



**Lochab Brothers & another v Njau (Suing as personal representative
of the Estate of Douglas Arura Njau (Deceased) (Civil Appeal
105 of 2019) [2023] KEHC 23423 (KLR) (13 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23423 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 105 OF 2019
DK KEMEL, J
OCTOBER 13, 2023**

BETWEEN

LOCHAB BROTHERS 1ST APPELLANT

KENNETH KEMBOI CHEBII 2ND APPELLANT

AND

**JOHN NJAU (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF
DOUGLAS ARURA NJAU (DECEASED) RESPONDENT**

*(Being an appeal arising from the judgment of Webuye Senior Resident Magistrate
Hon N. Barasa in Webuye SPMCC No. 246 OF 2017 delivered on 8/10/2019)*

JUDGMENT

1. The appeal arises from the judgement of Hon N. Barasa in Webuye SPMCC No.246 of 2017 delivered on 8/10/2019 wherein she found the Appellants 100% liable in damages to the Respondent and awarded the sum of Kshs 10,000/ for pain and suffering, Kshs 100, 000/ for loss of expectation of life, Kshs 600, 000/ for loss of dependency and Kshs 45, 000/ for special damages.
2. Being aggrieved and dissatisfied by the aforesaid judgement, the Appellants lodged a memorandum of appeal dated 6th day of November, 2019 wherein they raised several grounds inter alia; that the learned trial magistrate erred in law and fact in failing to hold that the respondent's action was time barred under section 4 of the *Limitation of Actions Act* Cap 22 Laws of Kenya; that the learned trial magistrate erred in law and fact in failing to consider that the respondent did not prove on trial sufficient reasons or grounds that warranted the delay in filing of his suit; that the learned trial magistrate erred in law and fact by failing to consider that an order granting leave to file suit out of time in itself does not suffice as a reason to succeed in a suit without proving sufficient grounds that cause the delay on trial; that the learned trial magistrate erred in law and fact in failing to consider the Appellant's submissions on



section 4 (2) of the *Limitation of Actions Act*; that the Learned trial magistrate erred in law and fact in holding the Appellants 100% liable for the accident whereas evidence available was not sufficient to show that the respondent had the locus standi to bring this suit as it was time barred and no sufficient grounds were proven to warrant the delay in filing suit; that the learned trial magistrate erred in law and fact by making an excessive award of damages not supported by evidence; that the learned trial magistrate erred in law and fact in failing to consider the issue of limitation of time in her decision and or judgment and therefore failed to make a determination on the same.

3. This being the first appellate court, I am obligated to subject the evidence tendered before the trial court to an independent examination so as to arrive at my own independent conclusion bearing in mind that I did not have the benefit of seeing or hearing the witnesses. See *Sele V. Associated Motor Boat Co Ltd* [1968] E.A. 128. It is noted that the Appellants did not tender their evidence before the trial court though they had duly filed their statement of defence and thus it was the evidence of the Respondent that was received. It was the evidence of the Respondent (PW1) that the deceased was his son and that he rushed to the scene and found that his son was no more. He stated that the deceased was then aged 8 years old and the first born as well as a pupil at Forest primary school in class three. He stated that he expected the deceased to study and help his parents later in life. He produced several documents namely; post mortem report, burial permit, burial expenses receipts, certificate of death and a limited grant of letters of grant of administration. He further testified that the 2nd Appellant was charged vide Webuye Traffic case No. 132 of 2013 whereupon he was convicted and ordered to pay a fine of Kshs 100, 000/ and in default to serve two years' imprisonment. He produced the certified copies of the traffic proceedings and judgement as well as a demand letter to the Appellants. He prayed that the claim be allowed as prayed. On cross-examination, he stated that he did not witness the accident and that the receipts were issued from the shop. On re-examination, he stated that the police blamed the driver of the motor vehicle. The Appellants closed their case without calling witnesses.
4. The appeal was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.
5. Learned counsel for the Appellants raised only one issue for determination namely whether the Respondent's suit was time barred. It was submitted that the Respondent's suit was time barred in terms of section 4(2) as read with section 27 of the *Limitation of Actions Act* cap 22 laws of Kenya. It was pointed out that the Appellants duly raised the issue of limitation vide paragraph 10 of their statement of defence and pages 48-49 of the record of appeal. It was submitted that the leave to lodge suit out of time obtained by the Respondent was a conditional one namely that the Respondent was required to justify the delay to file suit in time during the hearing of the matter but he failed to do so. It was submitted that had the trial court addressed itself on the issue, it would have been left with no option but to dismiss the suit for being time barred. Reliance was placed in the case of *Peter Ndai & Another Vs Peter Gitau Njoroge* [2008] eKLR where the court held that a party filing suit out of time even if granted leave with a condition must discharge the same in accordance with section 4(2) and 27 of the *Limitation of Actions Act*. Learned counsel submitted that the Respondent did not lead evidence to justify the granting of the ex-parte leave that had been given conditionally. It was therefore urged that the appeal be allowed and that the lower court judgement be set aside and that the Appellants be awarded costs.
6. Learned counsel for the Respondent vide submissions dated 14/6/2023, raised two issues for determination namely limitation of time to file suit and the question of liability.
7. As regards the issue of limitation, it was submitted that the Respondent was compelled to wait for the traffic proceedings in Webuye Traffic case number 132 of 2013 to be concluded before he could mount the civil suit. Learned counsel urged this court to dismiss the Appellants submissions that the



