



**Lubanchem Limited v Medispec Kenya Limited (Civil Appeal E321 of 2021)  
[2024] KEHC 12007 (KLR) (Civ) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12007 (KLR)

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

**CIVIL  
CIVIL APPEAL E321 OF 2021**

**JM OMIDO, J  
OCTOBER 4, 2024**

**BETWEEN**

**LUBANCHEM LIMITED ..... APPELLANT**

**AND**

**MEDISPEC KENYA LIMITED ..... RESPONDENT**

*(Being an Appeal from the Ruling and Order of Hon. Judith Omollo, Resident Magistrate delivered on 21st May, 2021 in Nairobi Milimani CMCC No. 8747 of 2019.)*

**JUDGMENT**

1. The Appellant, Lubanchem Limited has brought this appeal, being aggrieved by the ruling and order of the Chief Magistrate’s Court (Hon. Judith Omollo, Resident Magistrate) delivered on 21<sup>st</sup> May, 2021 Nairobi Milimani CMCC No. 8747 of 2019, against the Respondent, Medispec Kenya Limited.
2. The Appellant has presented the following grounds of appeal vide the Memorandum of Appeal dated 8<sup>th</sup> June, 2021:
  1. That the learned Magistrate erred in law and in fact in failing to correctly apply the principles and tests for the grant of an application to dismiss the suit for being statute barred.
  2. That the learned Magistrate erred in law and in fact in failing to consider and find that the Appellant had a claim that raises triable issues.
  3. That the learned Magistrate erred in law and in fact in failing to consider and find that the Respondent would not be prejudiced in any way by not dismissing the suit without being heard on merits.



4. That the learned Magistrate erred in law and in fact in failing to consider the explanation for the delay in filing the suit offered by the Appellant.
  5. That the learned Magistrate erred in law and in fact in failing to exercise her discretion not to dismiss the suit so as justice is administered without undue regard to procedural technicalities.
  6. That the learned Magistrate erred in law and in fact in dismissing the Appellant's suit thereby denying the Appellant a chance to be heard or shutting the Appellant from being heard.
  7. That the learned Magistrate erred in law and in fact in failing to exercise her unfettered, unlimited and unrestricted jurisdiction not to dismiss the suit.
3. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of *Sielle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.
4. In *Sielle*, Sir Clement De Lestang observed that:
- “This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.
- However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
5. The matter before the lower court was a tortious liability claim in which the Appellant (the Plaintiff in the lower court), vide a plaint dated 20<sup>th</sup> July, 2018 and filed on 2<sup>nd</sup> October, 2018 sought for compensation against the Respondent (the Defendant in the lower court) in special damages to the tune of Ksh.6,349,031/- together with costs of the suit and interest.
  6. The suit was based on the tort of negligence whereby the Appellant pleaded that on or about 16<sup>th</sup> August, 2013, the Respondents, its workers, agents and /or servants while constructing on its premises that was adjacent to the Appellant's premises in Industrial Area in Nairobi, negligently caused blockage of gutters and breakage of roofing tiles as a result allowed rain or storm water to overflow into the Appellant's premises, thereby damaging goods therein.
  7. The Appellant set out in the plaint the particulars of negligence that it attributed to the Respondent.
  8. The Appellant further pleaded that by reason of the Respondent's negligence, the Appellant suffered loss and damage on its property and stocks, which it particularized as follows:
    - a. Repair to the property and damage to stocks...Ksh.6,274,031/-.
    - b. Workers' fees.....Ksh. 75,000/-.

TOTAL.....Ksh.6,349,031/-.
  9. The Appellant thus claimed against the Respondent the amount of Ksh.6,349,031/-, pleaded as special damages, claiming that the Respondent had refused to make good the claim despite demands made and notices of intention to sue issued.



