Bakari v Irungu (Civil Appeal E248 of 2024)
[2025] KEHC 11842 (KLR) (Civ) (25 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11842 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E248 OF 2024

DKN MAGARE, J

JULY 25, 2025

BETWEEN

MWINYI HERI BAKARI ..... APPELLANT

AND

SAMUEL IRUNGU ..... RESPONDENT

(Appeal from the Judgment and decree of the Honourable Lucy Njora (SPM) dated 22.2.2024)

JUDGMENT

1. This is an appeal from the Judgment and decree of the Honourable Lucy Njora (SPM) dated 22.2.2024 in Nairobi CMCC No. 160 of 2020. The Appellant was the Plaintiff in the lower court.

2. In the Plaint dated 9.1.2020 and filed on 14.1.2020, the Appellant prayed for judgment for general damages, special damages and costs and interest in respect of a motor vehicle accident that occurred on 26.12.2016 involving the Respondent's motor vehicle registration number KAP 759V and the appellant.

3. It was pleaded that the Appellant was walking along Meru Road in Nairobi's Eastleigh when Respondent's motor vehicle registration number KAP 759V was being driven so negligently that it hit the Appellant hence the accident. The injuries were not particularized.

4. The Respondent filed a defence dated 27.5.2021. The Respondent denied the particulars of the accident as pleaded and blamed the Appellant for the causation of the accident.

5. In its judgment, the lower court found that the court had no jurisdiction to determine the suit as the suit was filed out of time and was time barred.

6. Aggrieved, the Appellant lodged a Memorandum of Appeal dated 21.2.2024 on the following 3 grounds that:

   a. The learned magistrate erred in law and fact in holding that the court lacked jurisdiction to hear and determine the matter on the basis of lapse of time between when the accident occurred and the time of filing, disregarding the law on when time stops running between the 21st of December and 13th of January both days inclusive.

   b. The learned magistrate erred in law and fact in finding that in the event the matter was to be determined on merit it still could not award on future medical costs as the same was not prayed before, disregarding the fact that the said prayer was still proved in court through evidence.

   c. The learned magistrate erred in law and fact in arriving at a decision completely in contrast of the evidence adduced in the form of material evidence.

   d. The learned magistrate erred in law and fact in arriving at a decision which not only removes the Appellant from the seat of justice but also condemns him to a lifetime of pain and suffering as he is in urgent need of medical attention.

7. Parties testified and produced evidence in court. The Appellant testified and called witnesses and the Respondent testified on the occurrence of the accident. However, the appeal turns on a question of law: limitation of actions. The court raised the issue of jurisdiction suo moto.

8. The Appellant appears to admit that the matter was filed out of time without leave but that the same can be ratified since time should be taken to have stopped running between 21st December and 13th January.

Submissions

9. The Appellant filed submissions dated 16.10.2024. It was submitted on limitation of actions that the dismissal of the suit denied the Appellant the right to be heard. The Appellant cited Civil Appeal No. 86 of 2015 - Gabriel Osimbo v Chrispinus Mandare to submit that an appeal filed out of time could be validated by seeking leave to admit it out of time.

10. The Appellant also submitted that the court ought to have awarded damages for future medical expenses.

11. I have not had sight of the Respondent's submissions.

Analysis

12. The issue is whether the learned magistrate erred in making a finding that the suit was time barred.

13. This appeal is on a point of law. In this case, the lower court found that the suit was filed on 14.1.2020 and the accident occurred on 26.12.2016 and so the suit was filed outside the 3 years limited by statute. Section 4 of Cap 22 states as follows:-

    Actions of contract and tort and certain other actions

    (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

    a) actions founded on contract;

    b) actions to enforce a recognizance;

c) actions to enforce an award;

d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

(2) 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:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

14. The philosophy behind limitation of actions is two way: It serves to protect against indolence and against vindication for matters which have rested due to long lapse of time and so memory. In the case of Rawa vs Rawa (1990) KLR, 275, the Court emphasized thus:

> "The object of any Limitation enactment is to prevent a Plaintiff from prosecuting stale claims on one hand and on the other hand protect a Defendant after he had lost evidence for his defence from being disturbed after long lapse of time."

15. Whereas the Respondent did not raise the issue of limitation of actions in the lower court, the court may take on this issue suo moto. From the plaint filed in the lower court, the cause of action arose on 26.12.2016 when the accident occurred. The suit was filed on 14.7.2020 after 3 years and 20 days. The suit was indeed filed out of time. The argument by the Appellant that time could stop running between 21st December and 13th January is without basis and I dismiss it. What is the basis for this argument?