Respondent did not get leave to lodge suit out of time yet there was such an order granted by Webuye law courts and which was captured in the record of appeal.

8. As regards the issue of liability, it was submitted that the Appellants were solely to blame for the accident which led to the death of the deceased and which was backed up by the conviction of the 2nd Appellant in Webuye Traffic Case No. 132 of 2013 wherein he was ordered to pay a fine of Kshs 100,000/ or in default to serve two years' imprisonment. It was submitted that by dint of section 47A of the Evidence Act, the conviction of the 2nd Appellant for the accident is sufficient evidence of negligence on his part and that the torts of the 2nd Appellant binds the 1st Appellant by virtue of being servant and or employee. It was also the view of the Respondent's counsel that the Appellants' failure to tender evidence left the evidence of the respondent uncontroverted.
9. On the issue of the award of damages, it was submitted that the awards given by the trial court were not excessive and should not be interfered with. Reliance was placed in the case of *Bashir Ahmed Butt Vs Uwais Ahmed Khan* [1982-88] KAR 5.
10. The Respondent's counsel sought for the dismissal of the appeal with costs and that the judgement of the trial court should be upheld.
11. I have given due consideration to the record of the trial court and the rival submissions of the counsels for the parties. I find the only issue for determination is whether the Respondent's suit was statute barred under the Limitation of Actions Act.
12. A perusal of the Respondent's plaint dated 30/11/2017 and filed on even date vide paragraph 5 thereof indicates that the cause of action arose on the 25/1/2013 and that the suit was lodged on 30/11/2017 and hence the same was outside the three years' statutory period pursuant to the Limitation of Actions Act. The Appellants in their statement of defence dated 16/1/208 paragraph 10 thereof warned the Respondent that they would be raising an objection to the suit for being time barred. The Respondent filed a reply to defence and indicated that he had already been granted leave to lodge suit out of time. I have seen the ex-parte order obtained by the Respondent on 22/11/2017 but which had a rider to the effect that the question of leave under which prayer (b) above will be one of the issues for determination at the trial. It seems the trial court did not make a determination on the issue of leave in the proceedings and judgement dated 8/10/2019 since an order for leave to file a suit of time can only be queried at the trial. In the case of *Ngari & Another Vs Odera* [1999] 2 E.A 241 it was held by the Court of Appeal that the requirements of the Limitation of Actions Act are stringent and that they are met before granting an application to file suit out of time and that an objection regarding the granting of leave to file suit out of time can only be brought at the hearing of the main suit. In the present case, the order obtained by the Respondent to lodge suit out of time dated 16/11/2017 was conditional in that the same was to be one of the issues for determination at the trial. The trial court was thus obligated to inquire into whether the conditions set out under section 27 and 28 of the Limitation of Actions Act had been met at the time of granting the order for leave to file suit out of time. Despite the trial court having expressly made such an order, it failed to do so either in the proceedings or the impugned judgement. I find that it was proper for the Respondent to discharge this obligation so as to ensure that the stringent conditions of the aforesaid Act were met. The said condition was glossed over by the trial court and further by the Respondent who was well aware of the conditional leave. Even though the Appellants did not press the Respondent over the said issue, the obligation lay upon him to see to it that the conditional leave was discharged so as to legitimize the suit against the Appellants. It is necessary to reproduce the provisions of section 27 and 28 of the Limitation of Actions Act which are as follows:

