Marcle & another v OMK (Minor suing through the next friend and father JKM) (Civil Appeal 25 of 2023) [2025] KEHC 3247 (KLR) (Civ) (6 February 2025) (Judgment)

Neutral citation: [2025] KEHC 3247 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CIVIL

CIVIL APPEAL 25 OF 2023

CM KARIUKI, J

FEBRUARY 6, 2025

BETWEEN

DENYS WINGSTONE GULD MARCLE ..... 1ST APPELLANT

NIGEL WELBY TRENT ..... 2ND APPELLANT

AND

OMK ..... RESPONDENT

MINOR SUING THROUGH THE NEXT FRIEND AND FATHER JKM

JUDGMENT

1. This suit arose from an incident that occurred on the 4th of January 2014 at Makumi Dam that led to the demise of the Appellant herein, suing through the next friend and father for which the Appellant blamed the Respondents. The matter proceeded to a hearing, and judgment was delivered on the 2nd of March 2021.

2. Being dissatisfied with the whole judgment, the Appellant filed a Memorandum of Appeal dated the 17th of March 2021 on the following grounds:

    i. The learned magistrate erred in law and fact by setting aside the orders that he had earlier issued on the 1st of August 2019 in allowing the Appellant to file the suit out of time.

    ii. The learned magistrate erred in law and, in fact, failed to take into cognizance the unique circumstances that led to the suit being filed late.

    iii. The learned magistrate erred in law and fact by disregarding the findings of the inquest, which found the Respondents liable and recommended that they be sued in civil court.

iv. The learned magistrate erred in law and fact by misdirecting himself on the *Limitation of Actions Act*.

v. Dissatisfied with parts of the judgment, the Respondents herein filed a Memorandum of Cross-Appeal dated the 17th of December 2021 on the grounds:-

vi. The learned magistrate erred in law and fact by failing to consider that the named Defendants/ Appellants were sued following the outcome of an inquest which recommended that proceedings be brought against them, which goes beyond the scope of an inquest.

vii. The learned magistrate erred in law and fact by holding that negligence was proved against the Defendants.

viii. The learned magistrate erred in law and fact by finding that the Defendants/ Appellants would have been wholly liable had the suit been appropriately filed.

Appellant's Submissions

3. It was stated that leave to file the suit out of time was granted to the Appellant in the lower court vide engineer SPMCC Misc App. No. 4 of 2019, the same was occasioned on the circumstances that there was a pending inquest, which was concluded on the 16th of May 2019. The Appellant, on the said circumstances, in order to establish whom to institute the claim against, would not have instituted the claim prior to the conclusion of the inquest.

4. The Appellant asserted that the leave to file out of time was made in good faith and the interest of justice awaiting the outcome of the inquest and that the learned trial magistrate erred by setting aside the leave granted to the Appellant to file the suit out of time.

Respondent's Submissions

5. It was submitted that the Honourable Court properly struck out the suit as the same was not properly filed.

6. On whether the Trial Magistrate correctly held that the suit was improperly filed, it was stated that the suit was filed on the 15th of August 2019, following the incident which occurred on the 4th of January 2014. Reliance was placed on Section 4(2) of the *Limitation of Actions Act* (Chapter 22). Any claim for negligence should have been brought within three years from the date on which the cause of action accrued, which period ended on the 4th of January 2017.

7. It was contended that the Application by the Appellant for leave to file suit out of time was made under Sections 38 instead of Sections 28 of the *Limitation of Actions Act*, which does not, of course, apply to the circumstances of this suit. Reliance was placed on the case of Bernard M. Mbithi v Mombasa Municipal Council & another [1993]eKLR

8. It was stated that the import of this decision is that leave granted ex parte to file a suit out of time is merely provisional, and the Respondents had every opportunity to challenge the facts and the law at the trial. The trial court is the one that must finally rule whether the Appellant has satisfied the conditions for overcoming the time bar.

9. The Respondent stated that the only reason the Appellant had for filing the suit out of time was that he was awaiting the results of the inquest. Further, the decision of the Court of Appeal in Bernard M. Mbithi v Mombasa Municipal Council & another [1993]eKLR is binding on this Honourable Court under the principle of stare decisis.