16. The basis was said to be Order 50 Rule 4 of the Civil Procedure Rules. The said rules provide as follows:

> Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction.

17. This is erroneous since exclusion of time requires extension of time for filing documents or pleadings under the rules or pursuant to a court order. Time for filing originating proceedings is not governed by the rules but the *Limitation of Actions Act*. This can be seen from Order 3 Rule 1(a) of the *Civil Procedure Act*, which provides as follows:

> Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.

18. On the other hand time for appearance is prescribed under Order 6 Rule 1 as follows:

> Where a defendant has been served with summons to appear, he shall unless some order be made by the court, file his appearance within the time prescribed in the summons.

19. Further, time for filing defence is also prescribed under Order 7 Rule 1 of the Civil Procedure Rules as follows:

> Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.

20. This can be contrasted with time for filing under statute. In the case of the *Civil Procedure Act*, time is provided for filing appeal and inclusive of the exclusion of certain periods. Filing is also provided under Order 42 Rule 1. It is in this respect that Order 50 Rule 4 applies. However, the limitation of actions does not have an equivalent of Order 50 Rule 4. The only question that must be dealt with is extension of time.

21. Counting or reckoning of time is provided both under the Act and *the Constitution*. Article 259 (5) (1)-(7) of *the Constitution* provides how time is reckoned as follows:

> (5) In calculating time between two events for any purpose under this Constitution, if the time is expressed —
>
> (a) as days, the day on which the first event occurs shall be excluded, and the day by which the last event may occur shall be included;
>
> (b) as months, the time period ends at the beginning of the day in the relevant month—
>
> (i) that has the same number as the date on which the period began, if that month has a corresponding date; or
>
> (ii) that is the last day of that month, in any other case; or
>
> (c) as years, the period of time ends at the beginning of the date of the relevant year that corresponds to the date on which the period began.
>
> (6) If a period of time prescribed by this Constitution for any purpose is six days or less, Sundays and public holidays shall not count when calculating the time.
>
> (7) If, in any particular circumstances, the period of time prescribed by this Constitution ends on a Sunday or a public holiday, the period extends to the first subsequent day that is not a Sunday or public holiday.

22. The said period governs the actions under *the constitution*, while Order 50 Rule 4 governs matters under the rules and orders of the court. Section 4(2) of the *Limitation of Actions Act* provides as follows:

> 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:
>
> Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

23. This means that the action can be brought after 3 years provided certain aspects are met. To this, the Act itself provides for extension of time within which to file suit. This is provided as follows:

> (1) Section 4(2) does not afford a defence to an action founded on tort where—

(a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and

(b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and

(c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

(d) the requirements of subsection (2) are fulfilled in relation to the cause of action.

(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is 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-

(a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

(b) in either case, was a date not earlier than one year before the date on which the action was brought.

(3) This section does not exclude or otherwise affect—

(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

24. Limitation of actions provides for time for filing suit. Whether a suit is within time is a matter of fact. The law requires that limitation of actions be pleaded to avoid trial by ambush. Order 2 rule 4 of the Civil Procedure Rules provides as follows:

(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

25. The Respondent did not plead limitation. This was also not made part of the matters left to the court to decide. This then raises two fundamental questions:

a. Whether the decision of the court, being based on limitation was proper;

b. Whether a court can decide a matter on a question not before it.

26. A question of limitation of actions is not a jurisdictional issue. It has to be raised. In the worst-case scenario, if it is not pleaded, it must be left to the court. Even at appeal level, this court may decide on

a different point other than those raised. Before doing so, the court must inform the parties to address that point. Dealing with the issue will otherwise be trial by ambush and contrary to a fundamental rule of natural justice, audi alterum paterm. This is more poignant in a case of tort, where there is a window under Section 27 of the *Limitation of Actions Act*. It must be remembered that the Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant a relief. In the case of Iga vs. Makerere University [1972] EA 65, the court of appeal for the former Eastern Africa [Law Ag V-P, Lutta and Mustafa JJA] as per Mustafa, J. A. posited as follows:

> " A Plaint which is barred by limitation is a Plaint "barred by law". Reading these provisions together it seems clear to me that unless the appellant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the Court "shall reject" his claim. The appellant was clearly out of time, and despite opportunity afforded by the Judge he did not show what grounds of exemption he relied on, presumably because none existed. The limitation Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for, and when a suit is time barred, the Court cannot grant the remedy or relief sought."

