



**Mega Transporters Co Ltd v Rage (Civil Appeal E005 of 2022)
[2024] KEHC 7425 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7425 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL E005 OF 2022
JN ONYIEGO, J
JUNE 21, 2024**

BETWEEN

MEGA TRANSPORTERS CO LTD APPELLANT

AND

ABDI ALI RAGE RESPONDENT

*(Being an appeal from the judgment of Hon. C. Maundu (CM)
delivered on 14-04-22 in Garissa CM's court in civil suit No.23 of 2020)*

JUDGMENT

1. The appellant herein was the defendant in Garissa CM's court civil suit No. 23 of 2022 while the respondent was the plaintiff.
2. In his amended plaint dated 19.05.2021, the respondent(plaintiff) averred that on or about 07.03.2017 along Modika – Nuno road within Garissa County in the republic of Kenya, the defendant(appellant)/ their servant/their agent drove motor vehicle registration number KBY 003T so carelessly and negligently that it hit the plaintiff's motor vehicle registration number KBS 003T thus causing the plaintiff's motor vehicle serious material damage.
3. The respondent(plaintiff) prayed for;
 - a. Special damages to the tune of Kes 7,330,350/=
 - b. Costs of the suit.
 - c. Interest on special damages from 7th March 2017 until full payment.
 - d. Any other relief that this honourable court may deem fit and just.



4. The appellant entered appearance and further filed an amended defence dated 20.05.2021 wherein it denied the occurrence of the accident. It further stated that it was a stranger in reference to the ownership of the said motor vehicle. It urged without prejudice that, if the alleged accident ever occurred, then the same was time barred under the *Limitation of Actions Act*. Further, in its defence, the defendant sought to challenge any leave granted to file the suit out of time as this was a case of material damage hence not covered by the sections of the law noted by the plaintiff.
5. The plaintiff filed his reply to the defence dated 21.06.2021 in which every allegation of fact and law as averred by the defendant was denied. Further, it was maintained that the suit was not time barred and without prejudice to the foregoing, the same was still viable as the plaintiff at the appropriate time would seek for leave to have the suit considered as properly filed.
6. The trial magistrate after considering the facts and evidence adduced before him, reached a determination that the appellant was liable for the occurrence of the accident and further allowed judgment in terms of prayers a, b, c. and d) as per the amended plaint. The court also awarded the respondent interest on the award at the court rates from the date of filing the suit till payment in full plus costs of the suit. That interest on costs to run from the date of the judgment until payment in full. It is this determination by the trial court that necessitated this appeal.
7. The appellant listed five (5) grounds of appeal reflected in the memorandum of appeal dated 10.05.2022 as hereunder;
 - i. That the learned trial magistrate erred in fact and in law by failing to examine the merits of the leave granted to file suit out of time and therefore misdirected himself and arrived on a wrong decision.
 - ii. That the learned trial magistrate failed to consider several judicial decisions and authorities submitted in challenging the ex parte leave granted.
 - iii. The learned trial magistrate erred both in law and in fact by failing to find that the respondent's suit had been filed out of time without any decisive character outside the respondent's knowledge to warrant leave.
 - iv. The learned trial magistrate erred in finding that the respondent had proved ownership of the motor vehicle registration number KBS 208 without any documentary evidence being placed before him hence arrived at a wrong decision.
 - v. The learned trial magistrate erred in law and in fact by failing to appreciate and attach due or any weight to the appellant's evidence (DW1) and submissions/ authorities on the issues on liability and quantum of damages.
8. The appellant urged this court to grant the following orders that:
 - i. The appeal be allowed.
 - ii. The lower court's judgment be set aside and the respondent's suit be dismissed.
 - iii. That there be such other orders or further orders as the Honourable Court shall deem just, fair and expedient.
 - iv. That the costs of this appeal and those of the lower court suit be awarded to the appellant.
9. This court having admitted the appeal herein, gave directions that the same be canvassed by way of written submissions a direction parties complied with.