10. By an application by Motion on Notice dated 26<sup>th</sup> October, 2020, the Respondent moved the lower court under Order 17 Rule 2(3) of the Civil Procedure Rules and Sections 1A and 1B of the Civil Procedure Act, Cap 21 Laws of Kenya in which the following substantive prayers were sought:
  - a. That this suit be dismissed with costs for being filed out of time.
  - b. That costs of this application be granted to the Defendant.
11. The Respondent's contested application proceeded before the trial court and was determined vide the ruling that was rendered on 21<sup>st</sup> May, 2021 in which the trial court found in favour of the Respondent and proceeded to dismiss the suit with costs for being filed out of time without leave of the court.
12. It is the above ruling that gives rise to this appeal. The Appellant, through the instant appeal proposes that the appeal be allowed and the ruling and order of the lower court be set aside and the Appellant be allowed to prosecute its case in the lower court.
13. From the perusal of the lower court file, what is not disputed is as follows: That on 11<sup>th</sup> April, 2017, the Appellant filed an ex parte Notice of Motion dated 6<sup>th</sup> April, 2017, in Miscellaneous Application No. 291 of 2017 Lubanchem Limited v Medispec Kenya Limited through which it sought that the court grants it leave to file a civil suit against the Respondent arising out of the cause of action that is subject to the instant matter out of time. That on 30<sup>th</sup> November, 2017, the court (Hon. G.A. Mmasi, Senior Principal Magistrate) dismissed the application dated 6<sup>th</sup> April, 2017 for non-attendance. That on 19<sup>th</sup> December 2017, the Appellant filed another Notice of Motion application dated 18<sup>th</sup> December, 2017, in Miscellaneous Application No. 291 of 2017 Lubanchem Limited v Medispec Kenya Limited seeking that the application dated 6<sup>th</sup> April, 2017 which was dismissed for non-attendance be reinstated. The application was subsequently heard and determined with the result that the dismissed application dated 6<sup>th</sup> April, 2017 was reinstated. That the Motion dated 6<sup>th</sup> April 2017 was ultimately determined by the court (Hon. A.N. Makau) and a ruling thereon delivered on 21<sup>st</sup> March, 2018, whereby the following orders were issued:
  1. That leave be and is hereby granted to the Plaintiff/Applicant (sic) to file in court a civil suit against the Defendant/Respondent (sic) for recovery of money sent to repair damages caused by rain water on the Plaintiff/Applicant's (sic) property on 16<sup>th</sup> August, 2013 from the construction of the adjoining building out of time.
  2. That the Applicant is given 30 days to file the pleadings.
  3. That the costs of the application be in the cause.
 That the suit before the lower court was filed on 2<sup>nd</sup> October, 2018, purportedly pursuant to the orders issued on 21<sup>st</sup> March, 2018.
14. Back to the application dated 26<sup>th</sup> October, 2020 (that gave rise to this appeal), I note that before determining the said Motion, the learned trial Magistrate correctly set out the issues that were in dispute as arising out of the application, which were whether the suit was filed out of time and whether the same would face dismissal if it was out of time.
15. In respect of both issues, the learned trial Magistrate was persuaded to rule in the affirmative.
16. Now to this appeal, directions were issued that the same proceeds by way of written submissions and the parties complied with those directions. I have perused and considered the record of the lower court, the present record and the rival submissions and I discern the issues for determination in the present appeal to be as follows:



- a. Whether the trial court erred in reaching the finding that the suit before the lower court was filed out of time.
  - b. Whether (subject to (a) above), on the basis of the trial court's findings that the suit was filed out of time, the trial court erred in dismissing the suit.
17. With regard to the first issue for determination which concerns the trial court's finding that the suit before the lower court was filed out of time, it is instructive from the pleadings, and as I have noted above, that the action was premised on the tort of negligence. Under Section 4(2) of the [Limitation of Actions Act](#), Cap 22 Laws of Kenya, 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.
  18. It is however to be noted that a party may under Order 37 Rule 6(1) of the Civil Procedure Rules and Sections 26 and 27 of the [Limitation of Actions Act](#), Cap 22 Laws of Kenya apply by way of an ex parte Originating Summons to bring a suit in respect of an action out of time, where the time for bringing such an action has lapsed. Although the application for the order of extension or expansion of time is ex parte in its nature, the law allows the opposing party to challenge the leave so granted within the suit that is filed pursuant to the order of extension/expansion of time.
  19. In respect of this case, it was pleaded in the pleadings that the tortious act or event occurred on 16<sup>th</sup> August, 2013. That then means that the time within which to bring the action lapsed on or about 15<sup>th</sup> August, 2016.
  20. As we have seen above, on 21<sup>st</sup> March, 2018, leave was granted to the Appellant to file his claim out of time and the court went further to limit the period within which to file the suit to 30 days from the date of the order. The suit before the lower court was filed on 2<sup>nd</sup> October, 2018, obviously outside the 30-day period that the court granted. No doubt then that the suit was filed out of time and without the leave of the court, the 30-day window period having expired.
  21. I therefore have no reason to fault the learned trial Magistrate for reaching the finding, which was correct, that the suit before the lower court was filed out of time.
  22. The second issue for me to determine is whether the learned trial Magistrate fell into error in dismissing the suit on the basis of the trial court's findings that the suit was filed out of time.
  23. In respect of this issue, the Appellant urged that the trial court had the discretion and jurisdiction to allow the suit to proceed on considering the reasons that were given by way of affidavit as to why there was delay in filing the suit and why the same was not filed within the 30 days that the court gave the Appellant.
  24. Jurisdiction of a court is conferred by a Statute or [the constitution](#) (See Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR) No doubt that the issue limitation of time goes to the root of the jurisdiction of a court.
  25. In the case of *Gathoni v Kenya Cooperative Creameries Ltd* [1982] KLR 104 Potter, JA stated the rationale of the Law of Limitation as follows:

