



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 522 of 2006

PETER KIMANI NDAI.....1ST APPELLANT

KENYA AGRICULTURAL RESEARCH INSTITUTE.....2ND APPELLANT

VERSUS

PETER GITAU NJOROGE.....RESPONDENT

J U D G M E N T

This is an appeal arising from a suit which was commenced by way of a plaint dated 29th December, 2003 filed on 1st October, 2003 at the SRM's Court in Githunguri. The suit which was grounded on negligence was filed out of time by Peter Gitau Njoroge (hereinafter referred to as the respondent) pursuant to leave granted to the respondent, in CM's Court Thika Misc. Application No. 59 of 2003 on 1st of October, 2003. In the suit the respondent sought to recover general and special damages from Peter Kimani Ndai, Kenya Agricultural Research Institute (hereinafter referred to as 1st and 2nd appellants), and Mbugua Muturi, for personal injuries arising from an accident involving motor vehicle Reg. No. KSR 680 owned by Mbugua Muturi and motor vehicle Reg. No. KAD 061M owned by the 2nd appellant.

The suit was heard by Ms. Lucy Mutai, Senior Resident Magistrate. During the trial in the lower court the respondent testified that on the 5th of June, 1996, he was traveling in a Nissan Matatu Reg. No. KSR 680 when it was involved in an accident with a Land Rover Reg. No. KAD 061M. The respondent blamed the 1st appellant who was the driver of the motor vehicle KAD 061M for the accident. He claimed that the motor vehicle was being driven on the wrong side of the road. As a result of the accident the respondent sustained injuries and had to be admitted in hospital.

Simon Kariuki Nganga who claimed to have been a passenger in the matatu KSR 680 at the time of the accident also testified. He claimed that the driver of the Land Rover KAD 061M was to blame for the accident.

A medical report which was prepared by Dr. Otiato who examined the respondent, and a police abstract report of the accident, were both produced in evidence without calling the makers, by consent of the parties counsels. The 1st and 2nd appellants filed a joint defence in which they denied the respondent's claims of negligence, and in the alternative claimed that the respondent's suit against them was statute barred. Mbugua Muturi also filed a defence denying the respondent's claim and contending that the accident was solely or substantially contributed to by the negligence of the 1st appellant. There was

however no witness who testified on his behalf.

The 1st appellant testified contending that the accident was caused by the Nissan matatu which was being driven at a high speed and which swerved on to the path of the land rover in an effort to avoid a donkey-cart. As a result of the accident the 1st appellant was charged with a traffic offence. During the trial both counsels for the appellants and respondents filed written submissions. The issues raised in the submissions included whether leave to file suit out of time was issued against the 2nd appellant, whether leave to file suit out of time was properly granted and whether the respondent's suit against the appellants was valid. Submissions were also made on the issue of liability and quantum.

In her judgment, which was delivered on the 6th of July, 2006, the trial magistrate found that leave was properly granted for the respondent to file suit out of time and that the suit brought by the respondent was not a nullity the same having been brought on the same day that leave was granted. On the issue of liability the trial court found that the accident was caused by the negligence of the drivers of the two motor vehicles. The trial magistrate apportioned liability at 90% as against 2nd appellant and 10% as against Mbugua Muturi. She awarded general damages of Kshs.400,000/=.

Being dissatisfied with that judgment, the 1st and 2nd appellants filed a memorandum of appeal before this court in which they have raised 10 grounds of appeal. The grounds of appeal generally fall into three areas. First is the issue of limitation, i.e, whether the leave to file suit out of time was properly granted to the respondents and if so whether there was leave to file the suit against the 2nd appellant. Secondly, on the issue of liability as to whether there was sufficient evidence of proof of ownership of the motor vehicle KAD 061M. Thirdly, was the issue of damages.

During the hearing of the appeal the advocate for the appellants abandoned the ground relating to damages. Counsel for the appellants submitted that leave to file suit out of time, ought not to have been granted to the respondent since he did not meet the requirement of Section 27 and 28 of the Limitation of Actions Act. Counsel submitted that the trial magistrate failed to inquire into the circumstances and reasons for which the court granted leave to the respondent to file suit out of time. Counsel maintained that the explanation of ill health given by the respondent was not sufficient to meet the requirements of Section 27 and 28 of the Limitation of Actions Act. The court was referred to the case of *Oruta & Another vs Nyamato 1988 KLR 490, Ngari and another vs Odera 1999 2EA 241, Nancy Njeri Njuguna vs Peter Okumu and the AG. HCCC.229 of 2001, Zacharia B. Shemichero vs AG and Another HC. Misc.Civil App.60 of 2005, and Nyambura Kamuyu vs Douglas John Francis & Another HCC.3485 of 1992.*

On the issue of ownership of the motor vehicle it was submitted that in the absence of a record from the registrar of motor vehicles, the police abstract report was not sufficient to prove ownership of the motor vehicle. In this regard the case of *Karauri vs. Ncheche (1995 – 1998)1EA 87* was relied upon. It was further submitted that there was no evidence to support the trial magistrate's finding on the issue of negligence.