27. Given that a claim is not extinguished but a bar from claiming stale claims, then an affected defendant is duty bound to plead the same. Doing otherwise will be trial by ambush. In the case of Mohamed Abdikadir Mohammed v Sammy Kagiri & another [2016] eKLR, the court, F. Gikonyo stated as follows:

(8) I am of the above orientation and it is clear the direction the court is taking. As it will become clear in my ultimate decision, I think I should not determine the other arguments by parties on the validity of the leave to file suit out of time or the jurisdiction of the court which granted it. It suffices to state that, the trial magistrate adopted the wrong approach in allowing the introduction of a fundamental defence of limitation when it had not been pleaded specifically by the Respondents. Thus, the trial magistrate erred in his decision to dismiss the suit on the basis of un-pleaded issue-limitation. This is not a case where the thinking in the case of Odd Jobs vs. Mubia (1970) EA 476 would apply. The exception to the general rule which allows the court to determine a case on an issue that is not pleaded, will apply where the issue is placed before the court, the parties address the issue and no party is taken by surprise or otherwise made to suffer any prejudice. See the case of Joseph Amisi Omukanda V Independent Elections & Boundaries Commission & 2 others [2014] EKLR, where the Court of Appeal, held as follows:

> "There is however a well-known exception to the general rule when the court can determine an issue even though it was not pleaded. This applies where the parties have raised an un-pleaded issue and left it for the decision of the court. The exception will apply where the issue is placed before the court, the parties address the issue and no party is taken by surprise or otherwise made to suffer any prejudice. (See Odd Jobs Vs Mubia (1970) EA 476).
>
> In the upshot, I would not agree that perforce, the trial magistrate was obligated to decide the case on un-pleaded issue of limitation when it had not been specifically pleaded or properly placed before the court; it was introduced during cross-examination and the Appellant was left with no opportunity to bring facts which would bring his case within the exception of section 27 of the Limitations of Actions Act. This was a surprise and surely prejudiced the Appellant. Accordingly, I set aside the judgment of the trial court.

28. The case herein is even in a worse status than the case handled by F Gikonyo. The Respondent did not raise the question of limitation. Before reaching the above conclusion, the court had this to say:

> I must admit that the requirement of Order 2 rule 4 of the CPR is not a merely matter of form which can be diminished by Article 159(2) (d) of *the Constitution* of Kenya, 2010. It is a rule which serves substantive justice and a pertinent component of fair hearing, for it prevents a party from taking the other by surprise on an important matter as defence of limitation. I am conveying a subtle judicial hint; that, a defence of limitation, if successful, is not a mere pin-prick thrust, or just a rapier-like stroke; it is a sure downright bludgeon-blow on the plaintiff's suit. It will completely defeat the plaintiff's claim. Therefore, for a party to enjoy the exception to the rule and challenge an ex parte order of extension of time, must give the other party proper notice of his defence on limitation so that the party to be affected will have an opportunity to plead such facts as are necessary to bring his case within the exception of Section 27 of the *Limitation of Actions Act*.

29. The Appellant also submitted heavily that the lower court erred in dismissing the prayer for future medical expenses had it admitted the suit. In the case of Tracom Limited & Another vs. Hassan Mohamed Adan Civil Appeal Number 106 of 2006, the Court of Appeal stated:-

> "We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.

30. Future medical expenses as special damages. They should be pleaded and proved. The Appellant did not plead future medical expenses. The same could not be available to him had the suit not been dismissed for being time barred. As was held in the cases of Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98 and Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992, while the cost of future medical expenses are special damages and whereas a claim for special damages should not only be pleaded but strictly proved, what amounts to strict proof must depend on the circumstances; that is to say, the character of the acts producing damage, and the circumstances under which those acts were done.

31. In the case, the Appellant also pleaded no such circumstances based on which the court would allow a future medical expenses. I find no basis to disturb the finding of the lower court under this head. General damages were not prayed and neither were particulars of injuries pleaded. The plaint is the most incompetent I have seen so far. Without pleading particulars of injuries, the Appellant is not suited. In the case of Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR, the court of appeal addressed the issue of injuries as follows:

> Although the plaint in the suit in the trial court was poorly drafted and did not reflect the correct particulars of the injuries sustained by the appellant, the parties themselves agreed by consent which was recorded as an order of the court about the production of the documents relating to the injuries. In addition, the appellant's witness, Dr. Wambugu Mungai, gave testimony and the medical report he had compiled was also produced as part

of the documents. Clearly, in our view, the trial court had before it sufficient evidence on which to assess the damages. The finding therefore, by the learned trial Judge that "A party is bound by his pleading as there are no particulars of injuries that have been precisely pleaded, I would award Shs.100,000/= ....." was, in our view, erroneous because it ignored the oral and documentary evidence that was placed before the court. The documentary evidence was by consent of the parties.

