



**Njoroge v Kimani (Civil Appeal E789 of 2022)
[2024] KEHC 7834 (KLR) (Civ) (2 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 7834 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E789 OF 2022

DAS MAJANJA, J

JULY 2, 2024

BETWEEN

PATRICK KIMANI NJOROGE APPELLANT

AND

JANE NDUITA KIMANI RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J.W. Munene, RM/Adjudicator dated 9th September 2022 at the Small Claims Court at Nairobi SCC No. No. E1320 of 2022)

JUDGMENT

Introduction and Background

1. The Appellant is dissatisfied with the judgment of the Subordinate Court rendered on 09.09.2022 where the Respondent was awarded Kshs. 153,530.00 as general and special damages for injuries she sustained as a result of being hit by the Appellant’s motor vehicle KBV *H Isuzu Canter (“the motor vehicle”) on 20.11.2017 along Kirugu-Dunyu Road. The Respondent blamed the Appellant for the accident as she claimed he was negligent in the manner that he controlled the motor vehicle that it hit her from behind as she was walking along a designated pedestrian path. The Respondent stated that as a result of the accident, she sustained soft tissue injuries on the forehead, upper arm and bruises on the left knee.
2. The Appellant denied the claim but averred on a without prejudice basis that the accident was wholly and/or substantially caused by the Respondent’s negligence. He also averred that the claim was time barred. He thus sought the dismissal of the suit against him.
3. Only the Respondent (PW 1) testified at the trial. The parties agreed to produce the Appellant’s documents in evidence. In the judgment dated 09.09.2022, the Subordinate Court found the



Appellant fully liable. On quantum of damages, it awarded Kshs. 150,000.00 and Kshs. 3,550.00 as general and special damages respectively. This judgment forms the basis of this appeal which the Appellant has grounded in the memorandum of appeal dated 06.10.2022. The appeal has been canvassed by way of written submissions which are on record and which I shall make relevant references to in my analysis and determination below.

Analysis and Determination

4. As this an appeal from the Small Claims Court, the jurisdiction of this court is limited by section 38(1) of the *Small Claims Court Act* (Chapter 10A of the Laws of Kenya) which provides that ‘A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.’ A court limited to matters of law is not permitted to substitute the Subordinate Court’s decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them (*John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR). Thus, the duty of this court is to determine whether the subordinate court’s conclusions were supported by the evidence on record and the law.
5. The Appellant faults the trial court for entertaining the suit that was statute barred. On the suit being statute barred, the Appellant submits the cause of action arose on 20.11.2017 and that since the same was a claim based on the tort of negligence, the matter ought to have been filed by 20.11.2020 but the same was filed on 31.05.2022, close to 5 years since the cause of action arose. The Appellant submits that whereas section 27 of the *Limitation of Actions Act* (Chapter 22 of the Laws of Kenya) (“the *LAA*”) provides for leave to be granted for a party to file a suit out of time, the Respondent did not provide valid reasons in its application dated 23.03.2022 before the Subordinate Court. On her part, the Respondent submits that the Subordinate Court allowed her application for leave to file the suit out of time for valid reasons.
6. It is not in dispute that the Subordinate Court in a ruling dated 23.05.2022 allowed the Respondent’s application and granted her leave to enlarge time in order to file the suit out of time. The Appellant challenged the said order and insisted that the suit was time barred and that the Appellant had not provided valid reasons as per section 27 of the *LAA*. In *Amos Muthinja M’Mungania v John Gaithe & another* [2016] eKLR Gikonyo J., stated as follows:

‘...The law on this point, the way I understand it, is that any leave to file suit out of time which had been granted ex parte prior to the filing of suit is a matter for trial. Therefore, the only legitimate means of challenging any exparte leave to file suit out time is at the trial. In fact, the law is that matters of limitation of actions should be decided in the trial after the court has taken into account all evidence, circumstances and facts of the case especially those tendered by the plaintiff to bring the suit within the exception in Section 27 of the Limitations of Actions Act. Fortunately, this subject is replete with very clear judicial decisions which I need not multiply except cite the case of (1) Oruta vs Samuel Mose Nyamato [1984] KLR 990 (2) Transworld Safaris Kenya Ltd –vs- Somak Travel Ltd [1997] eKLR, (3) Mbithi vs Municipal Council of Mombasa & another. (1990 -1994) E.A. and (4) Divecon Ltd vs Shrinmkhana S.Samani. Therefore, I refuse to accept the proposition by the Appellant that the learned trial magistrate did not have jurisdiction to set aside the leave to file suit out of time herein. Indeed, I belong to the school of thought which posit that matters of limitation of actions should never be tried as preliminary objections or in a summary manner but at the trial upon the evidence of parties.



