



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HCC.A.NO. 50 OF 2000

EASTERN PRODUCE (K) LTD..... APPELLANT

VERSUS

EARNEST OMOSE OSERE ..... RESPONDENT

### **JUDGMENT**

This is an appeal from the decision of the Senior Resident Magistrate's court in Kapsabet SRMCC No.18 of 1998 delivered on 16th March 2000. The memorandum of appeal is dated 7th April 2000 and the appeal was filed on the same date.

The memorandum of appeal had 4 grounds but at the hearing of the appeal Mr. Shivaji for appellant stated that he would restrict himself to ground 2 and 4 only. Ground 2 was that the learned magistrate erred in law and in fact in failing to find that the defendant and its servants or agents were not liable in negligence for the alleged injuries suffered by the plaintiff. Ground 4 was that the learned magistrate erred in law and in fact in failing to find that the suit is bad in law as it is fettered by laches, the cause of action having arisen in 1990, eight years before filing of the suit.

He submitted that on ground 2 that the appellant was allowed to amend its defence by the lower court. The amended defence listed particulars of negligence. Though the respondent was given leave to amend the plaint or reply to the amended defence, no further pleadings were filed on behalf of the respondent. This, in his view, amounted to admission of the particulars of negligence as given in the amended defence. He relied on the case of *Mount Elgon Hardware vs United Millers Ltd Kisumu Civil Appeal No.19 of 1996 (CA)*.

He also submitted that the testimony of the respondent had contradictions on the exact date in December 1990 when the accident is alleged to have occurred. Therefore he contended that the respondent should not have succeeded on the issue of liability.

On ground 4, he submitted that the suit was a nullity ab initio in the sense that it was brought outside the limitation period. The suit was based on both contract and tort, but it was brought in 1998 while the cause of action is said to have arisen on 21/12/90, which was about 8 years. He submitted that though extension of time can be granted by the court in cases of tort, where the claim relates to a contractual claim, the court does not have power to enlarge time. He relied on the case of *Thuranira Karauri vs Agnes Ndeche - Nyeri Civil Appeal No.192 of 1996(CA)* and the case of *Divecon Limited vs Shirinkhanu Sadrudin Samani Nairobi Civil Appeal No. 142 of 1997*. He urged the court to set aside the judgement and orders made in the case, with costs.

Mrs Kittony for the respondent supported the judgment and orders of the lower court. She submitted that paragraph 2 of the memorandum of appeal only refers to the issue of negligence. The submissions of the learned Counsel for the appellant on the issue of amendment of pleadings does not relate to the issue of negligence. The issue of contradiction of dates also does not relate to the issue of negligence. She therefore submitted that the submissions of the Counsel were irrelevant to the ground 2 of the memorandum of appeal. She further submitted that the appellant had failed to include certain important documents in the record of a appeal in that he did not include the application for leave to file the suit out of time and the reply to amended defence. She submitted that both Counsel were present in court when the application for leave to file suit out of time was heard, and such leave was granted. The issue cannot be raised now on appeal. She urged me to dismiss this appeal.

I have to decide whether negligence was proved against the appellant and whether the suit was statute barred in the first place.

On the issue of ground 2 of the appeal, it is basically that the learned magistrate erred in finding that the appellant, its servants of agents were liable in negligence for the injuries suffered. Counsel for the appellant argued that the amended defence was not responded to by the respondent. In his view this amounted to an admission of the particulars of negligence enumerated in the amended defence. He relied on the decision in Kisumu Civil Appeal No. 19 of 1996 - Mount Elgon Hardware vs United Millers Limited. However on perusal of documents in the file, I find that the defence was amended on 28th September 1998 and a reply to the amended defence was later filed. The reply to defence did deny any blame, on the plaintiff, for the accident. I am therefore not persuaded by that ground of appeal, as the facts show a different position from the submission of the appellant. That ground must fail.

On the issue of limitation of time to file the suit, it is true from the documents in the file that suit was filed in 1998 while the cause of action arose in 1990. However, before suit was filed, there was an application for leave to file suit out of time dated 6th February 1998.

I have perused the documents in the file to find when leave to file suit out of time as granted, but I don't see any record. However, that leave was sought for before the court that heard the case. Limitation was specifically pleaded in the emended defence. However in the written submissions of Kalya & Co. Advocates at the end of the proceedings, they only addressed the issues of liability and quantum. No issue of limitation was raised. The submissions were dated 1st February 2000.

In my view, though the amended defence pleaded limitation, this ground appears to have been abandoned somewhere on the way. As there was an application for leave to file the suit out of time, I am convinced that that leave was granted, as the same court is the one that heard the case. I see no distinction between contractual and tortious claims under the Limitation of Actions Act. In my view, a court can properly extend statutory time for filing a claim either under contract or tort in terms of the Limitation of Actions Act and the Civil Procedure Act.

I will opine that where special leave has been granted to a party, it is preferable that the pleadings filed in court pursuant to such leave should acknowledge that it is pursuant to leave granted by the court on a particular date.

The appellant fails on both grounds of the appeal. I therefore dismiss this appeal with costs.

Dated and delivered at Eldoret this..... day of ..... 2004

George Dulu

Judge

**Delivered in the presence of :-**