



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Civil Appeal 66 of 2003**

**JAMES MBUGUA.....APPELLANT**

**VERSUS**

**PAUL KIBET BIWOTT.....1<sup>ST</sup> RESPONDENT**

**P. N. TRANSPORTERS LTD.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

On 13<sup>th</sup> July, 2001 the appellant filed a case in the Senior Resident Magistrate's Court at Molo, Civil Suit Number 39 of 2001 seeking general and special damages as a result of a road traffic accident which had occurred on 10<sup>th</sup> November, 1997. The accident involved the appellant's deceased son who was hit and fatally injured by the second respondent's motor vehicle which was being driven by the first respondent. The respondents filed a statement of defence and denied the appellant's claim. The respondents did not adduce any evidence during the hearing but after the close of the appellant's case, the respondents submitted that the suit was time barred and that leave to file it had been wrongly granted. The trial magistrate considered all the submissions made by both counsel and in particular the provisions of Sections 27, 28 and 30 of the Limitation of Actions Act and reached the conclusion that there was no basis upon which the appellant could have been granted leave to file the suit out of time and he dismissed the suit with costs.

The appellant was dissatisfied with the said judgment and in his appeal, he argued that the trial magistrate erred in law in dismissing the appellant's case and that he had applied the wrong principles in deciding the matter and had therefore misdirected himself.

The appellants counsel conceded that the appellant had filed his case out of time but submitted that the respondent, having failed to call any witness to challenge the filing of the suit outside the statutory period, the trial magistrate should not have dismissed the suit on that ground. Counsel sought to rely on PASKARIA NYANCHERA VS CHARLES RATEMO NYANGESO Civil Application Number NAI 280 of 1997 (unreported). That was an application for extension of time to file and serve a Notice of Appeal and Record of Appeal out of time which the Court of Appeal allowed because the delay in filing the said documents was caused by the death of the applicant's counsel.

I did not find the aforesaid decision to be relevant in this appeal because it had nothing to do with the provisions of Limitation of Actions Act.

Mr. Kisila for the respondent opposed the appeal and said that the issue of limitation of time was within the jurisdiction of the trial court to decide and was properly dealt with by the trial magistrate. He submitted that the grounds upon which an applicant could seek to file a suit out of time were well stipulated in Section 27 of the Limitation of Actions Act Cap 22 and the appellant, in his application for extension of the limitation period, had failed to show that any of the conditions as stipulated in Section 27 aforesaid applied to him.

Mr. Kisila further submitted that the respondents were not under any obligation to adduce any evidence and that they were perfectly entitled to challenge the leave that had been granted to the appellant to commence the suit out of time. He cited several decisions in support of the said submissions.

It is not in dispute that the appellant's suit before the trial court was filed out of time. The reason for the delay was given as lack of funds to pay advocates fees and court filing fees. In paragraph 10 of the appellant's affidavit in support of his application for leave, he stated:-

*“10. That my delayance was not intentionally (sic) or due to ignorance but it was due to pauperism.”*

The court filing fees for the suit was Kshs.1745/-. The appellant had stated in the said affidavit that his only business was that of selling dry maize and by implication, that he was not making much out of it. While that may have been so, it is not one of the material factors outlined in Sections 27 and 28 of the Limitation of Actions Act and the trial court had no jurisdiction to grant leave in the first place.

It is trite law that grant of leave to file a suit out of time can only be challenged during the trial, See **DIVECON LIMITED VS SHIRINKHANU SADRUDIN SAMANI** Civil Appeal No. 142 of 1997 (unreported). The respondents' counsel was perfectly right in raising the issue of limitation even when no evidence had been led by the respondents regarding the occurrence of the accident in question.

The trial magistrate cannot be faulted for his decision. This appeal is without merit and I dismiss the same with costs to the respondents.

DATED, SIGNED AND DELIVERED at Nakuru this 14<sup>th</sup> day of November, 2005.

**D. MUSINGA**

JUDGE

**14/11/2005**

Judgment delivered in open court in the presence of Mr. Mosoti holding brief for Mr. Mamwacha and Mr. Kisila for the respondent.

**D. MUSINGA**

JUDGE

**14/11/2005**