



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. E218 OF 2020**

**BETTY ANN WANJIRU.....PLAINTIFF**

**VERSUS**

**DR. MARTIN WANYOIKE.....1<sup>ST</sup> DEFENDANT**

**PRIMECARE HEART CLINIC LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff herein instituted a suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants by way of the plaint dated 17<sup>th</sup> December, 2020 and sought for various reliefs including general and special damages arising out of a claim for medical negligence.

2. Upon service of summons, the defendants put in their joint statement of defence dated 2<sup>nd</sup> February, 2021 to deny the plaintiff's claim.

3. Furthermore, the defendants filed the notice of preliminary objection dated 2<sup>nd</sup> February, 2021 to challenge the competency of the suit based on the following grounds:

- a) ***THAT the suit is bad in law, inadmissible and incurably defective and incompetent for want of jurisdiction.***
- b) ***THAT Section 4(2) of the Limitation of Actions Act Cap. 22 Laws of Kenya provides that an action founded on tort may not be brought after the end of three (3) years from the date on which the cause of action arose.***
- c) ***THAT the plaintiff's claim against the defendants is premised on the tort of negligence and the cause of action arose in the year 2016.***
- d) ***THAT the claim against the defendants is statute barred as it has been brought after more than three (3) years from the date on which the cause of action arose.***
- e) ***THAT the plaintiff has not sought leave of the court under Section 27 and 28 of the Limitation of Actions Act.***
- f) ***THAT accordingly, the Honourable Court lacks jurisdiction to hear and determine the case.***

4. The parties dispensed with the preliminary objection through filing and exchanging written submissions. In their submissions dated 30<sup>th</sup> June, 2021 the defendants contend that going by the plaint, it is clear that the cause of action arose on 8<sup>th</sup> of March, 2016 being the date on which the plaintiff underwent the requisite medical tests and hence the three (3) year time period would begin to run from that date and which period lapsed on 9<sup>th</sup> March, 2019.

5. The defendants contend that in the alternative, time began to accrue from 29<sup>th</sup> August, 2016 being the date on which the plaintiff received her medical test results.

6. It is the submission of the defendants that the plaintiff brought her suit outside the stipulated timelines and without first seeking and obtaining leave of the court, thereby making her suit time barred. To buttress this point, the defendants have cited a few cases, including that of **Haron Onyancha v National Police Service Commission & another [2017] eKLR**, where the court considered the following reasoning in the case of **IGA v Makerere University [1972] E.A 65**:

***“...The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, the plaint must be rejected.”***

7. The defendants therefore submit that in the circumstances, this court lacks jurisdiction to entertain the suit.

8. The plaintiff whose submissions are dated 17<sup>th</sup> August, 2021 argues that whereas it is true that she underwent the medical tests in question sometime in March, 2016 and came to learn of her diagnosis in August of the same, year, it is only following the year 2018 that she was able to fully establish the true nature and extent of her illness and to associate them with the alleged negligence on the part of the defendants.

9. The plaintiff therefore submits that time would begin to run from the date on which she suffered damage resulting from the alleged negligent, which in the present instance was in late 2018. Reference was made to the case of **Humphrey Kiriungi Njagi v Aga Khan Health Services Ltd [2005] eKLR** in which the court rendered itself thus:

*“Are the Courts to take at face value the provisions of section 4(2) of the Limitation of Actions Act (Cap.22), and indiscriminately require that tort cases must be filed within three years of the occurrence of a particular incident? The answer must be no, because identifying the cause of action and determining its nature, may be a judicial task, performed after taking into account the facts of each case. The cause of action may not be obvious, or may be so extended or so dynamic that it cannot be marked as elapsed over one single day. The cause of action in health-care matters, for instance, cannot realistically be assigned to one single act occurring on a particular day, and for which one individual takes the blame. The reference-point in such a situation must be when the harm was sustained by the claimant; and the relevant date may be somewhat removed from the date when a particular act of medical care took place...”*

10. The plaintiff argues that the provisions of **Section 28** of the **Limitation of Actions Act (“the Act”)** permit an application for extension of time to file a suit even after its commencement, and consequently, this court has jurisdiction to entertain the present suit.

11. For the foregoing reasons, the plaintiff urges this court to strike out the preliminary objection.

12. I have considered the grounds laid out in the notice of preliminary objection; and the rival submissions and authorities cited in that respect.

13. It is clear that the preliminary objection is fundamentally challenging the validity of the suit for being statute barred. I will therefore address the six (6) grounds raised therein contemporaneously.

14. To begin with, what constitutes a preliminary objection was discussed in the case of **Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696** in the following manner:

*“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”*

15. The above definition was further advanced in the Supreme Court case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR** when it rendered itself thus:

*“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”*

16. The *first* limb of the preliminary objection touches on whether the present suit is statute barred.

17. Upon considering the rival positions taken by the parties and upon my perusal of the pleadings on record, I note that it is not in dispute that the claim in question is in the nature of medical negligence which is a tort.

18. I therefore turn my attention to the proviso of **Section 4(2)** of **the Act** which expresses the following:

*“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...”*

19. The law on limitations is clear that the time begins to run when the cause of action accrues. The real contention as seen from the preliminary objection and contending submissions lies in ascertaining when the cause of action began to accrue in the present instance.

20. From my perusal of the plaintiff, I observed that the plaintiff underwent various medical tests at the 2<sup>nd</sup> defendant’s clinic and under the care of the 1<sup>st</sup> defendant on various dates in March, 2016 and that she received her medical results from the defendants on 29<sup>th</sup> August, 2016 revealing that she had advanced stages of breast cancer.

21. Going by the plaintiff, the plaintiff thereafter travelled to the United States for specialized treatment from 5<sup>th</sup> October, 2016 until the year 2018 when she returned to Kenya.

22. The plaintiff indicates in her pleadings that following her treatment in the United States, she developed certain complications and damage which she attributes to negligence on the part of the defendants for failing to provide her with a diagnosis in good time.

23. I associate myself with the reasoning of the court in the case of **Humphrey Kiriungi Njagi v Aga Khan Health Services Ltd (supra)** cited in the plaintiff's submissions that the period during which a cause of action accrues is not always obvious particularly in medical negligence claims.

24. This being a medical negligence claim, it is apparent that the cause of action did not accrue in one event but was sustained over time.

25. Upon considering the facts presented in the plaint, I am of the view that the time began to run sometime in the year 2018 when the plaintiff pleaded that she started to develop post-treatment and post-surgery complications, though the exact dates are not indicated therein.

26. Suffice it to say that I am satisfied that at the time of filing the suit sometime on or about 17<sup>th</sup> December, 2020 the statutory time period had not lapsed and hence the suit is valid.

27. The *second* limb of the preliminary objection concerns itself with the subject of jurisdiction. Upon determining the suit to be competent, I am satisfied that this court has jurisdiction to entertain the said suit.

28. Consequently, the defendants' notice of preliminary objection dated 2<sup>nd</sup> February, 2021 is hereby dismissed with costs to the plaintiff.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... **FOR THE PLAINTIFF**

..... **FOR THE 1ST AND 2ND DEFENDANTS**