



**Kan Travellers v Hassan (Civil Appeal E046 of 2021)
[2023] KEHC 2298 (KLR) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2298 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E046 OF 2021**

**DK KEMEL, J
MARCH 20, 2023**

BETWEEN

KAN TRAVELLERS APPELLANT

AND

ZUHURA HASSAN RESPONDENT

*(Being an appeal from the Ruling of the Principal Magistrate's Court in Bungoma CMCC.
No. 361 of 2019 delivered on the 24th day of February 2021, by Hon. Stephen O. Mogute-PM)*

JUDGMENT

1. This is an appeal from the decision of the Principal Magistrate's Court on a Preliminary Objection dated March 19, 2020, filed by the Appellant on the ground that the suit namely Bungoma CMCC No 361 of 2019 was filed out of time.
2. A brief background of the matter is that the Respondent herein on July 21, 2020 filed the application dated July 3, 2020 seeking leave to extend time to file the suit out of time. Upon grant of the said order, the suit was deemed duly filed and according to the said Plaintiff on record, the cause of action arose on August 31, 2016 and that the suit was filed in Court on October 30, 2019. The reasons for delay were: lack of funds and that the Respondent had lost contacts of her advocate on record. The application was supported by an affidavit deposed by the Respondent on July 3, 2020. Further, it was deposed that as per the computation of time under Order 50 (b) of the *Civil Procedure Rules*, the Court had discretion to enlarge time before and after filing of the suit and that the Court ought to deal with the substance of the matter than dismiss the matter on a technicality as provided under Article 49 of the *Constitution*.
3. The Respondent filed grounds of opposition in response to the Plaintiff's application dated July 3, 2020 and stated that the application was frivolous, vexatious and an abuse of the Court process.
4. Both counsels on record filed their written submissions and authorities for the trial Court's consideration.



5. The trial Court in its ruling held that the reasons for the Respondent's delay to file a suit within a period of 3 years as probable and found it in the interest of justice that parties be granted an opportunity to be heard on merits.
6. Aggrieved by that decision the Appellant filed this appeal which is predicated on the grounds that: -
 - i. The learned trial magistrate erred in law and in fact in holding that the suit be heard on merit despite it being statutorily barred by limitation of time.
 - ii. The learned trial magistrate erred in law and in fact in disallowing the Appellant's Preliminary Objection on limitation of time despite the suit being time barred.
 - iii. The learned trial magistrate erred in law and in fact in enlarging time within which to file the suit and to deem the suit as properly filed, despite the application to enlarge time being filed after the suit was filed.
 - iv. The learned trial magistrate erred in law and in fact in not addressing the issues of limitation of time raised in the application dated 3rd July 2021, and Preliminary Objection dated 19th March 2020, hence making an erroneous decision.
 - v. The learned trial magistrate erred in law and in fact in failing to consider the Appellant's submissions and authorities on the suit being time barred and as a result arrived at an unjustified decision.
7. The appellant sought the following orders:
 - i. That the appeal be allowed.
 - ii. That this Honourable Court do allow the Preliminary Objection dated 19th March 2020.
 - iii. That this Honourable Court do strike out Bungoma CMCC No 361 of 2019 with costs to the Appellant.
 - iv. That costs of the appeal and Bungoma CMCC No 361 of 2019 be borne by the Respondent.
8. The appeal was canvassed by way of written submissions. Both parties filed and exchanged submissions.
9. Vide submissions dated 16th August 2022, the Appellants submitted that the Respondent filed a suit on 30th October 2019, seeking general damages, special damages and costs of the suit out of a road accident that occurred on 31st August 2018. A perusal of the police abstract confirms that the road traffic accident occurred on 31st August 2016 thus indicating that the Respondent filed the suit 3 years, 3 months after the cause action. Counsel relied on section 4 of the *Limitation of Actions Act* noting that the purpose of the *Limitation of Actions Act* was to avoid stale claims based on the sensible and rationale appreciation that over time memories fade and evidence is lost. He further relied on the case of *Gathoni vs Kenya Co-operative Creameries Limited* (1982) eKLR and *Ellyjoy Nyaguthi Kirimo v Cyprian Mugendi Igonga & 2 Others*.
10. It was submitted that it is only when the Appellant filed a Preliminary Objection in the lower Court that the Respondent was awoken four months down the line and filed an application dated July 3, 2020



under Order 37 Rule 6(2), Order 50 (4) & (6), Sections 1A, 3A of the [Civil Procedure Act](#), Sections 27 & 28 of the [Limitation of Actions Act](#) seeking leave of Court to have the suit deemed as properly filed.

