of Kshs. **11,025/=** in special damages, counsel urged that it was well founded. It was in the evidence that the respondent had paid Kshs. 11,000/- as mortuary fees, and Kshs. 9,257 to obtain a limited grant of letters of administration and in respect of these items, official receipts had been produced (p.26 of the record of appeal).

Learned counsel noted that the determination of liability had been founded on a consent – and the liability was apportioned on the basis of 50%-50% in respect of each party.

As already noted, the fulcrum around which the appellants' case turns is the limitation period. I have extracted that part of the trial Court record which shows that the trial Court, after adverting to the point, in its judicial finding, came to the position that the limitation point had not been seriously canvassed; and to the finding that leave was properly obtained by the plaintiff/respondent, for a delayed filing of suit. Upon that foundation, the trial Court proceeded to consider several questions of merit, and to determine the case as it did, issuing orders as in its discretion, it deemed appropriate. It is not for this Court to reverse exercises of judicial discretion, quite properly arrived at by the trial Court. Accordingly, the contention of the appellants founded on limitation of actions, is refused.

Upon considering all the other points raised on appeal, I find myself in agreement with learned counsel for the respondent, that the trial Court was properly guided on the question of liability, and in the assessment of damages including the special damages. I have no doubts that the trial Court's judgment and decree is for upholding, as the basis of the rights and liabilities due, appropriately, to the parties.

I hereby dismiss the appeal, with costs to the respondent.

***Orders accordingly.***

**DATED and DELIVERED at MOMBASA this...26.th.day of November, 2009.**

**J. B. OJWANG**

**JUDGE**

Coram: ***Ojwang, J.***

Court Clerk: ***Ibrahim***

For the Appellants: ***Mr. Njoroge***

For the Respondent: ***Mr. Omondi***