32. In the case of Boniface Kinyua Kathuri v David Munyoki [2021] KEHC 3074 (KLR), Limo J posited as follows:

> This court re-evaluated the evidence tendered and perused through the pleadings of the Applicant and this court found that the trial court was correct in its findings. What was specifically pleaded was not in tandem with what was adduced and proved at the trial. That was it. This court specifically pointed out that the Applicant ought to have resorted to amending his pleadings if he realized that there was some inconsistency like he did when he realized that the motorcycle described in his plaint was not the one he was riding in. The basis for that is that a party is bound by his pleading as clearly provided under Order 2 Rules 3 and 4 of the Civil Procedure Rule. This is further illustrated in the case of DARE VS PULHAM [1982] 148, C.L.R. 658 where a High Court in Australia described the purpose of pleadings as follows:-
>
> "Pleadings and particulars have a number of functions; they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity, they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial and they give a defendant an understanding of a Plaintiff's claim in aid of the defendant's right to make a payment into court..."

33. My understanding is that pleading injuries is crucial for meeting the ends of justice. However, the binding precedent of the court of appeal is that when pleadings are poorly pleaded, the court will look at, in respect of injuries the justice of the case and the evidence produced. In this respect, it is not that injuries were not pleaded, general damages were not sought. What are the damages that can be awarded under the *Law Reform Act* as prayed by the appellant? Section 3 of the *Law Reform Act* provides as follows:

> Proceedings against, and contribution between,joint and several tortfeasors
>
> (1) Where damage is suffered by any person as result of a tort (whether a crime or not)—
>
> (a) judgment recovered against any tortfeasorliable in respect of that damage shall not be a barto an action against any other person who would,if sued, have been liable as a joint tortfeasor inrespect of the same damage;
>
> (b) if more than one action is brought in respectof that damage by or on behalf of the person bywhom it was suffered, or for the benefit of theestate, or of the wife, husband, parent or child, ofthat person, against tortfeasors liable in respectof the damage (whether as joint tortfeasors orotherwise), the sums recoverable under thejudgments given in those actions by way ofdamages shall not in the aggregate exceed theamount of the damages

awarded by the judgmentfirst given; and in any of those actions, other thanthat in which judgment was first given, theplaintiff shall not be entitled to costs unless thecourt is of opinion that there was reasonableground for bringing the action;

(c) any tortfeasor liable in respect of that damagemay recovercontribution from any other tortfeasor who is, orwould if suedhave been, liable in respect of the same damage,whether as ajoint tortfeasor or otherwise, but no person shallbe entitled torecover contribution under this section from anyperson entitled to be indemnified by him inrespect of the liability in respect of which thecontribution is sought.

34. It is therefore not correct that the *Law Reform Act* deals with circumstances where the victim died. That relates only to Section 2 of the said Act. I find that the prayers were properly made.

35. In respect of injuries, the Appellant indicated that he suffered a broken arm, broken knee, broken spinal cord (sic) and injuries to the head. Dr. Roger Hanninton Kayo listed the following injuries:

a. Head injuries

b. Burst fractures along the thoracic vertebrae

c. Right distal ulna fractures.

d. Deep cut wounds on the right forearm and head

e. Blunt injury on the back

f. Hermatoma on the left knee

g. Blood loss

h. Soft tissue injuries

36. The court did not assess the damages. It is the court below that saw the witnesses and formed opinion on injuries. In Lei Masaku versus Kalpama Builders Ltd [2014] eKLR, the court noted as follows: -

> It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."

37. Therefore assessing at this stage will deny the respondent the right to challenge the damages. The matter will thus be remitted to the lower court for the court to assess damages on the basis of the documents and evidence tendered.

38. The net effect is that the appeal is allowed. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

39. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

40. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

41. The respondent did not oppose the appeal. They were also not at fault. In the circumstances, each party will bear their own costs.

Determination

42. In the upshot, I make the following orders:-

a. The appeal is allowed.

b. Each party to bear their own costs.

c. Judgment for special damages of Ksh. 4,000/= as awarded by the court.

d. The matter will thus be remitted to the lower court for the court to assess damages on the basis of the documents and evidence tendered.

e. Appeal on future earnings is dismissed.

f. Each party to bear its own costs.

g. 30 days stay of execution.

h. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 25TH DAY OF JULY, 2025.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties.

Court Assistant – Michael