



Kenya Plant Health Inspectorate Service & another v Ngumu & another (Suing as a Personal Representative of the Estate of Benson Mutua Wambua) (Civil Appeal E1087 of 2023) [2024] KEHC 14140 (KLR) (Civ) (6 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14140 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1087 OF 2023

MA OTIENO, J

NOVEMBER 6, 2024

BETWEEN

KENYA PLANT HEALTH INSPECTORATE SERVICE 1ST APPELLANT

CLEOPHAS IGADWA JISSI 2ND APPELLANT

AND

AMOS MUNYOLI NGUMU 1ST RESPONDENT

PATRICIA KANINI MBINDA 2ND RESPONDENT

**SUING AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF BENSON
MUTUA WAMBUA**

*(Being an appeal against the Ruling of Hon. L.B. Koech (SPM) delivered
on 28th September 2023 in the Milimani CMCC No. 8388 OF 2019)*

JUDGMENT

Introduction

1. This is an Appeal from the Ruling of the magistrate's court delivered on 28th September 2023 in the Milimani CMCC No. 8388 of 2019 in which the trial court dismissed the Appellants' preliminary objection (on the issue of limitation of time) in an action in tort which had been brought by the Respondent following a road traffic accident.
2. The background of the matter is that by a plaint dated 14th November 2019, the Respondents (being the administrators and legal representatives of the Estate of Benson Mutua Wambua – deceased) sued the Appellants seeking compensation against the Appellants following a fatal road traffic accident



which occurred on 22nd September 2011 involving the 1st Appellant's motor vehicle registration number KAJ 589S, then being driven by the 2nd Appellant.

3. The Appellants by their joint statement of defence dated 3rd July 2020 denied liability for the accident.
4. On 31st March 2023, the Appellants filed a notice of preliminary objection against the suit by the Respondents, seeking that the suit be struck out on the basis that the claim against the Appellants is statute barred under Section 4(2) of the Limitations of Actions Act, the suit having been filed outside the three (3) years allowed in law.
5. On 28th September 2023, the trial court rendered its Ruling dismissing the Appellants' preliminary objection on the basis that the issue of the suit being statute barred was raised by the Appellants in their defence.

The Appeal

6. Aggrieved by the decision of the trial court, the Appellants vide their memorandum appeal dated 12th October 2023 lodged an appeal to this court, raising four (4) grounds of appeal that; -
 - i. The learned trial magistrate erred in law and in fact and misdirected herself by failing to consider at all the submissions made before her by the Defendants/Applicants and reached an erroneous conclusion thereby occasioning a miscarriage of justice.
 - ii. The Learned Trial Magistrate erred in law and in fact by failing to considering the legal authorities cited by the Defendants/Applicants on the issue of limitation of time and its effect on the jurisdiction of the court and thereby erroneously dismissing the Preliminary objection in its ruling.
 - iii. The learned trial magistrate misdirected herself in her ruling as to the import of not pleading limitation of time in the defense and as to when a preliminary objection should be raised.
 - iv. The learned trial magistrate in addressing the issues raised in the preliminary objection in her ruling, took into account irrelevant factors-and wrong principles and arrived at a wrong decision thereby occasioning a miscarriage of justice.
7. The appeal was canvassed by way of written submissions. The Appellants' submissions is dated 19th June 2024 whilst that of the Respondent is dated 13th September 2024.

Appellant's submissions

8. In their submissions, the Appellants argued that their preliminary objection of 31st March 2023 to the Respondents' suit was meritorious and therefore the trial court erred in dismissing the same.
9. The Appellants submitted that the trial court erred in its ruling, by holding that the preliminary objection had taken the Respondent herein by surprise since the same had not been pleaded in their defense and that it was only raised when the matter had been set down for defence hearing.
10. It was the Appellants' submissions in this appeal that despite the fact that the issue of the suit being statute barred was not pleaded in the defence, the same was properly raised through a preliminary objection based on the pleadings filed in court by both parties. Citing Law, JA in the case of Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors (1969) EA 696, the Appellants stated that a preliminary objection can be raised, either where it has been expressly pleaded of or where it arises by clear implication of the pleadings.