10. It was stated that an application for leave to file a suit out of time is made ex parte before commencing the main suit. The filing in 2019 of the suit on the cause of action in tort, which arose on the date of the accident on the 4th of January 2014, is clearly outside the 3 years permitted for causes of action based on tort, and it is therefore statutorily time-barred by virtue of Section 4(1) of the *Limitation of Actions Act*.

11. It was submitted that the reasons given by the Plaintiff, namely waiting for the conclusion of the inquest, did not meet the threshold for extension, and the learned magistrate properly struck out the suit for being improperly filed.

Whether the recommendations of the inquest should guide the court.

12. It was stated that the Appellant stated that the reason he filed a suit against the two Defendants was that he was guided by the ruling of the inquest on who to sue. Reliance was placed on Republic v Francis Muriuki Wandeto (2016) eKLR.

13. It was averred that the ruling on the inquest conducted following the demise of the Appellant's son was filed in court as the Appellant's evidence and that in giving the ruling grossly misguided itself by apportioning both criminal and civil liability on the Respondents herein. It was submitted that the Respondents had already been judged both guilty and a hundred percent liable in criminal and civil matters that had not yet even commenced and that the inquest went beyond its scope by apportioning blame on the Respondents without giving them a chance to even look at the evidence as they came to court and stated the events of the day, never mind that they were never made aware of the ruling of the inquest until the same was used in evidence against them in a court of law.

14. The Respondent stated the fact that the Appellant herein was guided by the inquest in filing a suit against the Defendants, as he stated in evidence, makes the suit fatally defective as the entire suit is based on a gross violation of the rights of the Respondent under Article 50 of *the Constitution* of Kenya.

Whether the Trial Magistrate properly held that negligence was proved against the Respondents

15. It was stated that the suit was filed on the basis that the negligence of the Defendants caused injury to the Appellant's son, resulting in his demise. The Respondents herein were lawfully carrying out a sport allowed by law at the time, and the 2nd Respondent produced in evidence firearm certificates, game licenses, civilian firearm certificate identification cards, as well as approval from the Kenya Wildlife Service granting the request for duck shooting. The local administration and land owners in the area were also aware of the duck shooting on the said dates as directed by the letter from the Kenya Wildlife Service. He further stated in evidence that they also discouraged any locals from attending due to the dangerous nature of the sport. It was submitted that the Defendants, therefore, met all the legal requirements for safely participating in the sport as demonstrated by the evidence. Reliance was placed on EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR

16. It was averred that the Respondents herein were part of a group of several persons that would have met the description of "old white man," as described by PW2, the Appellant's witness, who did not give any identifying features. The learned magistrate thus erred in failing to take into account the circumstances leading to the Respondents' involvement in the matter. Particularly, the 2nd Respondent was the only member of the shooting club and did not reside in Nairobi at the time. He, therefore, volunteered to drive the Appellant to the police station to record statements, only to end up being sued.

17. The licenses and notices to Kenya Wildlife Services and the provincial administration fell on the Syndicate, not the individual Respondents, as evidenced by letters produced in evidence. The 2nd Respondent further testified that he neither invited nor paid any boys to collect ducks on his behalf as his trained dog accompanied him. Improperly guided by the inquest, the Respondents ended up shouldering the burden of the Naivasha Gun Syndicate, the club that organized the event on behalf of the members.

18. It was submitted that the Appellant failed to prove a causal link between the 1" and 2nd Respondents' negligence and the injuries suffered by his son, having been improperly guided by the ruling of the inquest and that this Honourable Court should, therefore, overturn the finding of the trial court on the same.

19. On the issue of contributory negligence, it was stated that the Appellant was fourteen years old at the time of his demise. Reliance was placed on M M (suing thro' the next of kin CMN) v Boniface Ngaruya Kagiri & another [2018] eKLR. In that case, the court apportioned 10% contributory negligence on the six-year-old Plaintiff, who was knocked down by a vehicle while crossing the road.