10. The appellant submitted in reference to the 1st, 2nd and 3rd grounds of appeal that the leave granted by the court through a miscellaneous application was not produced in court as evidence to confirm that extension of time was granted. That section 4(2) of the Limitation Act provides that an action in tort should be filed within three years as from the time of the fact.
11. It was contended that the accident herein having occurred in the year 2017 and the suit filed 2021, the same was filed four years after the fact and therefore, contra the provisions of the law. The appellant relied on the case of *Toyota Kenya Limited vs Beatrice Njoki & Another [2015]* eKLR where Njuguna J. held that a court must apply and adhere to section 27 of the *Limitation of Actions Act* to determine whether a plaintiff has a good claim or not and whether the delay in filing the suit was sufficiently explained. That the trial court erred by relying on the evidence of PW4 when he said that the parties being Somali, had employed *maslah* to enable them reach an agreement but the same did not yield any positive result hence the filing of the suit late.
12. In the same breadth, counsel urged while placing reliance in the case of *Kenya Power and Lighting Company Limited vs Collins Agumba Abage [2016]* eKLR that the grounds adduced by the respondent in relation to the late filing of the suit herein were not satisfactory. That despite the fact that the respondent argued that the parties were in talks for the whole period of time, nothing was produced before the court to support the same. Additionally, that even if the alleged talks between the parties were going on, the respondent was still free to file the suit herein in court.
13. Learned counsel maintained that the reasons given by the respondent to support the grant of leave were not only flimsy but also unsupported. The appellant relied on the case of *Tana and Athi Rivers Development authority vs Joseph Mbindyo and 3 Others Nyeri CA Civil Appeal No. 253 of 2011 [2013]* eKLR where the court was of the view that ongoing negotiations between the parties is not a reason good enough within consideration under section 27 (2) of the *Limitation Actions Act* can apply.
14. Touching on the fourth ground, the appellant urged that the respondent did not produce a certificate issued by the registrar of motor vehicles to confirm that he was the registered owner of the suit motor vehicle registration number KBS 208V. That the onus was on the respondent to prove that he was the registered owner of the suit motor vehicle which in this case, was not demonstrated.
15. On the fifth ground, the appellant urged that the trial court found it 100% liable without analyzing its submissions. That the trial court misguided itself by relying on assessment that was not authenticated since no evidence of payment was adduced. In the end, the appellant while relying on the case of *Miller vs Minister of Pension [1947] 2ALL ER 372* stated that the respondent failed to prove his case to the required standards and therefore, the appeal herein ought to be allowed.
16. The respondent on the other hand raised one issue for determination; whether the appeal herein has merits; on the claim that there was no proof that leave to institute the suit was granted, counsel opined that the same was misleading as the bundle of documents filed in Garissa Chief Magistrates Court Miscellaneous Case No. 5 of 2020 and dated 04.07.2020 was part of the respondent's bundle of documents and therefore it is a misplaced argument by the appellant that the same did not form part of the trial court's record.
17. It was further contended that the trial court's finding for leave to commence suit out of time was merited under section 27(2) of the *Limitation of Actions Act*. That in as much as the said section relates to personal injury claims, the same can be extended to other claims. This court was invited to have in mind articles 10 and 159 of *the Constitution* to ensure that substantive justice is rendered.
18. Regarding the issue of ownership, it was urged that in the case of *Ignatius Makau Mutisya vs Reuben Musyoki Muli [2015]* eKLR, the Court of Appeal was of the view that motor vehicle registration is



prima facie evidence. That the respondent led evidence before the trial court to wit that he was the owner of the suit vehicle.

19. On liability, the respondent urged that the trial magistrate did not err for the reason that he led evidence to support the same and further, the abstract showed that the appellant was to blame wholly for the accident. On quantum, it was urged that the trial court did not err in awarding the amount for the reason that the trial court was confronted with only one assessment report and the same was not challenged. That the appellant did not rebut the respondent's evidence and therefore, cannot cry foul at this stage. This court was therefore urged to dismiss the appeal for the same was in devoid of merit.
20. The court has considered the grounds of appeal and submissions by both parties. Being the first appellate court, the court has a duty to re-evaluate, re-analyze and re-consider a fresh the evidence tendered before the trial court and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In *Gitobu Imanyara & 2 others vs Attorney General [2016] e KLR*, where the Court of Appeal stated that;

“[A]n 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 itself and draw its own 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”

[See also *Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR*].

21. After analyzing the record of appeal, grounds of appeal and parties' submissions, the following issues does germinate for consideration,
 - a. Whether the suit herein was time barred;
 - b. Whether leave to institute these proceedings out of time was properly obtained
 - c. Whether the respondent/plaintiff was the owner of MV regn number KBS 208V
 - d. Whether the amount awarded as damages was reasonable.
 - e. Whether the appellant was 100% liable.
22. It is trite that the burden of proof in any ordinary civil proceedings is that on a balance of probability. See the holding by the Court of Appeal in *Palace Investment Ltd vs Geoffrey Kariuki Mwenda & Another [2015] eKLR*. It is worth noting that, he who alleges and desires judgment to be granted in his favour has the burden of proof. See Section 107 (1) of the *Evidence Act* which states that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

23. Section 108 further provides that:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”



24. Nevertheless, the award of damages is an issue of discretion by the trial court which should be exercised judiciously. Madan JA (as he then was) in *United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd* [1985] E.A held that;

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

25. The appellant contended that the trial magistrate failed to examine the merits of the leave granted to file suit out of time and therefore misdirected himself and arrived at a wrong decision.

