



**Barasa v Khalile & 2 others (Civil Appeal E018 of 2022)
[2023] KEHC 733 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 733 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E018 OF 2022
PJO OTIENO, J
FEBRUARY 9, 2023**

BETWEEN

AINEA WAFULA BARASA APPELLANT

AND

MZEE KHALILE ALIAS MZEE NAIRUKA KHALUYILE 1ST RESPONDENT

JOTHAM SONGWA KHALILE ALIAS KHALUYILE 2ND RESPONDENT

HASSAN MUNYOVO KHALILE ALIAS KHALUYILE 3RD RESPONDENT

*(Being an appeal from the judgment and ruling of Hon.
C.N.Njalale SRM in Butali Civil Suit No. 16 of 2019)*

JUDGMENT

Historical Background of the Appeal

1. The Appellant by way of a plaint dated 15th January, 2019 sued the Respondents, at the Senior Resident Magistrate Court in Butali, for General and Special damages for unlawfully trespass into his leased land and setting fire unto his sugar plantation growing on one (1) acre of the said land, thus occasioning to him loss and damage. The allegations were refuted by the respondents in a joint statement of defence dated 16th March, 2019.
2. The respondent, as Defendant at trial, contended in the defence that the cause of action having accrued on the 15th day of January, 2015 the three-year limitation period lapsing on 15th January, 2018, and that the application for leave to file the suit out of time allowed by an order obtained in Butali Misc. Application No. 10 of 2018, was erroneously allowed. All other allegations regarding loss and damage were equally denied and appellant put to strict proof. To that defence no Reply was filed.
3. In a judgment delivered by the trial court on 21st February, 2022, the leave granted *ex-parte* was set aside and the suit was dismissed for being time barred for reasons that the reasons given by the plaintiff in



seeking and obtaining leave was not the kind anticipated by section 27(2) of the [Limitation of Actions Act](#) and on that basis the leave granted was not justified.

4. Aggrieved with the decision of the trial court, the appellant lodged a memorandum of appeal dated 7th March, 2022 setting out six grounds of appeal whose gist was that the court erred in law and fact in dismissing the plaintiff's case on the grounds that the plaintiff suit was time barred when leave to file suit out of time was granted; in finding that leave was not justifiable when the plaintiff was granted leave by the honourable court to file suit out of time; in dismissing the plaintiff's suit on the ground of limitation when in fact the plaintiff filed his claim upon determination of Butali Senior Resident Magistrate Court Criminal Case No. 54 of 2015 which was determined on 12th March, 2018 whereby time starts running upon such determination of Butali Senior Resident Magistrate Court Criminal Case No. 54 of 2015 and not from the cause of action; the decision was against the weight of evidence on limitation and other evidence and had thus occasioned a serious miscarriage of justice.
5. The appeal has been canvassed by way of written submissions and each party has filed their respective submission. The appellant contends in the submissions filed that that prior to filing the suit, leave to appeal out of time was sought and obtained adding that the defendants were served with summons, entered appearance and filed a joint statement of defence hence the issue of time bar had been finally addressed and rested and not before the trial court for determination as was done.
6. To him time began to run on 12th March, 2018 following the conviction of the respondents in Butali SRMC Criminal Case No. 54 of 2015 wherein the respondents were charged and convicted with the offence of setting fire to cultivated produce contrary to section 334(b) of the [Penal Code](#) and placed reliance on the case of Kajiado HC Civil Suit No. 3B of 2016 *Tobias Moinde Kengere v The Postal Corporation of Kenya & 2 others* (2013) eKLR for the proposition that for a claim under the tort of malicious prosecution and false imprisonment, time starts to run when the plaintiff is acquitted or where an appeal is preferred when the conviction is quashed
7. The appellant further submits that he proved his case on a balance of probability and that the trial magistrate entered judgment in his favour and awarded him special damages, advocates fees and travelling expenses totaling to Kshs. 375,900/- but only dismissed it on the ground that it was time barred.

Respondents' Submissions

8. It is the submission of the Respondents that the argument by the appellant that the delay in filing the suit was because he was pursuing an out of court settlement was not backed by any evidence and that this reason does not fall within the purview of section 27(2) of the [Limitation of Actions Act](#).
9. On whether the delay in filing the suit was occasioned by the appellant awaiting determination in Butali Senior Resident Magistrate Court Criminal Case No. 54 of 2015, the respondents argue that section 193A of the [criminal procedure code](#) provides that a civil suit does not bar criminal proceedings and they cite the case of [Paul Gathuru Kariuki & another v Eens Limited & another](#) (2021) eKLR and [YH Wholesalers Limited v Kenya Revenue Authority](#) (2021) eKLR in respect thereto. Lastly, it is submitted that the purported leave vide Butali SRMC Misc. Application No. 10 of 2018 was never served upon the respondents.