20. It was stated that in the instant Appeal, the Appellant was, at the time, a fourteen-year-old school-going child. The father of the deceased stated in evidence that he had never warned the Appellant against swimming in the dam or attending the duck shooting event. That substantial negligence can, therefore, be attributed to the Appellant and his guardian as a fourteen-year-old boy is reasonably expected to understand the dangers of swimming in a dam and spectating a duck shooting event.

21. The Respondents contended that they were lawfully carrying out a sport allowed by law at the time, and the 2nd Respondent produced in evidence firearm certificates, game licenses, civilian firearm certificate identification cards, as well as approval from the Kenya Wildlife Service granting the request for duck shooting. The local administration and land owners in the area were also aware of the duck shooting on the said dates as directed by the letter from the Kenya Wildlife Service. He further stated in evidence that they also discouraged any locals from attending due to the dangerous nature of the sport. Your Honour, we submit that the Defendants, therefore, met all the legal requirements for safely participating in the sport as demonstrated by the evidence.

Whether the Respondents were liable

22. It was asserted that the Respondents ended up shouldering the burden of the Naivasha Gun Syndicate, which organized the event on behalf of the members. On the issue of liability, they submitted that the Appellants did not prove negligence against the Respondents, and as such, the issue of liability does not arise as liability follows fault. Further, the trial magistrate failed to address the issue of contributory negligence, which is assessing liability should the suit have been appropriately filed.

23. It was argued that while the trial court found the suit to be improperly filed, he found that the Respondents would have otherwise been found to be negligent and, therefore, liable. The choice of defendant respondents was improperly, unlawfully, and unconstitutionally guided by the ruling on the inquest, and the trial court failed to take into account the facts and the law on negligence. They contended that the Appellants did not make out a case for negligence against the Respondents and that this Honourable Court should overturn the finding.

24. It was submitted that the trial magistrate correctly held that the suit was improperly filed and struck out and that this Honourable Court should uphold the same and dismiss this Appeal with costs.

Analysis and Determination

25. This being a first appeal, parties are entitled to and expect a rehearing, reevaluation, and reconsideration of the evidence afresh, as well as a determination by this court with reasons for such determination. In other words, a first appeal is by way of retrial, and this court, as the first appellate court, has a duty to re-evaluate, re-analyze, and reconsider the evidence and draw its conclusions, of course, bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.

26. In Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR, the Court of Appeal stated that: -

> " An appeal to this court from a trial by the High Court is by way of retrial, and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it, and draw its conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

27. Additionally, in Peters vs Sunday Post Ltd [1958] EA 424, the court held that-

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide."

28. There is no dispute that the Appellant's cause of action in this case was founded on the tort of negligence. The trial magistrate held that respondents herein had demonstrated that the reason given by the Appellant for seeking leave to file suit out of time did not meet the threshold for granting such leave, and therefore, he stated that he had no choice but to set those orders aside. Additionally, the trial magistrate stated that in the Application for leave to file this suit out of time, the only reason given by the Appellant for failing to institute the suit herein within the prescribed time was that he was waiting for the outcome of the Engineer SPMC Inquest No. 4 of 2014. His finding notwithstanding, he went on to delve into the issue of liability and quantum.

29. In Nicholas Kiptoo Korir Arap Salat vs. Independent Electoral & Boundaries Commission & 7 Others (2014) eKLR, the court held that extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court, and a party who seeks an extension of time has the burden of laying a basis to the satisfaction of the court. Additionally, whether the court should exercise the discretion to extend time is a consideration to be made on a case-to-case basis, and the delay should be explained to the court's satisfaction.

30. Additionally, the Court of Appeal in Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229:

> " Judicial time is the only resource the courts have at their disposal, and its management does positively or adversely affect the entire system of the administration of justice."

37. Section 4(2) of the Limitations of Actions Act provides that:-

> " An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued."

