



**Mwangangi v Somba (Civil Appeal 17 of 2018)
[2023] KEHC 22408 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22408 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 17 OF 2018
FR OLEL, J
SEPTEMBER 21, 2023**

BETWEEN

BONFACE MWANGANGI APPELLANT

AND

JOSHUA MUTAITI SOMBA RESPONDENT

*(Being an appeal from the Order/ruling of Hon Y.A . Shikanda (SRM) in Machakos
Cmcc No 706 of 2015 Bonface Mwangangi Vs Joshua Somba delivered 12/02/2018)*

JUDGMENT

1. This appeal arises from a ruling of Hon. Y.A Shikanda (SRM) dated 12th February 2018, where he upheld a preliminary objection filed by the Respondent herein which preliminary objection was based on the ground that the claim as filed in the trial court was statute barred. Secondly that the trial court did not have territorial jurisdiction to handle the said cause of action.

The trial court upon considering the said preliminary objection on merit did find that the, leave granted to the appellant to file the suit out of time on 13/10/2015 was a nullity and proceeded to struck out the suit on the basis that it was statute barred.

2. The appellant did file his memorandum of appeal dated on 22nd February 2018 which set forth the following ground of appeal namely:
 - a. That the learned senior Residential Magistrate erred in law and in fact by holding that the appellant’s suit was time barred when the court had given leave to the appellant to file the suit out of time.
 - b. The learned senior Residential Magistrate erred in law to declare that leave granted by the court was a nullity when the law stated otherwise.



- c. That the learned senior Residential Magistrate erred in law and in fact by acting as an Appeal court while nullifying the leave to file suit out of time.

Appellant's Submissions

3. The appellant submitted that the trial Magistrate erred in law by declaring that the suit filed was time barred whereas leave required had been granted by the court to file the said suit out of the time as required under Sec 4(2) & 27 of the Limitation of Action Act Cap 26 laws of Kenya. If there was sufficient reason placed before court, the court could rightly enlarge time to a party to file a suit out of time. Reliance was placed on M'Ikiara M'rinkinkanye and Sebastain Nyamu v Gilbert Kabccre M'mbijiwe Nyeri Appeal No 124/2003 (2007) eKLR and Nation Media Group limited and 2 others v Margaret Kamene Wambua Nairobi Appeal No 563/2017(2021) KLR
4. The cause of Action herein arose on 21/02/2014 and the suit was filed on 09/09/2015, which was over the statutory 12 months period allowed in law. The delay in the filling the suit was not deliberate and was due to the fact that the appellant was seriously sick from the period of December 2014 to February 2015. The appellant had to undergo several operations and was on sick off until 30th June 2015 and had not regained his balance due to the nerves on the spinal cord. The reason thus advanced for the delay were sufficient and the order of extension of the time was thus properly granted upon proper and due consideration. The trial court thus erred to declare the leave granted a nullity.
5. The appellant further submitted that the trial court erred in law to nullify leave granted yet it had no jurisdiction to do. Sections 5 of the Magistrate Court Act No 26 of 2015 provided for the constitution of the Magistrate court and they were all subordinate courts with similar jurisdiction except from pecuniary jurisdiction as provided under section 7(1) of said Magistrate Court Act. The order granting leave could only be reversed or set aside on appeal to the High court or by an application for review made by either party.
6. The appellant prayed that the appeal be allowed and the Ruling/order of the trial court dated 12.02.2018 be set aside.
7. The Respondent did not file any submissions

Analysis & Determination

8. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the Civil Procedure Act a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko v Varkey Joseph AIR 1969 Keral 316
9. In Coghlan v Cumberland (1898) 1 Ch. 704, the Court of Appeal (of England) stated as follows -

“ Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite



apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

10. The only issue for determination in this appeal is whether the trial magistrate exercised his discretion in a wrong manner by purporting to find that the leave granted to the appellant by C. A Ocharo - Principal Magistrate on 13th October 2015 was granted in error and thus a nullity and whether or not the magistrate erred by acting as an appeal court while nullifying the leave to file the suit out of time.
11. The cause of action herein arose on 21st February 2014, when the Respondent wrote a letter to the chairman of Kikima cooperative society limited and copied to other government officials. The appellant avers that the said letter contained facts which were not true, were defamatory in nature and exposed him to ridicule, contempt and odium in the eyes of right-thinking members of the society including members of Kikima farmers' cooperative society.
12. The appellant did not file a suit with one year as expected in law and on 9th September 2015 did make an ex parte application seeking to be granted leave to file his suit out of time on the basis that he had been unwell between December 2014 to February 2015 and underwent a neck surgery from which he had yet to fully recover. The trial Magistrate considered the same and granted the appellant leave to file his suit out of time on 13th October 2015.
13. Upon the suit being filed the respondent counsel did raise a preliminary objection on the basis that the suit herein was time barred and challenged the leave granted on the basis that it was a nullity and secondly the respondent further challenged the territorial jurisdiction of the court as the cause of action arose within the jurisdiction of Tawa court. The trial court upheld the preliminary objection and did find that the leave granted on 13th October 2015 was a nullity and proceeded to dismiss this suit.

Whether the trial Magistrate erred in law and in fact by Acting as an Appeal court while nullifying the leave to file the suit

14. As succinctly elucidated in *Mary Wambui Kabugu v Kenya Bus Services Ltd*, Civil Appeal No 195 of 1995 , which court of Appeal decision was relied on by the trial Magistrate , there is not provision under the Limitation of Action Act, which allows for the defendant to seek to set aside the order for extension of time and the only time the defendant/ respondent can challenge the said order is at trial.
15. In the said *Mary Wambui Kabugu v Kenya Bus Services Ltd*, Civil Appeal No 195 of 1995 Akiwumi (JA) did hold that;

“When the judge of the superior court grants leave *ex parte* under the *limitation Act* to institute proceedings which can be challenged at trial he in a way, does no more than a judge does when for instance, grants an *ex parte* injunction, which can also be successfully challenged before another judge at its inter parties hearing. Further more the question of a judge of the superior court sitting on appeal on the granting of an ex parte order under the limitation Act by another judge of the superior court, does not in the particular circumstances, arise. In general, a party affected by an *ex parte* order can apply to discharge it but the procedure under the limitation Act is altogether exceptional. It says in terms that an application shall be made ex parte. This is a strong indication that the judge is to decide the application on hearing one side only. No provision is made for the defendant being heard. It must be remembered that even when the judge grants leave, there is nothing final about it. It is merely provisional. The defendant will have every opportunity of challenging the facts and the law afterwards at trial. The judge who tries the case is the one who must rule finally



whether the plaintiff has satisfied the conditions for overcoming the time bar, He is not the least bound by the provisional view expressed by the judge in chambers who gave leave.”

16. There was thus no error by the trial magistrate relooking at whether leave granted was made in error at trial and it being an issue of law he could make a determination of the same.

Whether leave granted to file the suit out of time was a nullity abinito

17. Section 4(2) of the *limitation of Actions Act* does provide that ;

“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:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date”

18. Section 27 of the *limitation of Actions Act* does provide that;

“(1) Section 4(2) does not afford a defence to an action founded on tort where-

- a. The action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
- b. The damages claimed by the plaintiff for negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
- c. The court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
- d. The requirements of subsection (2) are fulfilled in relation to the cause of action.

(2) The requirement of this sub section are fulfilled in relation to a cause of action if it is proved that material facts relating to the cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which-

- (a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and
- (b) in either case, was a date not earlier than one year before the date on which the action was brought”.

19. Further, Section 28 of Cap 22 states:-

Application for leave of court under section 27

- (1) An application for the leave of the court for the purposes of section 27 of this Act shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.



