



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL DIVISION

CIVIL APPEAL NUMBER 24 OF 2017

BETWEEN

DUNCAN IRUNGU KIMANI.....APPELLANT

AND

DAVID LIMMY MWANIKI..... RESPONDENT

(Being an appeal from the judgment and decree of the Hon. Mr. J. Kituku, Principal Magistrate made on 22nd February 2017 in Kiambu CMCC no 234 OF 2014)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. This appeal arises from the judgment of Hon. J. Kitutu, Principal Magistrate delivered on 2nd February 2017 in Kiambu CMCC No. 234 of 2017. The appellant herein was the plaintiff while the respondent was the defendant.

2. Vide the plaint dated 15th September 2014 the appellant sought to recover special damages of Kshs.187,000/- as a result of material damage caused to his motor vehicle registration number KBM 235R, a Toyota Corolla. The appellant alleged at paragraph 4 of the plaint that the damage suffered to his motor vehicle was caused by the negligent manner in which the respondent drove his own motor vehicle registration number KAU 912M and caused it to crash into the appellant's motor vehicle, thereby causing it extensive damage.

3. Particulars of negligence on the part of the respondent are also set out in paragraph 4 of the plaint. The suit was filed upon the appellant being granted leave to file the same out of time.

Judgment of the Learned Trial Court

4. In the judgment dated 22nd February 2017, the learned trial magistrate dismissed the appellant's suit on the ground that the same was time barred. The trial court awarded costs of the suit to the respondent.

The Appeal

5. Being aggrieved by the whole of the said judgment, the appellant filed the Memorandum of Appeal dated 7th March 2017 on the same date on grounds that:-

i. The learned trial magistrate erred in law and fact in failing to appreciate the relevant provisions of the statutes of limitation and hence arrived at a bad decision.

ii. The learned trial magistrate erred in law and in fact in rejecting the order granting leave to file suit out of time in the absence of any material presented before him to challenge that leave.

iii. That the learned trial magistrate erred in law and fact in failing to appreciate that the defence of limitations had not been raised in the pleadings and accordingly could not be introduced at the trial stage.

iv. **The Learned Trial Magistrate erred in law and in fact in failing to find that there was no defence presented nor any evidence called for the defence and therefore nothing that could be relied upon by the defence to challenge the plaintiff's claim.**

v. **The learned trial magistrate erred in law and in fact in relying on matters not presented before him at the trial to make a finding against the plaintiff.**

vi. **The learned trial magistrate erred in law and in fact in finding that leave to file a claim for damages out of time could not be granted by a court of law and hence arrived at a bad decision.**

vii. **The learned trial magistrate erred in failing to appreciate that by reversing the order granting leave in the circumstances of the case before him was tantamount to sitting on appeal from a decision of a colleague of concurrent jurisdiction as himself and whereas he lacked jurisdiction to make such a finding.**

viii. **The learned trial magistrate erred in dismissing the plaintiff's claim.**

6. **WHEREFORE** the appellant prays that this appeal be allowed and judgment be entered for him as against the respondent. The appellant also prays for costs of this appeal and of the case in the court below.

7. This is a first appeal. For this reason, this court has a duty of rehearing the case, though without the benefit of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same before reaching its own conclusions in the matter. This court has also to remember that it is usually a big thing for an appellate court to overturn the finding of a court that has had the advantage of seeing and hearing witnesses during trial. This can only happen if this court finds that the trial court misapprehended the evidence or if it applied the wrong principles in arriving at the impugned decision. Generally see *Selle vs Associated Motor Boat Co. Ltd & others [1968] EA 123*.

Background

8. From the plaint the cause of action in this matter arose on 9th May 2011 when the respondent's motor vehicle registration number KAU 912M crashed into the appellant's motor vehicle registration number KBM 235R thereby causing it extensive damage. As a result of the said alleged accident, the respondent was arraigned before the Chief Magistrate's Court at Nairobi on a charge of careless driving to which he pleaded guilty in *Traffic Case no. 12172 of 2011*. He was fined Kshs.10,000/- on 3rd June 2011, while the suit herein was filed on 23rd September 2014.

9. Meantime, by an ex parte application dated 5th August 2014, which application was duly supported by an affidavit sworn by the appellant and annexures thereto, the appellant was granted leave to file a suit against the respondent herein out of time.

