



**Roy Parcel Services Limited v Ouma & 2 others (Civil Appeal 647 of 2019)
[2024] KEHC 10166 (KLR) (Civ) (9 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10166 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
CIVIL APPEAL 647 OF 2019
TW OUYA, J
AUGUST 9, 2024**

BETWEEN

ROY PARCEL SERVICES LIMITED APPELLANT

AND

**PEREZ ATIENO OUMA (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF GEORGE OUMA OLOO (DECEASED)) 1ST RESPONDENT**

WE TILEY ‘M’ LIMITED 2ND RESPONDENT

JOHN ANDIGO ANDREW 3RD RESPONDENT

*(Being an Appeal against the Judgement/decree of the Chief
Magistrate Court at Nairobi Honorable K. I. Orange (SRM) delivered
on 28th October, 2019 in Nairobi CMCC No. 954 OF 2003)*

JUDGMENT

Background

1. The Respondent herein initiated the case by way of plaint in the Lower Court on 4th February 2003 against the 2nd and 3rd Respondents claiming general damages under fatal Accident Act and the [Law Reform Act](#), Special Damages and costs of the Suit. The Claim arose from a road accident that occurred on 24th June 2000 along Mai Mahiu Road when the 1st Respondent’s (Plaintiff’s) deceased was traveling as a passenger in Motor vehicle Registration number KAL 538S driven by the 3rd Respondent employed by the 2nd Respondent which collided with the motor vehicle registration KAH 528X thereby causing fatal injuries to the deceased.
2. Other suits emanated from the same accident namely:



- i. Material damage suit CMCC No.4039 Of 2003 W.E. TILEY M limited v ROY Parcel Services Limited
 - ii. Naivasha CMCC No.593 OF 2003
 - iii. Nairobi CMCC 954 OF 2003
3. Naivasha CMCC No.593 OF 2003 and Nairobi CMCC 594 of 2003 were stayed on 3rd November 2004 pending the final determination of CMCC No.4039 of 2003 which was agreed by the parties by consent to be a Test Suit. It was determined on 5th March 2014 by consent letter and duly adopted by court as judgement on liability between owners of the two subject motor vehicles (KAL 538S and KAH 528H).
4. The Appellant filed a Memorandum of Appeal on the following grounds:
- i. That the Learned Magistrate erred in law and in fact in finding that the Respondent's suit was not statutory barred under Section 4 (2) of the Limitation of Actions Act by failing to address the issue of whether the Defendant was enjoined to the suit out of the Statutory Limitation period.
 - ii. That the Learned Magistrate having misapprehended and misunderstood the Respondent's/plaintiff's suit enjoining the Appellant's/3rd Defendant out of time and/or failure to address the issue on whether or not it was properly before the Court arrived at erroneous decision.
 - iii. That the learned Magistrate erred in law and in fact by failing to decide on the issue of section 4 (2) of the Limitation of Actions Act which provides that an action founded on tort may not be brought after three years thereby did not exercise his discretion judicially.
 - iv. That the Learned Magistrate erred in law and fact in not finding that the suit was time barred and no leave to file suit out of time against the appellant/3rd Defendant was presented to court by the Respondent.
 - v. That the Learned Principal Magistrate erred in law and in fact in awarding the plaintiff damages given the suit was time barred.
 - vi. That the learned Magistrate erred in law and in fact in failing to consider the Appellant's/3rd Defendant's submission and the authorities cited before him, thereby arriving at an erroneous decision which has occasioned grave injustice to the Appellant/3rd defendant.
 - vii. That the Learned Magistrate erred in law and in fact in not evaluating the totality of all the evidence placed before him at the Hearing and relied on assumption thereby erroneously finding that the Respondent's/plaintiff's suit against the Appellant /3rd Defendant was properly before the court.
 - viii. That the Learned Magistrate erred in law and in fact in failing to appreciate and consider that the burden of proof lay with the Respondent's /plaintiff's to prove that the suit against the Appellant/3rd Defendant was properly before the court.
 - ix. That the Honourable Learned Magistrate misdirected himself by awarding the Respondent general damages and costs deviating from existing and established judicial principle on accident claims.
 - x. That Honourable Learned Magistrate erred both in law and in fact in finding that the Appellant/3rd Respondent was liable to compensate the Respondent.



