



ICEA Lion General Insurance Co. Ltd v Ngongo ((Suing as Legal Representative of Philip Mbakasawe- Deceased)) (Civil Appeal 18 of 2021) [2023] KEHC 748 (KLR) (10 February 2023) (Judgment)

Neutral citation: [2023] KEHC 748 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 18 OF 2021
REA OUGO, J
FEBRUARY 10, 2023**

BETWEEN

ICEA LION GENERAL INSURANCE CO. LTD APPELLANT

AND

**NYAMBUTI NGONGO RESPONDENT
(SUING AS LEGAL REPRESENTATIVE OF PHILIP MBAKASAWA- DECEASED)**

(Being an appeal arising from the ruling of Honourable Senior Resident Magistrate Dorcas Mac'Andere (RM) delivered on 5th February, 2021 in Kisii CMCC No 958 of 2019)

JUDGMENT

1. The suit before the subordinate court was filed following an order by Hon EA Obina (PM) in Kisii Cmc Misc Civil Application No 149 of 2019 that enlarged time for filing suit and granted the respondent leave to file the suit out of time. The respondent in compliance with the order filed his suit on December 17, 2019 before the subordinate court. The appellant entered appearance and filed its statement of defence.
2. Before the suit could be set down for hearing, the respondent filed a notice of motion dated February 12, 2020 seeking to strike out the suit on grounds that the order enlarging time was null and void as the court had no power under section 27, 28, 29 and 30 of the *Limitations of Actions Act* to extend the limitation at section 4 (4) of the *Act*. It was advanced that the power to extend time to file a suit in section 27, 28, 29 and 30 only applies to section 4 (2) of the Act in relation to actions founded on tort. According to the appellant the respondent's suit is not a claim for damages or tort and if there is any claim for damages then the suit is res judicata as the claim for damages was determined in CMCC No 772 of 2004.



3. The application was supported by the affidavit of Betty Isoe, the legal officer at the appellant. She averred that the respondent filed a suit against Monoi Outlets Limited on July 12, 2004 and obtained judgment for damages under the *Fatal Accident Act* and the *Law Reform Act* and was awarded Kshs 999,000/- together with costs of Kshs 49,094/-. On July 14, 2004, a cause of action arose against the appellant under section 10 cap 408 which allowed the respondent to file a declaratory suit to enforce the judgment. The respondent slept on his right from July 12, 2004 to December 17, 2019, a period of 15 years, before filing this suit.
4. She further averred that a suit to enforce a judgment cannot be instituted after the expiry of 12 years from the date of the delivery of judgment by reason of section 4 (4) of the *Limitation of Actions Act*. According to the appellant, the order enlarging time together with this suit are therefore contrary to the clear provision of statute and decisions dealing with the issue of limitation and ought to be struck off as an abuse of the process of the court.
5. The respondent filed his reply to the application recognizing that judgment in the primary suit was delivered on July 6, 2006 but due to circumstance beyond his control, he was unable to file a suit against the appellant. He advanced that he was granted leave by the subordinate court to file this instant suit after satisfying to the court the circumstances that prevented him from filing the suit within the prescribed time.
6. The trial magistrate in her ruling identified that the sole issue for determination was whether the suit was statute barred. The trial magistrate in her ruling found as follows:

“...the plaintiff was granted leave to file this suit out of time on October 30, 2019. That order has not been vacated, reviewed or appealed against.....In the absence of any order vacating the orders issued on October 30, 2019 the present suit is right before court and the application February 12, 2020 is thus dismissed...”
7. The appellant dissatisfied with the finding of the court has preferred this appeal by filing the memorandum of appeal dated March 1, 2021 on the following grounds:
 1. The Learned Trial Magistrate misdirected herself in finding that the lower court suit was not statute time (sic) barred.
 2. The Learned Trial Magistrate misdirected herself in equating the enforcement of the suit with the prior suit for damages.
 3. The Learned Trial Magistrate erred in concluding that the cause of action in the primary suit for damages is the same in the suit for enforcement of a judgment.
 4. The Learned Magistrate misdirected herself in failing to stike out the suit.
8. The appeal was canvassed by way of written submissions and both parties have complied by filing their respective submissions.
9. The appellant submitted that the respondent’s declaratory suit has been filed after 13 years in enforcement of judgment delivered on July 6, 2006 in Kisii CMCC No 772 of 2004. The respondent’s suit was irredeemably time barred and ought to have been struck out. They argued that the *Limitation of Actions Act* does not have provisions on extension of the limitation period in relation to judgments. They cited the cases of ELC No 37 of 2018, *John Mwaniki Mwaura v John Ndonyo Njuguna* [2018] eKLR; *Rwama Farmers Co-operative Society Limited v Muramuti Sacco Society Limited* 2021 eKLR; Misc Civil Application No 278 of 2015 (OS) *Koinange Investments and Development Company*