“The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”



26. There is also the case of *Anaclet Kalia Musau v Attorney General & 2 Others* [2020] eKLR, in which the Court of Appeal observed as follows:
- “The solitary issue in this appeal is, whether the suit before the High Court was statutorily time barred. To demonstrate that time limitation is a jurisdictional question and that if a matter is statute-barrred a court has no jurisdiction to entertain it, we cite the decision of the Supreme Court in the case of *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others*, Supreme Court Petition No. 19 of 2018,.....”.
27. There is also the East African Court of Appeal case in the matter of *Iga v Makerere University* [1972] E.A 62, where it was stated that;
- “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..... The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, and no grounds of exemption are shown in the plaint, the plaint must be rejected.” (Emphasis). The learned Judge in this appeal, no doubt did not err when she determined whether, by operation of the law, she had to down tools for want of jurisdiction.”
28. In another locus classicus on this subject, the Court of Appeal pronounced itself as follows in the case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR:
- “Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....
- Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”
29. The jurisprudence the above authorities provide is that the issue of limitation is one of jurisdiction and where a court reaches the opinion that it has no jurisdiction, it must down its tools.
30. An issue of jurisdiction is not one that can be cured under Article 159(2)(d) of *the Constitution* as suggested by the Respondent. The same is not a technicality but one that goes to the root of the matter as it concerns the powers of the court to entertain and determine the case.
31. To that, it then means that as the suit before the lower court was filed out of time, the learned trial Magistrate had no jurisdiction to proceed with the same. She had no discretion that was capable of being exercised, as was proffered by the Appellant.
32. I note that in her final orders, the learned trial Magistrate proceeded to dismiss the suit upon reaching the finding that it was filed out of time. That in my view was a misdirection. I say so because the suit was not heard on its merits and the proper order she should have made is for it to be struck out and not for its dismissal.



33. Perhaps the decision of the East African Court of Appeal in *Ngoni-Matengo Cooperative Marketing Union Limited v Alimahomed Osman* [1959] EA 577 would be germane, where it was held, inter alia, that

“when an appeal is not properly constituted the court ought strictly to strike it out rather than dismiss it.”

34. In the obiter of that case the court had this to say on the issue of dismissing versus striking out an appeal, which reasoning would apply to a suit:

“In the present case, therefore, as in *Bhogal’s* case, when the appeal came before this court, it was incompetent for lack of the necessary decree, as in *Bhogal’s* case for lack of the necessary order. This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to ‘strike out’ the appeal as being incompetent, rather than to have ‘dismissed it’; for the latter phrase implies that a competent appeal had been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of. But it is the substance of the matter that must be looked at, rather than the words used; and since neither the appeal in *Bhogal’s* case, nor the present appeal was in fact capable of being dismissed, that is to say of being treated as something properly before the court, each must be treated as if it had been struck out, which in effect it was.”

35. Being of the foregoing inclinations, I find the appeal herein to be devoid of merit and proceed to dismiss it.

36. The orders of the trial court are upheld save to substitute the order of dismissal of the lower court suit with an order striking out of the same.

37. Section 27 of the *Civil Procedure Act*, Cap 22 Laws of Kenya dictates that costs ought to follow the event. Consequently, the Appellant shall bear the costs of the appeal.

**DELIVERED (virtually), DATED & SIGNED this 4<sup>th</sup> day of October, 2024.**

**JOE M. OMIDO**

**JUDGE**

For The Appellant: Ms. Oloo holding brief for Ms. Akelo.

For The Respondent: Mr. Kiplagat.

Court Assistant: Ms. Njoroge.