5. The Appellant prays that:
 - i. That there be declaration that the Respondent's/plaintiff's improperly enjoined the Appellant/3rd Defendant in the suit before the Lower court without leave of Court extending time within which to enjoin the Appellant/3rd Defendant.
 - ii. That the issues of liability between the Appellant/3rd Defendant for 50:50 % does not arise in view of prayer I herein.
 - iii. That the plaintiff is not entitled to any remedy against the Appellant/3rd Defendant.
 - iv. The costs of this appeal be borne by the Respondent.
 - v. Any other Order and/or relief this Honourable court deems fit to grant.
6. The Appellant raises pertinent issues:
 - i. That the Appellant/3rd Defendant was improperly enjoined in the suit
 - ii. That the delay period between the year 2000 when the accident occurred and 2014 when the Appellant was enjoined in the suit can be construed to be time-barred.
7. The Appellant's appeal against the judgement of 18th October is threefold. First, it is premised on the argument that the suit was statutory time-barred under section 4(2) of the [Limitation of Actions Act](#) and that the court failed to ascertain as a legal requirement whether the Respondent obtained leave of the court before enjoining the Appellant. Secondly, the Appellant/3rd Defendant had filed a Notice of Preliminary Objection dated 15th October 2014 to the effect that the plaintiff's suit CMCC NO.4039 of 2003 was time barred but the court dismissed the application.
8. Thirdly, the Appellant argues that when the Respondent filed suit No.954 of 2003 claiming for general damages against the Defendant for the injuries suffered as a result of the subject accident, the Defendant denied all the allegations and put the Respondent to strict proof, denying negligence and preferring contributory negligence basis to the 2nd Defendant/3rd Respondent. In effect, the Appellant argues that the Respondent had not brought any suit against 3rd Defendant as at 23rd June 2003 when the statutory period expired.
9. The parties canvassed the appeal by way of written submissions which they had opportunity to highlight orally. I have considered the submissions by the Appellants and 1st Respondent in this matter. Having stated the Appellant's position above, I now address the Respondents' case.
10. The 1st Respondent argues that whereas the suit was time barred, the Respondent applied for extension of time and order to file suit out of time which was granted. That the Appellant filed a notice of Preliminary Objection which was dismissed, and that the Appellant did not appeal against that dismissal. That the matter proceeded to hearing on the basis of the leave obtained above. In effect the Respondent argues that limitation should not be entertained as a subject of appeal at this point.
11. The Respondent argues further that in CMCC NO.4039 of 2003 the appellant participated in the consent agreement between himself and the 2nd Respondent which was filed and adopted by court on 18th August 2005 as a test case.
12. That the suit was not dead by virtue of the limitation period and that all procedures under the [Limitation of Actions Act](#) were followed.

Issues For Determination



The issues for determination revolve around whether or not the Appellant was improperly bound in the suit herein and can be broken down as follows:

- i. Whether the consent order dated 18th August 2005 in CMCC 4039 of 2003 was binding upon the Appellant.
 - ii. Whether the suit was time-barred as at the time the 2nd Defendant sort to enjoin the Appellant.
 - iii. Whether the 2nd Defendant sort the necessary leave for expansion of time.
13. I have looked at the consent order dated 16th December 2005 in CMCC No. 4039 also referred to as “test case” between the Appellant and the 2nd Respondent. The order read in part that:
- i. This suit be tried as a test case with regard to liability for the accident which occurred on 24th June 2000 giving rise to this claim as between the plaintiff and the defendant
 - ii. This court judgement on liability in this matter is binding as between the plaintiff and the Defendant in all actions arising out of the accident.
 - iii. Upon an undertaking by the parties to this suit do proceed with the diligence all further proceedings in C.M.C.C at Nairobi Number 954 of 2003 and SPMCC at Naivasha Number 593 of 2003 be stayed until after Judgement shall have been entered in this action.
 - iv. Parties list the matter for hearing within the next 60 (sixty) days hereof.
 - v. The costs of and occasioned by the application be the cause.
14. I note that the Appellant was a participant in this consent order and that there was no appeal against it despite its binding nature. The validity of this consent order was therefore not challenged in court at that time neither is it an issue in the instant appeal. However, it was upon the parties making the claim to move to court in the required manner and to invoke the contents thereof. It is alluded to that part of the consent arrangement was that all matters were to be pended awaiting the determination of CMCC 4039 of 2003. It is on record that CMCC 4039 of 2003 was determined on 18th August 2005. It therefore follows that if any party would want to cite the above as the cause of the delay, then they would also have to explain the time lapse from 18th August 2005 when the Test case was resolved and 2014 when the 2nd Respondent sought to enjoin the Appellant.
15. What is in issue is the subsequent order on 17th September 2014, granting the 1st Respondent leave in CMCC 954 of 2003 to amend plaint and to issue summons to the Appellant as the 3rd Defendant. The 2nd Respondent moved the court by way of a Notice of Motion dated 3rd September 2014 and orders were granted on 17th September 2014 to the effect:
- It is hereby ordered by consent
1. That the Plaintiff be and is hereby granted leave to amend the plaint in terms of the draft amended plaint herein and summons thereof to issue to the 3rd defendant herein Roy Parcels Services Limited
 2. Prayer (b) is withdrawn in its entirety and all effect therein
 3. Costs in the cause
16. Prayer (b) which related the consent order of CMCC 4039 of 2003 being applied in this case was withdrawn. Summons were subsequently issued against the Appellant on 23rd September 2014.