Limited v Ian Kabuu Ngethe & 3 Others [2015] eKLR and Jeremiah Matoke v Kenya Commercial Bank Limited & Another [2014] eKLR.

10. The respondent in his submission argued that the appeal is incompetent as the appellant was given an opportunity to file a supplementary record of appeal with the order appealed from, but failed to do so in contravention of Order 42 Rule 13 (4) (f) of the Civil Procedure Rules. He relied on the case of Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo [2016] eKLR.

11. The respondent supported the finding of the trial magistrate arguing that the order extending time for filing suit out of time had not been challenged and the same remains in force. In relied on the case of Re of Estate of M'kwaria Mbukia (Deceased) [2021] eKLR where the court cited the decision of the Court of Appeal in Wildlife Lodges Ltd v County Council of Narok and Another [2005] 2 EA 344 (HCK):

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it. It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid, whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.”

12. After considering the grounds of appeal in the memorandum of appeal, the record from the lower court and the arguments by the parties, the issue before the court is as follows:

Whether the notice of motion dated February 12, 2020 was properly before the court, if so, whether the order enlarging time was improper.

13. The Notice of Motion dated February 12, 2020 challenges the court order made by Hon. EA Obina (PM) in Kisii CMC Misc. Civil Application No 149 of 2019, a separate suit from which this appeal emanates. The order in Kisii CMC Misc Civil Application No 149 of 2019 enlarged time and gave the respondent leave to file the suit. The appellant being dissatisfied with the order made in Kisii CMC Misc. Civil Application No 149 of 2019 had recourse to file an Appeal pursuant to provisions of Order 42 of the Civil Procedure Rules or a review in accordance to Order 45.

14. The appellant's application before the subordinate court merely invited the trial magistrate to sit as an appellate court in a decision that was delivered by Hon EA Obina (PM) in Kisii CMC Misc Civil Application No 149 of 2019.

15. The Court of Appeal in the case of Bellevue Development Co Ltd v Hon Mr Justice Francis Gikonyo & 7 Others [2018] eKLR stated as follows:

“I have no difficulty upholding the learned Judge's holding that as a judge of the High Court he had no jurisdiction to enquire into or review the propriety of the decisions of the Judges, who were of concurrent jurisdiction as himself. In our system of courts, which is hierarchical in nature, judges of concurrent jurisdiction do not possess supervisory jurisdiction over each



other. No judge of the High Court can superintend over fellow judges of that court or of the superior courts of equal status.

This position is so well established that it would be a strange aberration for a judge to embark on what is essentially an examination of the judicial conduct and pronouncements of judges of the same status as himself, a task that is left to courts and judges of higher status in the hierarchy, by way of appeals. Pronouncements by judges of the High Court on this point are germane and demonstrative of this understanding.”

16. The court system in Kenya has superior and subordinate courts. The trial magistrate sitting as a subordinate court did not therefore have the jurisdiction to hear and determine the application before her as it was made by a magistrate holding concurrent jurisdiction. The appellant ought to have filed an appeal against the decision by EA Obina (PM) in Kisii CMC Misc. Civil Application No 149 of 2019 before the High Court. The trial magistrate had no power to discharge the order of Hon EA Obina and this court cannot find otherwise. In the end, I find no merit in the memorandum of appeal dated March 1, 2021 and the same is dismissed. The respondent shall have the cost of the appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT KISII THIS 10TH DAY OF FEBRUARY 2023

R.E. OUGO

JUDGE

In the presence of:

Miss Adhiambo For the Appellant

Miss Kusa For the Respondent

Orwasa C/A