The respondent's counsel urged the court to distinguish the authorities relied upon by the appellant's counsel contending that they related to mistake or error by counsel, which was not the case herein. Counsel for the respondent urged the court to follow the case of *Oruta & Another vs Nyamato (Supra)* wherein it was held that:

“Reading the Limitation of Actions Act closely, it was not the intention of the legislature to allow a claim based on personal injuries on account of negligence and nuisance or breach of duty to be met with defence of limitation”.

The court was urged to find that the respondent having produced the order granting him leave to file his suit out of time it was for the appellant to call for evidence showing that the leave was granted inappropriately. It was submitted that appellants did not adduce such evidence in the lower court. It was maintained that the extension of time granted to the respondent for filing the suit out of time was for the

particular cause of action and did not limit the respondent to particular parties. The case of *Nyambura Kamuyu vs Douglas John Francis & Another* (Supra) which was cited by the appellant's counsel, was distinguished, as the applicant therein sought to amend the pleadings to enjoin a party ten years after the course of action accrued, without a prayer for extension of time.

Counsel for the respondent urged the court to follow *H.C.(Nakuru) OS 198 of 1997 Moses Kimutai vs Onaye Balonzi Bus Company & Another, wherein Ondeyo J.* granted leave to an applicant to file his suit out of time, for reasons that due to the extent of his injuries he did not know that he was required to sue the defendant within a period of three years. On the issue of ownership of the motor vehicle it was submitted that the appellants own witnesses had confirmed ownership of the motor vehicle.

I have carefully reconsidered and evaluated the evidence which was adduced before the lower court. I have also considered the submissions made before me and the authorities cited. From the pleadings which were before the lower court, it is evident that at paragraph 2 of their statement of defence, the appellants denied the contents of paragraph 5 of the plaint and put the respondent to strict proof. Paragraph 5 of the plaint stated that the respondent was a passenger in a motor vehicle Reg. No. KSR 680 and that the 1st appellant was the authorized driver, servant and or agent of the 2nd appellant, the registered owner of motor vehicle Reg. No. KAD 061M. In his evidence the respondent did not call any evidence to prove that the 2nd appellant was the owner of the motor vehicle KAD 061M or that the 1st appellant was an agent of the 2nd appellant.

Reliance was placed on the police abstract report which was produced in evidence by consent of the parties. I have perused the original police abstract report which was produced in the lower court. I do not find any mention of the 2nd appellant in the abstract report nor is the owner of this particular motor vehicle KAD 061M indicated. In his evidence in the lower court, the 1st appellant stated that in the year 1996 he worked at KARI, Muguga, and that on the material day he was driving motor vehicle Reg. No. KAD 061M. Nowhere in his evidence has the 1st appellant stated that the motor vehicle was owned by the 2nd appellant.

In her judgment, the trial magistrate unfortunately misdirected herself when she stated that the 1st appellant "***in his evidence admitted being the driver of the vehicle Reg. No. KAD 061 at all material time and owned by the 2nd appellant.***" The trial magistrate did not therefore address the pertinent issue of the ownership of motor vehicle KAD 061M and the paucity of evidence from the respondent. I find that there was no evidence to support the trial magistrate's finding that Motor vehicle KAD 061M was owned by the 2nd appellant or that the 2nd appellant was vicariously liable.

On the issue of limitation, it is not disputed that the respondent's cause of action arose on the 5th of June, 1996 and therefore as at 1st October 2003, the suit stood statute barred hence the need for the order extending time for the respondent to file the suit out of time. Contrary to the assertions made by the appellants' counsel, the respondent's suit was not filed before the order granting leave for extension of time, but was filed on the same day that leave was granted.

It is evident from the order issued in *CM's court (Thika) Misc. Application NO. 59 of 2003*, granting leave to the respondent to file the suit out of time that the respondent presented himself as the intended plaintiff and indicated Peter Kimani Ndai as the intended defendant. In his judgment, the trial magistrate held that the leave sought by the respondent was for a specific cause of action and whether the appellants were named thereon was immaterial as long as the respondent was able to show that the said cause of action indeed affected the appellants. That finding was erroneous as the leave granted to the respondent specifically related to the cause of action against the person indicated in the application and cannot be extended to any other unnamed persons. Moreover, the respondent himself stated under cross-examination that he only intended to sue Peter Kimani (i.e. 1st appellant). In the circumstances the suit against the 2nd appellant cannot stand as the same was statute barred and there was no specific leave for that suit to be brought out of time as against the 2nd appellant.

Further, on the issue as to whether the leave to file the suit out of time was properly granted, in the case of *Oruta and Another vs Nyamato (Supra)* which was referred to by both Counsels, it was held that an order for leave to file a suit out of time can only be queried at the trial.