26. Having perused the said leave granted in Misc. Case No. 5 of 2020 *Abdi Ali Rage vs Mega Transporters Company Limited*, the applicant, the respondent herein via an originating application dated 30.06.2020 and filed on 02.07.2020 sought for leave to file suit out of time. The court after considering the same granted the said leave on 14.07.2020. Thereafter, the respondent filed the suit herein via plaint dated 28.07.2020 together with 7 documents among them the order granting leave. It is therefore not proper to say that the said leave was not produced as evidence as the plaintiff adopted his witness statement to which the said documents were attached and the magistrate made reference to the same in par.13 of his judgment. To that extent, that ground fails.

27. As to whether the suit was time barred, the appellant faulted the learned trial magistrate for failing to examine the merits of the leave granted to file suit out of time thus reaching a wrong decision. There is no dispute that the accident occurred on 7th March 2017 and the suit herein filed on 28th July 2020. This translates to a period beyond 3 years which time is prescribed for institution of claims based on tort for personal injury claims. See Section 4(2) of the *Limitation of Actions Act*. The appellant argued that for material damage claims like the one in question, there is no law providing for extension of time.

28. For avoidance of doubt I wish to reproduce section 4(2) as hereunder;

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.

29. Further Section 27(1) of the Act stipulates as follows:

“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.”

30. Further to the above, the principles governing an ex-parte application in respect of leave to file a suit out of time were enunciated in the Supreme Court case of *County Executive of Kisumu vs County Government of Kisumu and 8 Others (2017) eKLR [Civil Application No. 3 of 2016]* as follows: -

- a) 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;
- b) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c) Whether the court should exercise the discretion to extend time is a consideration to be made on a case by case basis;
- d) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e) Whether there will be any prejudice suffered by the respondents if the extension is granted;
- f) Whether the application has been brought without undue delay; and
- g) Whether in certain cases, like the election petitions, public interest should be a consideration for extending time.

31. In the present case, the cause of action arose on or about 07.03.2017 while the amended plaint was filed on 28.07.2020, that is 4 years after the limitation period provided in section 4 (2) of the *Limitation of Actions Act*, which is 3 years.

32. The respondent in his statement did not make any references to the alleged maslah negotiations and further, as already noted, no document was annexed to support the same. It was during cross examination that he stated that the delay in filing the suit was due to the fact that the parties being Somali, they employed maslah to enable them reach an agreement but the same did not yield any positive result hence the filing of the suit late. Having perused the record herein, I find that there was no evidence of the alleged maslah negotiations annexed in the pleadings in the main suit nor in the pleadings for leave in the Misc. Suit No. 5 of 2020.

33. The above notwithstanding, 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;

34. In the persuasive case of *Royal Media Services Ltd vs. Valentine Mugure Maina & Another (2019) eKLR*, Ngaa J. explained the application of Section 4(2) of the *Limitation of Actions Act* as follows:-

“Before I conclude, I must mention that section 4(2) is couched in such terms that the trial court is left with discretion to extend the time within which a claimant can file suit for



damages in defamation claims. It may be that the claimant was under disability of some sort and therefore he could not, for that reason, file the claim within the statutory period. Where the court is inclined to extend time, it must have regard to all the circumstances of the case and in particular to such circumstances as the length and the reasons for, the delay on the plaintiff..... the court, in making its discretion will consider the date on which any such facts did become known to him and the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action.”

35. The above notwithstanding, it is trite that the said extension of time only applies to personal injuries claims and not material damage claims as is the case herein.

36. I have taken into consideration the fact that there needs to be an appreciation of the Statute of Limitations Act and the purpose for which it was crafted. In the case of *Rawa vs Rawa* (1990) KLR, 275, the Court emphasized that: -

“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.”

37. In the present case it has been suggested that the appellant contributed to the respondent’s delay. Having noted that the assertion has not been proved, it is my considered view that the respondent is undeserving the orders as awarded by the trial court. I say so for the reason that the respondent did not satisfactorily explain his failure to institute the proceedings within the stipulated time hence the suit was time barred.

38. On the question whether there was proof of ownership of the motor vehicle KBS 208V, it is clear that no records from the registrar of motor vehicles nor insurance cover was produced. The respondent did not produce any ownership documents to prove ownership of the said MV. A police abstract is not sufficient proof of motor vehicle ownership. See *Thuranira Karauriv vs Agnes Mocheche* (1997) where the court stated that where ownership is denied, a certificate of search signed by the registrar of motor vehicles is necessary. In this case none was produced.

39. In nutshell, I am persuaded by the appellant’s grounds of appeal and accordingly do uphold the same. In the upshot, I am persuaded to set aside the findings of the trial court and substitute the same with an order dismissing the respondent’s claim against the appellant with no order as to costs

Dated, signed and delivered virtually this 21st day of June 2024

J. N. ONYIEGO

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