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 requirement of subsection (2) are fulfilled in relation to the cause of action.
2. The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that 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.
3. This action does not exclude or otherwise affect:-
- a. Any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or
 - b. By operation of any law which, apart from this action, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

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- (1) Any application for the leave of the court for the purposes of section 27 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 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:-
 - a) to establish that cause of action, apart from an defence under section 4(2); and
 - b) to fulfill the requirements of section 27(2) in relation to that cause of action.
13. From the above, it is evident that to justify the granting of leave to file suit out of time an applicant must satisfy several conditions inter alai; that the claim is one for damages for negligence, nuisance or breach of duty; that the claim consists of or includes damages for personal injuries; the material facts relating to the cause of action including facts of a decisive character, were at all times outside the actual or constructive knowledge of the applicant until a date after the 3 year limitation period or a date not



earlier than one year before the end of the limitation period; that the action was brought not more than one year from the date the facts came to the applicant's knowledge; that the applicant has adduced evidence upon which the court is of the view that if the action was brought, that evidence would in the absence of any evidence to the contrary, be sufficient to establish the cause of action and also fulfill the requirements of section 27(2) in relation to that cause of action.

14. It is noted that the Appellants did in their statement of defence challenged the issue of the suit having been lodged after expiry of the limitation period but during the hearing of the suit the Respondent failed to present evidence regarding the circumstances in which the leave to file suit out of time was obtained. The Respondent sought to rely on the order granting leave to lodge suit out of time but left it at that even though the order explicitly indicated that the reasons for the delay to lodge suit on time to be canvassed and determined during the trial. This was necessary so as not to steal a match from the Appellants. Even though the Respondent's counsel indicated in his submissions that the reasons for the delay was due to the fact the Respondent was waiting for the traffic case to be completed before he could mount the civil suit for damages. I find this submission to be bereft of any validity since nothing barred the Respondent from filing suit. It is instructive that a civil suit could be instituted independently even during the pendency of criminal or traffic proceedings. In any case, submissions alone cannot take the place of evidence. It was incumbent upon the Respondent to discharge that burden. Further, the trial court was obligated to enquire into whether the conditions set out under section 27 and 28 of the *Limitation of Actions Act* had been met in view of the order granted vide the miscellaneous application filed *ex-parte* to the effect that the reasons advanced be determined at the trial. I find that it was erroneous for the learned trial magistrate to leave out that key issue without making a specific finding thereon. It was also erroneous for the trial magistrate to assume that reasons had been given by the Respondent while lodging the *ex-parte* application yet the order granted was quite explicit that a determination was to be made by the court during the trial. In the absence of such a determination, then the Appellants' contention that the leave to lodge suit out of time was inappropriately issued must have been properly raised. Consequently, I am inclined to agree with the Appellants' claim that the Respondent did not satisfy the court that the conditions for granting leave to file suit out of time were met.
16. As the appeal has succeeded, I find that had the Respondent's suit succeeded, I would have upheld the trial court's finding both on liability and quantum for a number of reasons, Firstly, on liability, the Appellants did not tender evidence to controvert that of the Respondent and further the 2nd Appellant who was an agent of the 1st Appellant had been convicted and sentenced in Webuye Traffic case number 132 of 2013 wherein he was ordered to pay a fine of Kshs 100, 000/ and in default to serve two years' imprisonment. There is no evidence that an appeal was ever lodged. The torts of the 2nd Appellant bound the 1st Appellant who is the employer. On the award of Kshs 10, 000/ for pain and suffering, I find the same to be reasonable since the deceased died on the spot and thus did not experience a lot of pain before breathing his last. On the award of Kshs 100, 000/ for loss of expectation of life, I find the same to be reasonable as it is the conventional award usually granted by the courts. On the issue of loss of dependency, I find the award of Kshs 600, 000/ being a global award for the death of a minor deceased to be reasonable. On the issue of special damages, the same were specifically pleaded and proved.
17. In the result, it is my finding that the Appellants' appeal has merit. The same is allowed with an order that the judgement of the trial court is hereby set aside and substituted with an order dismissing the Respondent's suit with costs. The appellants are awarded the costs of the appeal.

DATED AND DELIVERED AT BUNGOMA THIS 13TH DAY OF OCTOBER, 2023.

D.KEMEI



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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