11. It was submitted that according to Paragraph 3 of the Respondent's supporting affidavit, she was well aware of the matter as instructions were given to the advocate after being given the Police Abstract and P3 form. It was submitted that a look at the Police Abstract indicated its date as 23rd April 2018, while the P3 form was dated 24th January 2018. It was submitted that the Respondent had instructed an advocate in the matter who was well aware of the limitation period and ought to have advised his client on the same. Counsel relied on Section 28 (3) of the [Limitation of Actions Act](#).
12. It was submitted that the availed reasons were not sufficient and that the same ought to be dismissed. He relied on the case of [Republic vs Public Procurement Administration Review Board & Another exparte Teachers Service Commission](#) (2015) eKLR.
13. Counsel urged this Court to dismiss the Respondent's suit in the lower Court with grounds that it was time barred under the Limitations of Action Act.
14. In opposition to the Appeal, the Respondent vide submissions dated 7th November 2022, submitted that subject to the provisions of Order 37 of the CPR the Honourable Court has the discretion to enlarge time where a suit had been filed and have the suit deemed filed with enlargement of time. He urged this Court to dismiss this appeal with costs.
15. According to section 78(2) of the [Civil Procedure Act](#), the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted thereto. Thus, the duty of the first Appellate Court is to subject the evidence to a fresh evaluation and make its own conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of [Selle & Anor v Associate Motor Boat Co. Ltd](#) 1968 EA 123.
16. Under section 4(2) of the [Limitation of Actions Act](#), an action founded on tort shall not be brought after the expiration of three (3) years from the date in which the cause of action occurred. However, Section 28 of the Act vests in the Court the power to extend time and grant leave to the applicant to file suit out of time.
17. The Appellant contended that it raised the question of leave as a preliminary issue but the trial court did not consider it. It bears repeating that limitation of actions is a matter for trial and should be so determined. It is noted that the application as well as the ruling does disclose the central reason upon which leave was granted to file suit outside the limitation period of 3 years. I have noted that the trial Court did not consider the issue of limitation of actions in its ruling. I should think that, perhaps the trial Court took the view that it was not necessary to determine the question of limitation as leave granted was sufficient for all purposes. This notwithstanding, I should establish whether the Respondent's suit should be dismissed for being time barred.
18. Considerations outlined in sections 27, 28, 29 and 30 of the [Limitation of Actions Act](#) should be seen within the principle of justice that; justice shall be done to all parties in judicial proceedings. Similarly, of significant note is that the law detests delay, for being insidious and an affront to justice. Therefore, whereas access to justice is a cardinal constitutional principle of justice, care should be observed, where delay in seeking remedy is manifest, not to deny or implore the right of the Defendant to the defence of limitation of actions except in accordance with the law.