- (2) Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient— (emphasis added)
- a) to establish that cause of action, apart from any defence under section 4(2) of this Act; and
 - b) to fulfil the requirements of section 27(2) of this Act in relation to that cause of action.
20. The interpretation of Sections 4, 27 and 28 of the Limitation of Actions Act has resulted into two schools of thought namely: -
- (i) That a suit based on defamation cannot be filed at all after the expiry of twelve months.
 - (ii) That the court can grant leave to file a suit based on defamation and extend the twelve months' limitation period.
21. There are several cases which propound the two views. Mwera J, as he then was in the case of David Gitumbi Thande & another v Gitunugri Dairy Farmers Co-Operative Society Ltd. & 9 others held as follows:-
- “The defendants’ position was that the court had no jurisdiction to grant extension of time to sue in defamation because section 4 of the Act states that no action for libel or slander may be brought after the end of twelve months while section 27 of the same Act only envisages extending the time to sue in matters of negligence, nuisance or breach of duty where damages are in respect of personal injuries of any person.
- Having heard counsel, perused the law applicable and the circumstances of this case, this court is inclined to agree and it agrees with the defendants that the orders of 29.4.05 granting the plaintiffs time beyond the statutory 12 months to sue for damages in defamation be reviewed. Extending time to sue in tort matters is limited to negligence, nuisance, breach of duty where damages are confined to personal injuries of a personal nature. And to succeed in getting the orders to sue out of time, a party has to satisfy the court in accordance with section 28 of the Act. Defamation is not covered here and so the review sought is granted. It was in error to grant the orders of 29.4.05 when the law did not provide for such, i.e suing on account of defamation after the statutory 12 months. The application dated 12.1.05 ought to have been dismissed and the whole suit struck out. (emphasis added)
22. Similarly, in the case of Republic v Principal Magistrate P. Ngare Gesora & 2 others Ex-Parte Nation Media Group Ltd. (2013) eKLR, of 2011, Nairobi Judicial Review Application No 321 of 2011 Justice Odunga was of the same view that cases of libel and slander cannot be brought after the expiry of twelve months.
23. On the other hand, in the case of Mwangi Kanyingi v Francis Kariuki Kanyingi & another (2008) eKLR Justice Makhandia (as he then was) stated as follows:-
- “It is now well settled law that for one to file a suit outside limitation period enshrined in the Limitation of Actions Act, the applicant has to avail himself of the provisions of Section



27 of the Act which provides inter alia that Section 4 (2) shall not afford a defence to an action founded on tort where the action is for damages for negligence, nuisance or breach of duty, the damages claimed consist of or include damages in respect of personal injuries of any person, the court gives leave for the purpose of the section, and the requirements of subsection 2 thereof are fulfilled in relation to the cause of action.” (emphasis added)

24. In the case of *Mary Osundwa v Nzoia Sugar Company Limited* Civil Appeal No 244 of 2000 [2002] eKLR the Appellant had successfully sought leave (granted by consent in the High Court) to file a cause for alleged breach of contract, some 7 years since the cause of action accrued. The Court of Appeal having set out the provisions of Section 27 (1) of the *Limitation of Actions Act* stated that:

“The section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort. Accordingly, Osiemo J. had no jurisdiction to extend time as he purported to do on 28th May, 1991. That the order was by consent was neither here nor there; the parties could not confer jurisdiction on the Judge by their consent”. (Emphasis added)

25. Similarly, in *Bosire Ogero v Royal Media Services* [2015] eKLR and *Dr. Lucas Ndung’u Munyua v Royal Media Services Ltd & another* [2014] eKLR, the courts held that Section 27 (1) does not provide for the extension of time to file a suit for defamation. No doubt echoing the holdings in *Wycliffe A. Swanya v Toyota East Africa Limited and another* [2009] eKLR; *Rawal v Rawal* (1990) KLR 275 and *Dhanesvar v Mehta v Manilal M. Shah* [1965] EA 321, Aburili J. restated the rationale behind the *Limitation of Actions Act*, in *Bosire Ogeto’s case* as follows:

“The Law of Limitation of actions is intended to bar plaintiffs from instituting claims that are stale and (is) aimed at protecting defendants against unreasonable delay in bringing of suits against them. The issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same”.

26. The notice of preliminary objection was based on the undisputed fact that the cause of action herein accrued on 21st February 2014 when the alleged defamatory statements were published by the Respondent, hence the suit for defamation ought to have been filed by 20th February 2015. The appellant did not file the plaint until 9th September 2015 and sought/was granted leave to extend time on 13th October 2023. In my view, it is beyond argument that the preliminary objection raised a pure point of law based on limitation, and there is no relevant matter of fact requiring determination by the court and thus was rightly determined by the trial court at the preliminary stage.

Disposition

27. This court therefore having considered the undisputed date on which the instant cause of action arose finds that, on a plain reading of Section 27(1) of the *Limitation of Actions Act*, and based on precedent, there is no jurisdiction conferred on this court to extend time for the filing of a defamation suit.
28. This appeal thus has no merit, the same is thus dismissed with no orders as to costs.
29. It is so ordered.



JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 21ST DAY OF SEPTEMBER 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 21st day of September, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant

