REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO 332 OF 2004

SIMON KIARIE (A minor suing through his Uncle

and next friend JOHN MBUGUA MUIGAI) ……..……...… APPELLANT

VERSUS

SAMWEL MUIGAI THUKU ……..……. RESPONDENT

(An appeal from the Judgment of Hon. Muthoni Mburu, RM in Limuru Civil Case Number 372 of 2003 consolidated with Civil Case Number 373 of 2003 delivered on 22nd April, 2004).

JUDGMENT

This appeal relates to two suits from the lower court which were consolidated. To understand the issues raised in the appeal, I will first set out the procedural histories of the two suits.

The Plaintiffs in the two suits commenced the actions in the lower court at Kiambu on 3rd December, 2002 seeking damages against the same Defendant based in the tort of negligence. The Plaintiffs claims were that the Defendant was the proprietor of a certain motor vehicle which was involved in a traffic accident on 23rd December, 1998 in which they were travelling as fare paying passengers. One of the Plaintiffs is a minor and sued through his uncle and next friend for the injuries he sustained. The other Plaintiff sustained fatal injuries and the action was brought by her personal representative on his behalf and on behalf of her estate and dependants.

The Defendant entered appearance in both actions and filed defences in which he denied, among other things, that he was the proprietor of the offending motor vehicle. He also denied that he was guilty of the negligence pleaded against him. There was also an alternative pleading by the Defendant in both defences. He averred that if indeed the offending motor vehicle was involved in an accident as pleaded, the same was caused by circumstances that were beyond his control. He pleaded an act of God, force majeure and inevitable accident. He also pleaded limitation in both cases.

At sometime, the Plaintiffs successfully applied to this Court to have the two suits transferred to the lower court at Limuru where they were tried and determined.

That was not all. It appears that the Plaintiffs were aware before they commenced their actions that the same had been caught up by the Limitation of Actions Act (Cap 22). So they did the automatic thing. They applied to the lower court at Kiambu by way of an Originating Summons for leave to file the actions out of time which application was allowed before the suits were commenced.

The cases, upon consolidation, were set down for hearing and at the end of the trial the learned Magistrate in the court below dismissed both claims. How did the learned Magistrate deliver herself in her decision?

The learned Magistrate refused the Plaintiffs' claims on the basis of two factors. Firstly, she was of the view that the Plaintiffs did not prove that the Defendant was the owner of the offending motor vehicle. Secondly, she said as follows:

> **"I also agree with the defence that they had a right to challenge the leave granted by the Kiambu Court in the present court and as submitted the Kiambu Court should not have entertained the matter for want of jurisdiction".**

The Plaintiffs were aggrieved by the decision of the lower court and appealed to this court. The appeal was based on 7 Grounds set out in the Memorandum of Appeal as follows:

> ***1. The learned trial Magistrate erred in law in sitting on appeal over the order of leave to file suit out of time granted by the Senior Principal Magistrate, Kiambu in Miscellaneous Case No 8 of 2002 (O. S.).***
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> ***2. The learned trial Magistrate erred in law and fact, in holding that, the Senior Principal Magistrate's Court in Kiambu Miscellaneous Case No 8 of 2002 (O. S.) did not have jurisdiction to deal with the application for leave to file suit out of time.***
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> ***3. That the learned Magistrate misdirected herself in law and fact in the way she handled the issue of leave to file suit out of time and as a result occasioned serious miscarriage of justice to the appellant.***
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> ***4. The learned trial Magistrate erred in law and fact in failing to consider and address the evidence of PW 3 and the submission of the advocates on the issue of ownership of motor vehicle registration number KTQ 457.***
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> ***5. The learned trial Magistrate erred in law and fact in treating the evidence of certificate of registration of the motor vehicle as the solely conclusive evidence of ownership.***
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> ***6. The learned trial Magistrate erred in law and fact, in holding that there was no evidence tendered before her, to proof (sic) the ownership of motor vehicle KTQ 457.***
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> ***7. The learned trial Magistrate erred in law and fact in dismissing the Appellant's suit on liability against the Respondent.***

Having considered the record of the lower court and the submissions proffered before me in this appeal by Counsel for the contending parties, I find it difficult to agree with the court below that the Plaintiffs did not satisfy it that the Defendant was the proprietor of the offending motor vehicle. In the cases before the lower court, evidence was led by way of a Police Abstract (P Exhibit 7) and proceedings in a previous related action in which the Defendant was found liable in a claim arising from the same accident as the one in respect of the cases in the court below (See P Exhibit 15). Further the Defendant's own witness (DW 1) who was the driver of the offending motor vehicle at the material time admitted in cross-examination that the Defendant was the proprietor of the offending motor vehicle. These facts were sufficient to find the Defendant, on a balance of probabilities, as the proprietor of the offending motor vehicle. To insist that the ownership of the motor vehicle could "only be … (proved) by a certificate of registration" is not only inconsistent with the law on the question but would also amount to imposing a higher standard of proof on a Plaintiff beyond that contemplated in civil cases. (See ***Mwanzia Nzaumi vs Kenya Bus Services Ltd Civil Appeal No 302 of 2002 which deal with a similar situation***). The Defendant relied on the case of ***Thuranira Karauri vs Agnes Ncheche Nyeri Civil Appeal No 192 of 1996*** to support his contention that he was not the proprietor of the offending motor vehicle. However, that decision can be distinguished on the fact that the Plaintiff in that case sought to rely on a police abstract alone. He had no other evidence. Here, there was much more than a police abstract, and taken together in totality was sufficient to establish on a balance of probability true ownership of the motor vehicle.

If I may go further, Section 8 of the Traffic Act (Cap 403) which is the substantive statute that governs the issues raised here does not say that ownership of a motor vehicle can only be proved by way of a certificate of registration. That is because the law recognizes that although a person may be registered as an owner of a motor vehicle, yet there may be circumstances to show that ownership has changed. (See generally ***Osumo A. Nyaundi vs Charles Kibondori & Others Kisumu Civil Appeal No 46 of 1996).***

The next point which was argued with force related to the question whether the Kiambu Court had jurisdiction to transfer the suits from Kiambu to Limuru and whether the same court had jurisdiction to extend time for the filing of the suits out of time.

On whether the Kiambu Court had jurisdiction to transfer the suits as it did, I have no doubt that it did. The submission which was proffered in the Court below and before me on behalf of the Defendant was that because the suits were initially field in a court without jurisdiction, they were incompetent ***ab initio*** and could not be transferred. Reliance was placed on the case of ***Kagenyi vs Musiramo & Another (1968) E A 43*** which said that an order for the transfer of a suit form one court to another cannot be made unless the suit had been in the first instance brought to a court which had jurisdiction to try it.

I think that practitioners must strive to understand the decision of ***Kagenyi*** properly. That case related to pecuniary jurisdiction of the Court, not its territorial and legal jurisdiction, a point often confused by Advocates.

Although one may talk of "territorial jurisdiction" in respect of Resident Magistrates Courts, the fact is that those courts have jurisdiction throughout Kenya {See Section 3 (2) of the Magistrates Courts Act (Cap 10)}. However, the place where the suit should be filed relates to the court's administrative jurisdiction, and is governed by Section 15 of the Civil Procedure Act, Cap 21 {See the decision of this court in ***HCCC No 36 of 2002 (Kericho)***}. So a case may be filed in the lower court at Kisumu but for logistical reasons it may be ordered to be heard at Nairobi, may be because the cause of action arose at Nairobi or because the witnesses are based at Nairobi. That will not mean that the court at Kisumu did not have jurisdiction in the first place, unless it was a case of the Kisumu Court not having monetary jurisdiction, in which case the ***Kagenyi case*** would apply.

In the present case, it is, therefore, not exactly correct to say that the Kiambu Court did not have jurisdiction. The correct position is that although the Kiambu Court had the same jurisdiction as the Limuru Court, it was convenient that the case be tried at Limuru for the factors which guided this Court in transferring the case to Limuru. It would be completely different if the original court did not have jurisdiction at all in which case the ***Kagenyi*** case would be relevant to prevent transfer.

Finally, I have to deal with this point: was the lower court which granted leave to the Plaintiffs to commence actions in the lower court entitled to do so?

Although it is not exactly clear from her Judgment, one of the reasons why the lower court refused the claims in the lower court was because it was of the view that the court which granted leave to the Plaintiffs to file the suits out of time did not have jurisdiction to do so. This matter appears to have been the central matter which the lower court meant to deal with in saying that the Kiambu Court did not have jurisdiction to deal with the question of extension of time. Although in their submissions before me the Counsel for the contending parties appear to have also included and argued about the transfer of the suits. However, as I notice form the memorandum of appeal, no single ground of appeal specifically deals with the question of transfer, yet the first 3 grounds of the appeal dealt directly with the extension of time for filing of the appeal.

The Plaintiff's objection in respect of the last point was that the Learned Trial Magistrate was precluded from revisiting the question of leave to file the suits out of time which had been decided by the other lower court which granted the leave.

The Trial Magistrate appears to have acceded to a submission proffered by the defence that she had authority to re-open the leave granted by the other court for filing the suits out of time. Was she correct in

this view? My answer is definitely yes.

The leave granted to file actions out of time is done exparte and a Defendant to such an action can only have an opportunity to challenge it at the hearing of the suit. This is what was said in the case of ***Mary Wambui Kabugu Legal Representative of Kabugu Mutua vs K. B. S. Ltd Civil Appeal No 195 of 1995***. However, in this case, there was no evidence of the basis upon which the Defendant sought to challenge the leave which had been granted. Mr Kamwendwa for the Defendant referred me to page 106 of the Record of Appeal where he said the challenge to the leave can be found. Because of the importance of this submission, I would like to set out that reference which is a portion of the written submissions filed on behalf of the Defendant in the lower court:

> ***"(ii)… leave to file suit out of time is normally done ex-parte. It therefore follows that the only place the same can be challenged is at the trial of the main suit … the Counsel for the Defendant did try to bring this fact to your honour but was overruled. It is our submissions (sic) that the defendant had a right to challenge the ex parte leave so obtained."***

That is where that submission stopped. No basis for the challenge of the leave was laid. There is no record of any submissions made and no record of any Reply to those submissions. The fact that the initial attempt to do so had been halted by the court did not prevent the Defendant to lay the basis in their submissions. This is what Shah, J A meant when he said as follows in ***Mary Kabugu*** supra:

> **"… the only time when such a defendant can challenge the order granting extension of time is at the time of the trial, either on facts brought out at the trial, or by way of arguments at the trial if circumstances and facts allow such arguments at the trial …"**
>
> **(Underlining supplied for emphasis).**

So, whether the leave was regular or not was not canvassed to enable the court below or this court make a decision thereon. Mr Kamwendwa stated from the bar that the point had been raised below but conceded before me that there was no such record and I cannot for myself endeavour on a path to presume that there might have been one.

Based on the foregoing findings, the appeal must succeed, and I allow the same by setting aside the decree of the lower court dismissing the Plaintiffs suit and substitute therefor with a decree in favour of the Plaintiffs against the Defendant on liability.

Upon dismissing the suit, the learned Trial Magistrate went ahead and did the proper thing which she had to do and assessed the damages as follows:

A) IN RESPECT OF THE MINOR

(i) General Damages – Kshs.65,000/=

(ii) Special Damages – Kshs. 4,500/=

Total **Kshs.69,500/=**

B) IN RESPECT OF THE CLAIM RELATED

TO THE DECEASED

(i) Loss of expectation of life Kshs. 70,000/=

(ii) Loss of earnings Kshs.299,200/=

(iii) Pain and suffering Kshs. 10,000/=

(iv) Special Damages Kshs. 15,150/=

Total **Kshs.394,350/=**

There was no appeal against those awards and there was no submission proffered by the Defence that the same were unsupportable or unreasonable. I accept that they are the correct measure of damages to be awarded in this case and I endorse the same and award.

As the Plaintiffs have been successful on all aspects, I award them the costs of the appeal and the costs in the court below, together with interest as prayed in the Plaint. Those shall be the orders of this court.

Dated and delivered at Nairobi this 21st day of April, 2005.

ALNASHIR VISRAM

JUDGE