11. According to the Appellants, the issue of limitation of time is a substantive issue that goes to the root of the Respondent's case before the trial court and not a procedural technicality which can be ignored by a court under the guise of Article 159 (2) (d) of *the Constitution*. The case of David Agongo Kugo v Teachers Service Commission [2017] eKLR was cited by the Appellants in support of this argument.
12. The Appellants asserted that the alleged accident having happened on 22nd September 2011, the three-year statutory period provided under Section 4(2) of the *Limitation of Actions Act* within which proceedings in tort are to be brought expired long before 14th November 2019 when the instant suit was filed. That consequently, the trial court was therefore duty bound to uphold the Appellants' preliminary objection since no leave had been obtained by the Respondents to file the suit out of time. The Appellant cited the case of Rosemary Wanjiru Kungu v Elijah Macharia Githinji & another [2014] eKLR in this regard.
13. In the premises, the Appellant urged this court to allow the appeal and set aside the trial court's ruling of 28th September 2023.

Respondent's Submissions

14. On their part, the Respondents submitted that as rightly held by the trial court, the issue of the suit being statute barred by section 4(2) of *Limitation of Actions Act* was not pleaded by the Appellants in their defence and therefore could not validly be raised as a preliminary objection.
15. Citing among others, the case of Stephen Onyango Achola & another v Edward Hongo Sule & another [2004] eKLR, the Respondents submitted that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings ought to be ignored.
16. It was further the Respondents' argument that in any event, the suit was filed within the prescribed three (3) years' statutory period. According to the Respondents, despite that the accident happened on 22nd September 2011, time did not start to run from that date since there was an inquest into the cause of death of the deceased, being the Nairobi CMCC Inquest No. 14 of 2012: In the matter of Public Inquest into the cause of death of Mr. Benson Mutua Wambua, whose ruling was delivered on 15th November 2016.
17. Referring to the provisions of Section 26 (a) of the *Limitation of Actions Act*, the Respondent submitted that the public inquest was due to the fact that there was suspicion of fraud on the part of the Appellants, consequently, time could not start to run until after 15th November 2016 when the inquest was completed and a ruling made thereon. The case of Justus Tureti Obara v Peter Koipetai Nengiso (2014) e KLR was cited by the Respondents in support of this argument.
18. The Respondents therefore took the position that their suit having been filed on 14th November 2019 was well within the three (3) years' period prescribed by the law.
19. The Respondent therefore urged this court to dismiss the Appellants' appeal with costs and affirm the trial court's ruling of 28th September 2023.

Analysis and determination

20. I have carefully reviewed the Appellant's memorandum of appeal filed herein, the pleadings and proceedings from the lower court as well as the submissions by the parties in support of their respective positions. I note that the only issue for determination in this appeal is whether the trial court erred in dismissing the Appellant's preliminary objection that the Respondent's suit was statute (time) barred.



21. It is common ground that the primary suit in this matter relates to a road traffic accident which occurred on 22nd September 2011. The suit was filed by on 14th November 2019, which is approximately eight (8) years after the happening of the accident.
22. Section 4(2) of the *Limitation of Actions Act*, Cap 22 provides that an action based in tort may not be brought after the end of 3 years from the date on which the cause of action accrued. The instant suit being one having its basis in tort of negligence would, barring any special considerations, be considered time barred under the statute.
23. However, the Respondent argued, which position was upheld by the trial court in its ruling the subject of this appeal, that the Appellants could not in the circumstances of this case, take up as a preliminary objection, the issue of the claim being statute barred on the basis that no such defence was raised in the Appellant’s statement of defence dated 3rd July 2020 in answer to the Plaintiff.
24. Order 2 Rule 4 of the Civil Procedure Rules provides as follows in relation to pleadings subsequent to a plaintiff; -
 4. “Matters which must be specifically pleaded [Order 2, Rule 4]
 - (1) A party shall in any pleading subsequent to a plaintiff plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant statute of limitation or any fact showing illegality; –
 - a. which he alleges makes any claim or defence of the opposite party not maintainable; or
 - b. which, if not specifically pleaded, might take the opposite party by surprise; or
 - c. which raises issues of act not arising out of the preceding pleadings.
 - (2) Without prejudice to sub-rule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.” [Emphasis added]
25. I have carefully reviewed the Appellants’ statement of defence dated 3rd July 2020 and note that the issue of the claim being time barred under section 4(2) of the Limitations of Actions Act was not taken up as a defence.
26. While admitting that the issue of the suit being statute barred was not specifically pleaded in their defence, the Appellant’s position in this appeal is that that the issue is one “which arises by clear implication out of pleading.”
27. In deciding this appeal, I find the decision of the Court of Appeal in the case of Stephen Onyango Achola & another v Edward Hongo Sule & another [2004] KECA 156 (KLR) where the court upheld the position that no preliminary objection can be taken on a point not pleaded quite useful. The court stated as follows; -