Issues, Analysis and Determination

10. This court has executed its mandate on first appeal, considered the grounds of appeal, the proceedings of the lower court and the submissions by both the appellant and the respondents and discerns the following issues for determination: -



- a. When did the cause of action in Butali Senior Resident Magistrate Court Civil Suit No. 16 of 2019 accrue?
- b. Whether the decision by the trial magistrate to set the leave to file suit out of time was lawful?

When did the cause of action accrue?

11. The limitation period for filing a suit founded on tort is provided for under section 4(2) of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya which stipulates that an action founded on tort shall not be brought after the end of three years.
12. The question that appears to be in dispute is when the three years began to run in the instant suit. The appellant in citing the case of *Tobias Moinde Kengere v The Postal Corporation of Kenya & 2 others* (2019) eKLR, has argued that the cause of action began when Butali Senior Resident Magistrate Court Criminal Case No. 54 of 2018 terminated in his favour. I have looked at the decision cited and I must note that the cause of action in the cited case was malicious prosecution and one of the elements of malicious prosecution is that the plaintiff must show that the prosecution terminated in his favour and that is the reason why in such an instance, time begins to run from the date of the acquittal. The case is thus inapplicable in this instance.
13. That said, it the court's learning that a cause of action founded on the tort of trespass does not hinge and depend the conviction of a defendant in a criminal trial. In fact, even where the tortfeasor is acquitted, the victim retains is chose in action and the fact of acquittal may be a defence but not an absolute one. The essence is that the standard of proof in a criminal trial being very high is never the yardstick in the civil claim. The cause of action, being trespass, arose on the 15th day of January, 2015 as plead in the plaint and the suit ought to have been filed on or before the 14th day of January, 2018. The appellant having unequivocally pleaded the date the wrong was committed and injury suffered, and having reiterated in the reply to defence that indeed the accrual of the cause was on the same date, it was not permissible in law to depart from that position by seeking to prove an inconsequential position about when the prosecution ended in a conviction. The issue of the date of conviction as grounding the accrual of the cause is not genuinely argued. Not genuinely argued because if that was the belief of the plaintiff, then one would wonder why he had sought to extend time before filling the suit. It is the finding of the court that the appellant was apparently aware that the cause of action accrued on the date the trespass occurred and not later.
14. It is thus my finding that the cause of action arose when the act of trespass occurred on 15th January, 2015. It is also my finding that the only reason the appellant sought and obtained leave was the awareness that the time had lapsed.

Whether it was lawful to revisit the grant of leave?

15. It not in dispute that the appellant obtained leave to file the suit out of time. The dispute is whether it was right for the trial court to interrogate the propriety of that grant in the suit subsequently filed. How to deal with an ex-parte order extending time to file a suit is now a well beaten path since the decision of the Court of Appeal in *Oruta & another v Nyamato*[1988] eKLR where it was held:-

“The procedure for obtaining the extension of time for the purpose of section 27 of the Act is set out in Section 28. It is also provided for in Order XXXVI rule 3C of the *Civil Procedure Rules*. The application is to be made ex-parte and the defendant is not in a position to oppose the application. In fact, he only becomes aware of the order, if obtained, when the order



is served together with the plaint. However, there is no provision for the application to set aside the order in the Act but the defendant can raise the matter as an issue at the trial.

...The respondent having obtained leave to file action as required by the Law, that order can only be queried at the trial but not by application to discharge it otherwise the provision of the Act in providing for obtaining an order ex-parte will be rendered nugatory. ... The appellant can raise the objection at the trial and the trial Judge will have to deal with the matter on the evidence to be adduced at the trial.

16. It is thus erroneous and a misapprehension of the law to fault the trial court for having interrogated the appropriateness of the order enlarging time and in setting it aside on the basis that it was erroneously granted. The court has executed its mandate in reappraising the entire record with a view to coming to own conclusions and it is not satisfied that there was any error by the trial court that merits an interference.
17. It is therefore the finding of the court that the appeal lacks merits for which reason it is dismissed with costs. Let such costs be agreed and paid within 30 days from today or a bill of costs be filed for taxation within 21 days after there shall have been failure to agree on costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 9TH DAY OF FEBRUARY, 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Atulo for the Appellant

No appearance for the Respondents

Court Assistant: Polycap