19. Of the effect of delay, I do no better than Hardiman J. in his judgement in *J. O’C V The Director of Public Prosecutions* [2000]3 IR 478,499-500 which may be summarized as follows; -
- a) A lengthy lapse of time between an event giving rise to litigation and a trial creates a risk of injustice.
 - b) The lapse of time may be so great as to deprive the defendant of his capacity to be effectively heard.
 - c) Such lapse of time may be so great as it would be contrary to natural justice and an abuse of the process of the court if the defendant had to face a trial in which he or she would have to try to defeat an allegation of negligence on her part in an accident that took place after a long lapse of time.
 - d) A long lapse of time will necessarily create inequity or injustice, and amount to an absolute and obvious injustice or even a parody of justice.
 - e) The foregoing principles apply with particular force where disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past, as opposed to cases where there are legal issues only, or at least a high level of documentation or physical evidence, qualifying the need to rely on oral testimony.
20. Therefore, there is a public interest element in the provisions on limitation of actions. See Peart J. in *Byrne v Minister for Defence* [2005]1 IR 577,585 where it was stated as follows; -
- “a public interest, which is independent of the parties, in not permitting claims which have not been brought in a timely fashion, to take up valuable and important time of the Courts and thereby reduce the availability of that much used and need resource to plaintiffs and defendants who have acted promptly in their litigation, as well as increase the cost to the Courts Service and through that body to taxpayers, of providing a service of access to the Courts which serves best the public interest.”
21. Be that as it may, I am aware that it has been held that requirements in section 27(2) of the *Limitation of Actions Act* are stringent and constitute the test on whether to grant or not to grant leave to file suit out of time. I am also aware that it has been held that in the context of statutory limitation provisions, the amount of delay may not be relevant. On this see the case of *Crispus Ned Ngari and another V Churchill Odera* CA No233 of 1998 (1999) 2 EA 241, and *Barclays Bank of Kenya Ltd v the Commissioner General of Kenya Revenue Authority* CA No 67 of 1998.
22. Considerations of material factors, fairness and equity permeate the statutory limitations of time to file suit. Arbitrary locking out of a Plaintiff from seeking remedy due to limitation of time is awful. However, organized and democratic societies which are governed by the rule of law do recognize the need for causes of actions to be commenced within reasonable time and have prescribed statutory limitation of time. Thus, except as may be allowed in law, it is oppressive to a Defendant to be dragged into civil claims long after the circumstances that gave rise to the cause of action have changed or lapsed since the occurrence of the loss and damage.
23. This is a claim founded on alleged negligence of the appellant. The *Limitation of Actions Act* sets out material facts of a decisive character and circumstances in which a person may be permitted to file suit



out of time. For purposes of this appeal, I draw from the excerpts of Section 30 which provides as follows; -

- (1) In sections 27, 28 and 29 of this Act, any reference to the material facts relating to a cause of action is a reference to one or more of the following—
 - a) The fact that personal injuries resulting from the negligence, nuisance or breach of duty constituting that cause of action;
 - b) The nature or extent of the personal injuries resulting from that negligence, nuisance or breach of duty; (c) the fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable.
- (2) For the purposes of sections 27, 28 and 29 of this Act any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice with respect to them, would have regarded at that time as determining, in relation to that cause of action, that (apart from section 4(2) of this Act) an action would have a reasonable prospect of succeeding and of resulting in the award of damages sufficient to justify the bringing of the action.
- (3) Subject to subsection (4) of this section, for the purpose of sections 27, 28 and 29 of this Act a fact shall be taken at any particular time, to have been outside the knowledge (actual or constructive) of a person, if, but only if—
 - a) He did not know that fact; and
 - b) In so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose ascertaining it; and
 - c) In so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances.

24. The record shows that the Respondent knew of the fact of the accident and did ascertain that following the accident, that, for purposes of a relief in damages a suit ought to be instituted before a court of law. She further noted in her supporting affidavit to the application for leave dated 3rd July 2020 that the purpose for her delay was as a result of loss of contacts of her advocate and lack of funds to institute the said suit.



25. Failure by the learned trial magistrate to consider limitation of time at the trial in light of sections 27 and 30 (3) of the Limitations Act was an error in principle. The language used in sections 27-30 of the *Limitation of Actions Act* does not intend exercise of discretion in granting leave to be at whim or caprice. It takes an inquiry in accordance with the said sections to make a determination for leave to file suit. Looking at the record of appeal, the Respondent had filed her suit well knowing that it was out of time and only made the application for leave after the Appellant raised the preliminary objection. The respondent was actually woken up from slumber as it were. This depicted a party who was not bothered by the stricture of limitation of time in filing the suit. Hence, the application to lodge suit out of time was in bad faith and an abuse of court process after the Appellant raised the anomaly in the suit. It is clear that the learned trial magistrate went into error when he allowed the application by the Respondent. The same must be reversed.
26. Ultimately, I am satisfied that the entire appeal has merit and is hereby allowed in the following terms: -
- i. The Preliminary Objection dated March 19, 2020 is merited.
 - ii. Bungoma CMCC No 361 of 2019 is hereby struck out for being statute barred under the *Limitation of Actions Act* with costs to the Appellant.
 - iii. The Respondent's application dated July 3, 2020 is hereby dismissed with costs to the Appellant.
 - iv. The costs of this appeal are awarded to the Appellant.

DATED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF MARCH 2023.

D. KEMEI

JUDGE

In the presence of:-

Miss Ogato for Appellant

No appearance Mwebi for Respondent

Kizito - Court Assistant