“The claim by the two appellants was for recovery of land. The second respondent was relying on the provisions of a statute, that is *Act No 5 of 1974* to defeat that claim. The provisions of order VI rule 4 (1) and (2) required him to specifically plead the statute on which provision he relied to defeat the appellants’ claim. Support for order VI rule 4 (1) and (2) is to be found in Halsbury’s Laws of England, 4th Edition, vol 36 at paragraph 48 page 38 headed:



“Matters which must be specifically pleaded: The defendant must in his defence plead specifically any matter which he alleges makes the action not maintainable or which, if not specifically pleaded might take, the plaintiff by surprise, or which raises issues of fact not arising out of the statement of claim. Examples of such matters are performance, release, any relevant statute of limitation, fraud or any act showing illegality. Other matters which must be so pleaded are the Statute of Fraud, and the provision of the Law of Property Act, 1925 which requires contracts for the sale or disposition of land to be in writing, and, it seems, any ground of objection to the jurisdiction of the Court.” [emphasis added]

28. The Court (Omolo, O’Kubasu & Githinji JJA) in the case of Stephen Onyango Achola & another (supra) went on and stated as follows; -

“The second respondent having failed to specifically plead the issue of limitation in its defence it was not entitled to rely on that issue and base its preliminary objection on it; nor will the second respondent be entitled to rely on that defence during the trial of the suit unless it amends its defence. It is trite law that cases must be decided on the issues pleaded and we need not cite any authority for that proposition. It is equally not to be forgotten that a party who is entitled to rely on the defence of limitation is perfectly entitled to waive such defence and thus let the suit proceed to trial on its merit.”

29. In the circumstances of the present case, and taking guidance from the Court of Appeal in the case of Stephen Onyango Achola & another (supra) I hold and find that the trial court was right in dismissing the Appellant’s preliminary objection on the basis that the same was not specifically pleaded as required under Order 2 Rule 4 of the Civil Procedure Rules.

30. The argument by the Appellants that the failure on their part to plead limitation of time in their defence is a procedural technicality which ought to be overlooked pursuant to the guidance given by Article 159(2) (d) of the Constitution cannot be the correct position in law. It is this court’s view that Article 159(2) (d) of the Constitution is intended to promote substantive justice, which is mainly aimed at sustaining rather than terminating suits.

31. In any event, the cases relied on by the Appellant (including the seminal case of Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors (1969) EA 696 on the definition of the term ‘preliminary objection’ supports the position that a preliminary objection is a point of law which has been pleaded, or which arises by clear implication out of pleadings. It therefore follows that the Appellants could only raise a preliminary objection on an issue they had expressly pleaded in their defence, or one which could be clearly implied from their defence.

32. From a review of the Appellant’s defence on record, it is clear that the issue of the Respondent’s claim being statute barred by time was not pleaded in the defence neither can it be seen as arising from that defense. In my view, the Appellants cannot, in the absence of any pleading from them on issue of limitation, purport to rely on the pleadings by the Respondents to support their argument that the claim is statute barred.

33. In any event, and taking into cognizance that this is a matter that was the subject of an inquest by the court, it may very well be argued that time stopped running for the period of the inquest and that the 3 years provided in law only started running when the inquest ended. This is the position taken by the Respondents in their submissions in this appeal.

34. In my view, Article 159(2) (d) and the overriding objective under Section 3A of the Civil Procedure Act confers on the Court considerable latitude in the interpretation of the law and rules made thereunder.



In the exercise of this discretion, the purpose is always to achieve substantive justice. Consequently, in my view, this is a case where the Respondents ought to have their day in court and have their case heard on merits.

35. Arising from the above discussions, I find this appeal unmeritorious and hereby dismiss the same with costs to the Respondents.
36. It so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 6TH DAY OF NOVEMBER 2024

ADO MOSES

JUDGE

In the presence of:

Moses Court Assistant

Kiwinga..... for the Appellants

N/A.....for the Respondent