In the case of *Ngari and Another vs Odero (1999) 2EA 241*, the court of appeal held that the requirements of Sections 27 and 28 of the Limitation of Actions Act are stringent and the court must be satisfied that they are met before granting an application to file suit out of time. It was further held that an objection regarding the granting of leave to file suit out of time can only be brought at the hearing of the main suit.

In this case the appellants properly raised their objection to the granting of leave to file the suit out of time as an issue in the suit to be determined at the trial. It was therefore for the trial court to inquire into whether the conditions set out under Sections 27 and 28 of the Limitation of Actions Act had been met at the time of granting the order for leave to file the suit out of time.

Section 27 and 28 of the Limitation of Actions Act states as follows: -

(1) Section 4(2) does not afford a defence to an action founded on tort where: -

(a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and

(b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and

(c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

(d) the requirements of subsection (2) are fulfilled in relation to the cause of action.

(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which: -

(a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

(b) in either case, was a date not earlier than one year before the date on which the action was brought.

(3) This section does not exclude or otherwise affect: -

(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

28. (1) An application for the leave of the court for the purposes of Section 27 shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.

(2) Where such an application is made before the commencement of a relevant action, the court

shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient:-

(a) to establish that cause of action, apart from any defence under Section 4(2); and

(b) to fulfill the requirements of section 27(2) in relation to that cause of action.

(3) Where.....” (Not relevant).

From the above it is evident that to justify the granting of leave to file a suit out of time an applicant must satisfy the following conditions: -

1. That the claim is one for damages for negligence, nuisance or breach of duty.
2. That the claim consists of or includes damages for personal injuries.
3. That material facts relating to the cause of action including facts of a decisive character, were at all times outside the actual or constructive knowledge of the applicant until a date after the 3 year limitation period or a date not earlier than one year before the end of the Limitation period.
4. That the action was brought not more than one year from the date the facts came to the applicant's knowledge.
5. That the applicant has adduced evidence upon which the court is of the view that if the action was brought, that evidence would in the absence of any evidence to the contrary, be sufficient to establish the cause of action, and also fulfill the requirements of Section 27(2) in relation to that cause of action.

In this case although the granting of leave was questioned in the pleadings, the respondent did not offer any evidence regarding the circumstances in which the leave to file the suit out of time was obtained.

The respondent simply contended himself with producing a copy of the order. Under cross-examination the respondent explained that he was seriously injured, that is why there was delay in filing the suit. He explained that he consulted a lawyer and told him about the accident but the lawyer did not proceed to court since the respondent had not fully recovered.

Although the trial magistrate acknowledged that that the appellants questioned the order granting leave to file the suit out of time contending that the same was not grounded on the lack of knowledge of material facts relating to the cause of action but due to errors on the part of his advocate, the trial magistrate stated as follows: -

“I find that that court that issued the orders must have had in its mind the requirements of the said Sections vis a vis the affidavit in support of that application and the Counsel's submission when it went ahead to grant the orders. I believe that for that court to have allowed the application it must have satisfied itself that the requirements of the aforesaid Sections had been met. Besides this court did not have the opportunity of perusing the said application to note what was contained in the plaintiff's affidavit when seeking for the said leave notwithstanding the fact that in his evidence and on cross-examination he told the court that he delayed in bringing the suit to court within time because he attended hospital for too long.”

It is apparent from the above that the trial magistrate shied away from her responsibility of inquiring into whether the conditions set out under Sections 27 and 28 of the Limitation of Actions Act had been met at the time of granting leave, taking the view that such an inquiry must have been made by the court which granted the order. That was obviously a wrong approach as the trial court was obligated to reconsider the circumstances and make a specific finding.

Further it was upon the respondent to satisfy the trial court that the conditions set out in Section 27 and 28 of the Limitation of Actions Act were met. That burden did not at all shift to the appellants. Apart from the feeble claim that the suit could not be filed because he was still unwell, the respondent did not identify any material facts relating to the cause of action which were not within his actual or constructive knowledge.

There was therefore no evidence upon which the court could conclude that the conditions set out in Sections 27 and 28 of the Limitation of Actions Act with regard to granting leave for filing suit out of time as set out hereinabove were fulfilled. The appellants contention that leave to file the suit out of time was inappropriately issued, was therefore not without substance.

Consequently I find that this appeal must succeed as the respondent did not satisfy the court that the conditions for granting leave to file suit out of time, were met. Secondly there was no leave to file the suit against the 2nd appellant, thirdly, there was no evidence to establish that motor vehicle KAD 061M belonged to the 2nd appellant or that the 2nd appellant was vicariously liable. Accordingly I set aside the judgment of the lower court against the 1st and 2nd appellants and substitute it thereof with an order dismissing the respondent's suit.

Those shall be the orders of this court.

Dated this 7th day of May, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Kihara for respondent

Erick – Court clerk