31. The Court in Jones M. Musau & another v Kenya Hospital Association & another [2017] eKLR held that:-

> In general, the period of limitation begins to run when the cause of action accrues. Under Section 27 of the Act, Section 4(2) does not afford a defense to an action founded on tort where the action is for damages for negligence, nuisance, or breach of duty. The damages claimed by Plaintiff for the negligence, nuisance, or breach of duty consist of or include damages in respect of personal injuries of any person, and the court has, whether before or after the commencement of the action, granted leave for purposes of that provision. To qualify for leave, it should be 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 either was after the 3 years of limitation prescribed for that cause of action or was not earlier than one year before the end of that period and in either case, was a date not earlier than one year before the date on which the action was brought.

32. Consequently, any claim for negligence should have been brought within three years from the date on which the cause of action accrued. The trial suit was filed on the 15th of August 2019, whilst the alleged negligent incident occurred on the 4th of January 2014, which was about 5 years after. The Appellant's reason for filing the suit out of time was that he was awaiting the outcome of the inquest in order to establish whom to institute the claim against would not have been instituted prior to the conclusion of the inquest.

33. In Bernard M. Mbithi vs. Mombasa Municipal Council & Another [1993] eKLR, the court held that: -

> " In the present case, there can be no doubt that the Appellant knew right from the start that the death of his son had been caused by negligence and/or breach of duty attributable to the respondents. He did not have to wait for the conclusion of the inquest to make that determination. The fact that he thought this was necessary did not and could not make it a material fact. The Application was, therefore, rightly rejected by the judge. I would dismiss the Appeal with no order at all costs.
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> .....
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> The appellant/plaintiff must prove material facts relating to the cause of action or included facts of a decisive character which were outside his knowledge (actual or constructive) until after the three-year limitation period or not earlier than one year before the end of that period. The appellant/plaintiff contends that he was waiting for the outcome of the inquest and that he did not know that he could institute action before the outcome of the inquest was known. I disagree that this explanation fulfills the statutory requirements of section 27(2) of the *Limitation of Actions Act*. He knew all along or ought to have known that the 1st Respondent owned Tom Mboya Primary School. The fatal pit or trap was on the grounds of the school. Within a few days of the tragedy, he would have found out from the police, who investigated the incident, who was responsible for digging the pit. The Appellant did not show any reasons for his inability to find out who the tortfeasors were. He was in full knowledge (actual or constructive) of the tortfeasors. This being a statutory requirement that he so proves the material facts or included decisive facts related to the cause of action, he could not properly invoke the inherent jurisdiction of the court. The inherent jurisdiction of the court may only be invoked where no provisions exist. This is not the case in the instant case. Ground 1 of the Memorandum of Appeal fails.

..... The fatal incident occurred on the 14th of April 1988. The ruling was delivered on the 19th of February 1991. During the intervening period, the Appellant took no reasonable steps to obtain appropriate advice from a legal practitioner. He may be illiterate, but that reason would not avail him of the interpretation of sections 27,28 and 29 of the Act as read with section 30 of the Act and, in particular, subsection (2) thereof. I do not consider that the learned judge misapprehended the law in arriving at that conclusion. I also hold that ignorance of the law was not a material fact of a decisive character relating to the cause of the intended action. The Appellant knew the tortfeasors well within the prescribed period. As a reasonable man, he could have sought legal advice well within time to protect his rights. This Application was brought on the 28th of November 1991, ten months after the ruling of the inquest, and was delivered on the 19th of February 1991. The Appellant's conduct regarding the material facts of the decisive character, as well as his failure to seek legal advice, cannot be regarded as that of a reasonable and prudent person. The death of his son called for vigilant and reasonable steps to be taken to ensure that the tortfeasors were sued for their negligence."

34. Accordingly, I agree with the trial magistrate that the Appellant need not have waited for the outcome of the inquest before filing suit, and the same was not a material fact sufficient to warrant the issue of orders for leave to file suit out of time. Additionally, having held the same and having gone through the respondents' cross-appeal, I find that the same lacks merit and, therefore, the court makes the orders;

    i. Therefore, this Appeal and the cross-appeal have no merit and are accordingly hereby dismissed.

    ii. Parties to bear their own costs.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 6TH DAY OFFEBRUARY, 2025.

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CHARLES KARIUKI

JUDGE