Gitahi v Attorney General (Civil Appeal E006 of 2020)
[2023] KEHC 20682 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20682 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E006 OF 2020

LM NJUGUNA, J

JULY 21, 2023

BETWEEN

SUSAN WANGARI GITAHI ..... APPELLANT

AND

HON ATTORNEY GENERAL ..... RESPONDENT

JUDGMENT

1. The appellant herein filed in this court a memorandum of appeal against the ruling of the learned trial magistrate Hon. Macharia (P.M.) in Nyeri CMCC No. 385 of 2019 delivered on 13.10.2020. The grounds upon which the appeal is based were that:

    i. The learned magistrate erred in law and fact in making a ruling against the weight of evidence.

    ii. The learned magistrate erred in law and fact in the computation of days to determine whether the suit was time barred contrary to the provisions Order 50 Rule 4 of the *Civil Procedure Rules* and section 57 of the *Interpretations and General Provisions Act*, Laws of Kenya.

    iii. The learned magistrate erred in law and fact by failing to exclude public holidays in the computation of days while determining whether the appellant's suit was time barred contrary to section 57 of the *Interpretations and General Provisions Act*, Laws of Kenya.

    iv. The learned magistrate erred in law and fact failing to find that there was sufficient grounds to warrant the hearing and determination of the appellant's suit.

    v. The learned magistrate erred in law and fact in failing to consider that under article 159(2) of the *constitution*, justice should be done without undue regard to procedural technicalities.

2. The appellant thus prayed that the appeal be allowed and the ruling of the lower court be set aside and be substituted with an order allowing the appellant's case to be heard to its logical conclusion.

3. The appellant's cause of action is one of malicious prosecution following her acquittal on a charge of murder. The case proceeded for hearing and via a ruling dated 06.12.2018, the court found that the prosecution did not make out a prima facie case against the appellant. Consequently, the appellant filed Civil Case Number 385 of 2019 at the Chief Magistrates Court in Nyeri, seeking general damages for malicious prosecution, damages for false and unlawful imprisonment plus costs of the suit. The respondent filed a defense dated the 14th day of January, 2020 in which it denied the appellant's claim. Further, the respondent filed a preliminary objection dated 11th March, 2020 on the ground that the suit was time barred and that the same offended the mandatory provisions of section 3(1) of the *Public Authorities Limitations Act*. The trial court after considering the objection, delivered a ruling dated 13.10.2020 wherein the court struck out the suit with costs to the respondent.

4. The appellant being dissatisfied with the said ruling, filed a memorandum of appeal dated 22. 10.2020 seeking for prayers inter alia that the appeal be allowed and the ruling of the trial court be set aside and be substituted with an order allowing the appellant's case to be heard to its logical conclusion.

5. Directions were taken that the application be canvassed by way of written submissions and only the appellant complied with the said directions.

6. On grounds 1 and 2, the respondent relied on section 3 of the Public Authorities Limitations Act and submitted that the appellant's claim was time barred. It was submitted that the learned trial magistrate in his judgment did a computation of time by counting the days erroneously. It was argued that the learned magistrate arrived at 368 days and determined that since a year is composed of 365 days, the plaintiff's claim was barred by three days. Reliance was placed on the cases of *Richard Francis Maleu Vs Odhiambo Asher & Another* [2020] eKLR; *Francis Njenga Vs James Muraya & Another* [2021] eKLR and Section 2 of the *Interpretation and General Provisions Act*. The appellant argued that the trial court did not consider the meaning of 'month' as provided for in section 2 of the *Interpretation and General Provisions Act* and instead of counting 'calendar months' erroneously counted the days that constitute a year. It was contended that the learned magistrate ought to have considered that the last day in the 12 month period was 07.12.2019 which fell on a Saturday which ought to have been an excluded day and therefore the period ought to include the following day, not being an excluded day. It was argued that the plaint was filed on 09.12.2019 which was on Monday which was the next working day as 08.12.2019 was also an excluded day. That the plaint therefore was filed within time as per section 57 (b) and (c) of the *Interpretation and General Provisions Act*.

7. On grounds 3, 4, 5 and 6, it was submitted that the learned magistrate ought to have considered the provisions of article 159(2) of *constitution* in that the claim raised substantial constitutional issues requiring determination by the court; that the trial court failed to consider that there were sufficient grounds to hear the suit and failure to serve substantive justice in the matter was not proper. Reliance was placed on the case of *Gabriel Osimbo Vs Chrispinus Mandare* [2020] eKLR wherein the learned judge held that the court ought to exercise judicial discretion when called upon to determine whether to strike out a suit or not. The appellant argued that the trial court did not weigh the prejudice that was likely to be suffered by the appellant as opposed to the prejudice to be suffered by the respondent in striking out the suit. The appellant relied on the case of *Pascal Barasa Olaimo & 75 others Vs Attorney General* [2019] eKLR. In the end, the appellant contended that the appeal herein ought to be allowed.

