



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 65 of 2005

KENYA POWER & LIGHTING COMPANY LIMITED.....APPELLANT

VERSUS

MUTAVA NZANU NGUU.....RESPONDENT

JUDGMENT

The appellant was originally sued in Senior Principal Magistrate's Court at Kiambu in Civil Suit No. 645 of 1997. This suit was filed on 7th August 1997, and the cause of action arose on 4th November 1981. By an order made on 28th April 1999 by the Kiambu Resident Magistrate, the suit was ordered to be transferred to either to Eldoret Law Courts or Kabarnet since the accident occurred at Kericho. The record does not show how the suit ended up before the Chief Magistrate's Court at Nakuru. Be that as it may, the suit was tried on 24th February 2005 and judgment was delivered on 13th May 2005. This is the judgement which is the subject of this appeal.

In that suit, the respondent sought for compensation for injuries he suffered while working for the appellant. The respondent claimed that he was exposed to risk while fixing wires at Eldama Ravine in the cause of his work. An electric pole snapped and hit him on his back. As a result, he sustained the following injuries:

- (a) Injuries of lumbar spine,
- (b) wastage of paravertebra muscles
- (c) Back trauma
- (d) Arthritis
- (e) Impotence

The respondent blamed the appellant for the accident and relied on the particulars stipulated in the plaint. The appellant filed a defence denying liability and in the alternative attributed the negligence to the respondent who failed to exercise proper care and attention while carrying out his duties. The appellant also pleaded in the defence that the suit was untenable because it was filed out of time and in contravention of the provisions of the Limitation of Actions Act.

The respondent gave evidence during the trial and relied on the evidence of Dr. Abed

Omuyoma who examined the plaintiff on 17th December 2004. He confirmed the plaintiff suffered injuries which he classified as harm. The doctor told the court that he relied on the information found in the Form LD 104 Notice by Employer of Accident causing an injury to a workman. This form was filled on 26th November 1981 regarding the appellant's accident which occurred on 4th November 1981.

The plaintiff also testified that he was working with the appellant at Timboroa Forest, and while they were fixing posts the rope cut and the post fell on him. He was injured on the back. He was hospitalised at Eldoret Hospital for two days where he was treated. As a result of the accident he continues to suffer back pain and became impotent therefore he could not sire any more children. He produced the LD 104 form which was completed by the employer in November 1981. He said that he filed a case in Kiambu for the extension of time to file the suit out of time which was given on 16th June 1997, by the Senior Principal Magistrate Kiambu in Misc. Civil 152 of 1996.

During cross-examination, the respondent indicated that he had worked with the respondent between 1981 to 1993 when he retired on medical grounds. He contended that his boss took away the papers and promised to pay him for the injuries but he was not paid. Thus, he proceeded to apply for leave to file the suit out of time. He said the reason why he filed the suit late was because he was also on treatment. After evaluating the above evidence the learned trial magistrate apportioned liability at 80% to the appellant and 20% to the respondent. On quantum the respondent was awarded Kshs 180,000/= for general damages, less 20% contribution making a total Kshs 144,000/= with costs and interest.

Being aggrieved by the said judgment, the appellant appealed on the single ground of appeal that the trial magistrate erred in law for failing to uphold the defence of limitation.

Counsel for the appellant argued that the trial court should have addressed the issue of limitation during trial. The cause of action arose on 4th November 1981 and the suit was filed in August 1997, that is after sixteen (16) years since the cause of action arose. The respondent did not give any reasons why it took him sixteen (16) years to file the suit. Counsel also submitted that the leave which was purportedly given by the Senior Principal Magistrate Kiambu was a nullity since no Originating Summons was filed as required under **Order 36 (3)(c)(i)**. Moreover, the court that can grant leave is the High Court and not the Subordinate court. Besides that, the respondent did not adduce evidence regarding the issue of limitation which was critical to his suit and since the appellant could not challenge the leave granted *ex-parte* all they could do was cross-examine the respondent and address the issue substantively in their submissions as a legal issue.

