



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 700 of 2003

BOC KENYA LIMITED APPELLANT

VERSUS

JOSEPH KINUTHIA KARANJA 1ST RESPONDENT

PATRICK KARANJA KINUTHIA 2ND RESPONDENT

(An appeal from the Judgment and Decree of Honourable N.A. Owino in the Milimani CMCC No. 7449 of 2002 dated 25th day of September, 2003)

JUDGMENT

This Appeal arises out of the decision of the Lower Court to award special and general damages to the Respondents for injuries sustained following an explosion of a gas cylinder manufactured and sold by the Appellant.

Although there are seven grounds of Appeal listed on the Memorandum of Appeal, the Appellant chose to pursue only two grounds, namely (i) that the ex parte leave to extend time for filing suit was irregular, and (ii) that the affidavit in support of the application for leave was sworn only by one Plaintiff, and, therefore, the other had not obtained leave.

It is not in dispute that the accident and injury giving rise to the cause of action here took place on 9th January, 1999. This action was filed on 23rd September, 2002, more than four years after the cause of action arose. Clearly, the Respondents (Plaintiffs in the Lower Court) needed leave to file suit out of time. They made an ex parte application for that purpose, and were indeed granted leave on 19th September, 2002, as is indicated on the Plaint.

An application for leave to file suit out of time is generally made **ex parte** under Section 27 of the Limitation of Actions Act, Cap 22. In this case too, that application was made, and leave granted, **ex parte**. The Appellant (Defendant) clearly had a right to challenge leave at the trial, and, indeed, it did so. First, and most importantly, it did so in the Statement of Defence. Paragraph 2 of the Defence states:

“The 1st defendant avers that the plaintiff’s suit is bad in law as it offends the provisions of the Limitation of Actions Act Cap 22 of the Laws of Kenya

only, during the cross-examination of the First Plaintiff, the issue of the late filing of the suit was

raised (see page 31). Thirdly, at the submissions stage, the Appellant's Counsel again re-visited the issue. He made detailed submissions on why leave should never have been granted in the first place, and he properly relied on the Court of Appeal decision in Divecon Ltd v. Shiruikhanu D. Samnani (CA 142 of 1997).

And what was the learned Magistrate's response to all this? A curt and completely inaccurate five lines in the Judgment which states as follows:

"The issue of obtaining leave to file this suit out of time was not challenged during the hearing. Counsel for the defendant is therefore estopped from raising the issues in the submissions as this amounts to testifying from the bar. Suffice to say however that leave to file suit out of time was granted by a court of competent jurisdiction. The reasons given were sufficient."

The Lower Court simply did not deal with what I believe was the most important part of the Defence – that the suit was time-barred! And the Court was inaccurate in its Judgment that the Defendant had not "challenged" the issue of leave. Clearly, it had – in three different ways, as I have indicated.

The Lower Court was completely wrong in denying the Defence to invoke its challenge to the leave that was granted to file the suit out of time, and on that ground alone, this Appeal must succeed, and ordinarily I could remit the file back to the Lower Court with a direction that the Defence plea be considered on its merit, and a Judgment pronounced on that important issue. However, this being an old case, no useful purpose will be served by doing so. The facts are not in dispute, and the record is clear. I will invoke my inherent jurisdiction and simply deal with the matter.

In the application for leave to file suit out of time, the Respondents admitted that the cause of action arose on 9th January, 1999. But the only reason cited for failing to file suit in time is that they were awaiting a report from the Government Analyst regarding the Respondent's negligence.

That, in my view, is not a valid reason not to file suit in time. What the Respondents were waiting for is "evidence", and delivery of late evidence is not a good reason not to obey the statute of limitations.

In the case of **Divecon** (supra), the Court of Appeal outlined in detail the circumstances under which the Court can grant extension of time for filing suits in tort cases, **and held that the Plaintiff must prove that material facts relating to the cause of action were outside his knowledge.**

The facts in this case are not in dispute. The Respondents knew exactly what caused the accident, but chose to wait for more than four years before filing suit. There was no basis in law to have granted them leave to file the suit out of time.

Accordingly, **I would allow this Appeal; strike out the Plaintiff filed in the Lower Court on the grounds that it was statute barred; and set aside the Lower Court Judgment. The Appellant shall have the costs, both here, and in the Lower Court.**

Dated and delivered at Nairobi this 6th day of March, 2007.

ALNASHIR VISRAM

JUDGE