8. I have considered and analyzed the pleadings and the submissions in this appeal and it is my view that the main issue for determination is whether the trial magistrate erred in law and fact in striking out the appellant's suit.

9. This court holds the view that under the circumstances herein, it cannot purport to re-invent the wheel and hasten to point out that judicial precedents are replete with views on the question as to when

time begins to run in such a cause of action. I refer to the decision in *Mbowa v East Mengo District Administration* [1972] EA 352, the East African Court of Appeal in which the court expressed itself as follows:

> " The action for damages for malicious prosecution ... essential ingredients are:
>
> 1. the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority;
>
> (4) the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge .... The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged...The law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge. In this case the respondent could have brought his action for malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal".

10. It therefore means, that the cause of action accrued at the termination of the criminal case, and not at the point when the plaintiff was arrested and charged. From the pleadings, the appellant's case originated from Criminal Case No. 25 of 2010 whereby Matheka J found that no prima facie case had been made against the appellant thus she was set at liberty. The said judgment having been delivered on 06.12.2018, it therefore means time to institute the suit started running from 06.12.2018 when the Court set the appellant at liberty.

11. Section 3(1) of *Public Authority Limitations Act* Cap 39 reads as follows:-

> " No proceedings founded on tort shall be brought against the Government or a Local Authority after the end of twelve months from the date on which the cause of action occurred"

12. It therefore follows that the cause of action ought to have been filed at least December 2019. A perusal of the record herein shows that the appellant filed her pleadings sometime on Monday 09.12.2019; and

while opposing the same, the respondent before the trial court submitted that the appellant's plaint ought to have been filed on or before Thursday 05.12.2019 and given that the suit was filed on Monday 09.12.2019, the same was outside the limitation period of twelve months from the said date of the cause of action.

13. That in light of the above provision, a view that I equally agree with, the appellant ought to have brought her claim on or before Friday 06.12.2019 which is a normal working day, and by filing the suit on Monday 09.12.2019, the appellant's tortuous claim was time barred by operations of the statute as no leave was sought to file the pleadings. For the avoidance of doubt, I have taken the liberty to compute the time as follows:

Date of decree- 06/12/2018

07/12/2018-31/12/2018= 25 days

01/01/2019-31/01/2019= 31 days

01/02/2019-28/02/2019= 28 days

01/03/2019-31/03/2019=31 days

01/04/2019-30/04/2019=30 days

01/05/2019-31/05/2019=31 days

01/06/2019-30/06/2019=30 days

01/07/2019-31/07/2019=31 days

01/08/2019-31/08/2019= 31 days

01/09/2019-30/09/2019=30 days

01/10/2019-31/10/2019=31 days

01/11/2019-30/11/2019=30 days

01/12/2019-Saturday 07/12/2019=07 days

Total No. of Days= 366 days

Considering that the year 2019 was not a leap year, my computation of time is supposed to bring 365 days which ends exactly on Friday 06/12/2019 which is a normal working day according to statute.

14. Article 159(2) (d) of *constitution* and the need to observe timelines set by *constitution* or any other statute; can be deduced from the Court of Appeal decision in the case of *Raila Odinga & 5 Others v Independent Electoral & Boundaries Commission* SC Petition No. 5 of 2013; [2013] eKLR (Raila Odinga 2013), in which it was explained the flexibility of Article 159(2)(d) and the need to determine each case on its own merits while taking into account the unique circumstances of a case. The Court of Appeal also relied on the decision of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* SC Application No. 16 of 2014; [2014] eKLR (Nicholas Salat) where the court held that the filing of a Notice of Appeal is a jurisdictional pre-requisite, and therefore taking everything in totality and our decisions above, the Court of Appeal arrived at the conclusion that the Petitioner had a mandatory obligation to comply with the Rules aforesaid and once he did not, then his appeal was still-born.

15. In the premises therefore, and in agreement with the trial court, I find that the cause of action herein was not properly before the court for the reason that the same was time barred.

16. As a consequence of the above, the appeal herein is found to be in want of merit and the same is dismissed with no order as to costs.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 21ST DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the State