In the case of **Yunes K. Oruta & Anor. vs. Samwel Mose Nyamato CA. Civil Appeal No. 96 of 1984** the Court of Appeal held that in a claim based on personal injuries and where an *ex-parte* order of leave to file the suit was obtained *ex-parte*, that order can only be queried at the trial and the court cannot be called upon to discharge it otherwise. In this case, the Learned Trial Magistrate had a duty to consider the defence of limitation of time. The court merely observed that leave to file suit was obtained despite the fact that it was challenged.

On the part of the respondent, this appeal was opposed on the grounds that the appeal was filed one year after the decree had been issued and after the respondent filed an application to dismiss the appeal for want of prosecution. On the issue of limitation, the plaintiff testified that the appellant took away the document and promised to pay him for the injuries, which is a justifiable reason. The fact that the documents were taken away prevented the respondent from filing the suit and also the fear of being sucked. Leave was properly granted to the respondent and it was admitted during the hearing and it is too late for the appellant to doubt its authenticity during the appeal. The appellant did not adduce any evidence to contradict any of the evidence by the respondent. Counsel therefore urged the court to allow the appeal.

The issue for determination in this appeal is whether the appellant's defence of limitation of period within which to file suit should have been upheld by the trial magistrate. Under **section 4(2)** of the **Limitation of Action Act (Cap 22)** it is provided that:

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action occurred.”

Under **section 27** of the same Act:

“the period within which to file suit can be extended if the plaintiff can prove that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside his knowledge.”

The reasons given by the respondent was that the appellant took possession of the documents (*which I assume is the LD 104*) this is the only document which was produced in evidence dating 1981, and promised to pay for the compensation. Further, the respondent was afraid of filing suit against the appellant for fear of being sacked. In his evidence the respondent testified that he was retired from employment in 1993 yet the suit was filed in 1997, about four years later. The respondent does not seem to say that he was not aware of the cause of action. He was all along aware of material facts as defined under **section 30** of the **Act** which provides as follows:

“(a) The fact that personal injuries resulted from the negligence”

(b) the nature or extent of the personal injuries resulting from that negligence.....”

(c) the fact that the personal injuries so resulting were attributable to that negligence.....”

Under the same **section 30(3)** a material fact will be taken to have been outside the knowledge of a person if, but only if,

“a) he did not know that fact, and

b) In so far as that fact was capable of being ascertained by him, he had taken all such steps as it was reasonable for him to have taken before that time for the purpose of ascertaining it; and

c) In so far as there existed and were known to him circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances.”

Bearing the above considerations in mind, it is obvious that the respondent was aware of the cause of action and the only reason that stopped him from filing suit was fear of reprisal from the appellant. I am not satisfied that the respondent needed form LD 104 to file suit. Even if he did, he left employment in 1993, when he was aware of the cause of action and it was not until June 1997 that he obtained leave to file the suit. The respondent should have obtained leave immediately if this fear of being sacked were to be taken to be a justifiable reason for not filing the suit within the limitation period.

This court is of the view that, there is a reason why the legislature provided for the limitation period in the Act and even went as far as detailing the circumstances under which the period can be extended. The reasons given by the respondent do not fall within the matters envisaged under **section 27**. Even if they did, the respondent did not take appropriate and reasonable steps to obtain the leave of the court to file suit within a reasonable time, after leaving

employment.

For the above reasons, I find the Learned Trial Magistrate should have considered the defence of limitation in her judgment. The leave which was granted by the Senior Principal Magistrate at Kiambu was challenged, and the appellant was entitled to a finding in the judgement. If this was done, the trial court would have arrived at a different conclusion that this suit was untenable in law. Accordingly the appeal is allowed. The judgment by the trial court is hereby set aside with costs to the appellant.

Judgment read and signed on 9th day of May, 2008

M. KOOME

JUDGE