- (7) I will add one more thing: that the requirement of the law (Order 2 rule 4 of the *Civil Procedure Rules*) that matters of limitation must be specifically pleaded in the defence underscores the intention of the law that limitation should become an issue for trial. See the case of Divecon Ltd vs Shirinkhanu S. Samani Civil Appeal No. 142 Of 1997, where the court quoted with approval the words of Gachuhi, J.A., the leading judge in the Oruta case (supra) thus:

“It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the *Limitation of Actions Act...*”

Accordingly, a proper understanding of Section 27 of the *Limitation of Actions Act*, the plaintiff bears the legal burden to show that material facts relating to his or her cause of action were outside the persons’ knowledge. I have looked at the proceedings, as recorded by the trial magistrate. The explanation given by PW1 on this subject was that the advocate he had instructed to follow-up the accident claim cheated him that he had filed suit when he had not. He blamed the said advocate for the delay in filing the suit. He was cross-examined on this particular matter of limitations of action. Again he was re-examined by Mr.Kiogora on the issue of Limitation of Action. All that he did was to blame his advocate for the delay. The question I must ask myself is whether the reason for delay constitutes material fact for purposes of Section 27 of the *Limitation of Actions Act*. On this I find help in the words of Kwach JA (as he then was) in the case of Mbithi vs Municipal Council of Mombasa (*Supra*) that:

“Material facts are restricted to three categories of fact, namely,

- (a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting the cause of action,
- (b) the nature or extent of the personal injury so resulting; and
- (c) the fact that personal injuries were attributable to the negligence, nuisance or breach of duty or the extent to which they were so attributable”.

The judge went onto state that:

“It is not sufficient that the facts unknown to the plaintiff should be material within the above definition; they must also be of a decisive character; that is to say, they must be such that a reasonable person, knowing them and having obtained appropriate advice with respect to him, would have regarded them as determining that an action would have a reasonable prospect of succeeding and resulting in the award of damages sufficient to justify the bringing of the action. Finally, the plaintiff must prove that a material fact of a decisive character was outside his knowledge (actual or constructive)

7. I agree that where the plaintiff has been granted leave to institute a suit out of time, then the issue of limitation should not be determined as a preliminary point but at the trial upon evidence of the parties. The Appellant pleaded the issue of limitation and highlighted it in his submissions before the Subordinate Court but a reading of the judgment indicates that the Adjudicator never determined it. This constitutes an error of law.
8. The trial magistrate was also mistaken in holding that since an order for granting leave to file the suit out of time had already been granted, then that was the end of the matter. As has been stated above, once an exparte order to file suit out of time is granted, it can be challenged later in the trial, as the Appellant did.



9. Assuming the trial court considered the Appellant's defence and submissions on the matter, the question then is whether the reason for delay advanced by the Respondent constituted a 'material fact' for purposes of section 27 of the Limitation of Actions Act. The Respondent stated that she was aware of her cause of action and had appointed advocates to institute suit on her behalf but that she could not do so due to financial constraints. Going by Kwach JA.'s (as he was then) categorization of material facts in *Mbithi v Municipal Council of Mombasa (Supra)* that were outside the knowledge (actual or constructive) of the Respondent for the extension provision of section 27 to apply, it follows that financial constraints is not one of them. In any event, the Respondent did not adduce evidence of her impecuniosity to explain the delay as demanded by sections 27 and 28 of the LAA.
10. I find and hold that the Adjudicator ought to have dismissed the suit for being time barred as the Respondent failed to give valid reasons within the meaning of the LAA for the delay in filing the suit on time. The Adjudicator's failure to do so is an error of law that warrants the court's intervention.

Disposition

11. The Appellant's appeal is allowed with the consequence that the judgment of the Subordinate Court dated 09.09.2022 is set aside and substituted with an order that the Respondent's suit is dismissed for being statutorily time barred. The Respondent shall bear the costs of the suit before the Subordinate Court. The Appellant shall have the costs of this appeal assessed at Kshs. 20,000.00.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JULY 2024.

D. S. MAJANJA

JUDGE