17. First, I note that whereas the statutory period was long expired, there is no specific prayer or order for time expansion. What is prayed for and is granted is leave to amend plaint and summons to issue to the Appellant as the 3rd Defendant.
18. Secondly, the order expressly excludes prayer (b) which was specific on adopting the consent order of 4039 of 2003 to apply in this suit. This means therefore that the determination of CMCC 954 of 2003 was not dependent upon the outcome of CMCC 4039 of 2003 and therefore displaces the Respondent's argument based on the "test case." This disposes off the issue as to whether or not the Test case was binding on the Appellant.
19. Thirdly, the Appellant upon entering appearance in the matter raised a Preliminary Objection dated October 2014 to the effect that the suit was time barred. This Application was dismissed vide ruling dated 23rd January 2019. I fault this Ruling in that the trial court relied on the Ruling dated 17th September 2014 (referred to above) which did not address the issue of time expansion.

Determination

20. Under section 4(2) of the [Limitation of Actions Act](#) it is clear that an action arising out of Tort may not be brought after a period of 3 years except with the leave of court under exceptional circumstances. The exceptional circumstances and principle 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.
21. It cannot be overemphasized that there needs to be an appreciation of the [Limitation of Actions 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."



22. In the present case it is an outright assumption by the Respondent that the order dated 17th September 2014 granting leave to amend the plaint and for summons to issue against the Appellant was also an order for expansion of time which is not the case. This court holds the view that the requirement to obtain leave of the Court and expansion of time is so specific that it cannot be assumed or wished away. The Respondent does not deny that the suit was time barred but assumes that the order was obtained when leave was granted to enjoin the Appellant and summons issued. It suffices to state that the two are separate and distinct issues.
23. The delay period between the year 2000 when the accident occurred and 2014 when the Appellant was enjoined in the suit is significant and ought to have been addressed. There is no explanation by the Respondent as to why it took more than 10 years or what steps if any were taken to pursue a legal action. This court can only conclude that the Respondent slept on their right by missing a key action which ought to have been taken at the point of seeking leave to enjoin the Appellant as the 3rd Defendant. This omission cannot be fixed by the Appeal court.
24. This court therefore holds that:
 - i. The suit by 2nd Respondent against the Appellant was time-barred having been filed in 2014 while the cause of action arose in 2000.
 - ii. The 2nd Respondent did not obtain the requisite orders for expansion of time before enjoining the Appellant as the 3rd Defendant
 - iii. The Appellant was wrongly enjoined as the 3rd Defendant in the Suit without the requisite leave or expansion of time.
 - iv. The Ruling dated 23rd January 2019 dismissing the Appellant's Preliminary Objection was misguided as it was based on misapprehension of the Order dated 17th September 2014 which did not grant an order for expansion of time.

Disposition

- i. This Appeal is allowed as prayed
- ii. The Judgement/Decree of the Chief Magistrate Court delivered on 18th October 2019 against the Appellant is hereby set aside
- iii. Parties to bear their costs

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF AUGUST, 2024

ROA 14 days.

HON. T. W. OUYA

JUDGE

FOR APPELLANT.....

FOR RESPONDENT.....

COURT ASSISTANT.....