10. After the pleadings closed, the respondent filed a Notice of Preliminary Objection dated 7th January 2015 in respect of the appellant's plaint filed on 23rd September 2014. The Preliminary Objection was premised on grounds:-

i. That the plaintiff's suit is time barred by dint of the Limitation of Actions Act.

ii. That the plaintiff's claim as framed falls outside the provisions of the Limitation of Actions Act in respect of which leave to file suit out of time may be granted.

iii. That by reason thereof, the plaintiff's suit is bad in law and should be struck out.

11. The preliminary objection was in line with the respondent's statement of defence dated 17th October 2014, in which the respondent had averred at paragraph 11 thereof as follows:

"11. Further to this, the defendant avers that this suit is bad in law and the defendant shall raise a preliminary objection on the same during the hearing."

12. The preliminary objection was canvassed by way of written submissions and on 25th January, 2015 the learned trial court rendered its decision on whether leave granted to file suit out of time can be challenged in the manner adopted by the respondent. In his ruling the learned trial magistrate stated that once such leave has been obtained, it can only be queried at the trial but not on an application to discharge it or by way of a preliminary objection. In other words, the respondent's preliminary objection was dismissed with costs to the appellant, paving the way for the case to proceed to full hearing.

The Appellant's Case During Trial

13. PW1 was Daniel Muturi Mbugua, a motor vehicle assessor. He testified that from his assessment of motor vehicle registration number KBM 235R, the repair charges would be Kshs.172,000/-. He produced his report – Pexh 1 – which included charges of Kshs.5000/- paid to him to attend court as per Pexh 2.

14. During cross examination, PW1 stated that as at 9th May 2011 when he received instruction from the appellant, the damage was still fresh, but he could not say whether the repair work was undertaken after the assessment was done.

15. The appellant testified as PW2. From his written statement dated 15th September 2014, he stated that the accident in which his motor vehicle was damaged was caused by the negligence of the respondent. He gave the total cost of the repairs, inclusive of breakdown charges and assessment costs as Kshs187,000/-. The appellant also stated that he had lost income of Kshs.3,500/- to 4,000/- daily for 30 days.

16. When the appellant was asked to explain why there had been a delay in filing suit he stated that he went to Sudan for business and could therefore not sign the pleadings earlier. He also testified that he had no documentary proof of his alleged daily earnings.

The Respondent's Case

17. The respondent did not call any witnesses during the trial; but filed written submissions.

Issues for Determination and Submissions

18. The only issue for determination in this appeal is whether the trial court was right in dismissing the appellant's material claim on the sole ground that the suit was time barred, even in view of the fact that the appellant sought and obtained leave to file the suit out of time.

19. The parties have filed the rival submissions in which they have referred to supporting case law. I shall refer to these submissions and authorities during the next segment of the judgment: analysis and determination.

Analysis and Determination

20. The law with regard to the point in contest is found in section 27 of the Limitations of Actions Act which provides 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 the 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 purpose of this section; and

d) 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 –

e) 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

f) in either case, was a date not earlier than one year before the date on which the action was brought.

3) This section 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) the operation of any law which, apart from this section, 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.

21. The law as stated above has been explained in a number of decisions by the Superior Courts. A case in point is the persuasive decision by Mbiti J in *Lucia Wambui Ngugi versus Kenya Railways & Another Nairobi HMC No. 123 of 1989* (an authority cited by the respondent herein) in which the learned Judge held, *inter alia*, that:-

“Since it has been decided that the defendants have no right to go back to the High Court to challenge such orders [for leave] it is particularly important that when such an application is made, the order should not follow as a matter of course. The evidence in support of the application ought to be very carefully scrutinized, and, if that evidence does not make quite clear that the plaintiff comes within the terms of the Limitations Act, then either the order ought to be refused, or the plaintiff perhaps to be given an opportunity of supplementing his evidence. It must of course be assumed for the purposes of the ex parte application that the affidavit evidence is true; but it is only if that evidence makes it absolutely plain that the plaintiff is entitled to leave that the application should be granted and the order made, for such an order may have the effect of depriving the defendant of a very valuable statutory right. It is not in every case in which leave has been given ex parte on inadequate evidence that the defendant will be able to mitigate the injustice which may have been done to him by obtaining an order for the trial of a preliminary issueSection 27 of the Limitation of Actions Act provides that the limitation period under section 4(2) of the said Act can be extended in certain circumstances and by the provisions of section 31 of the said Act, all Limitation periods prescribed by any other written law is extendable by the provisions of sections 27 of the said Act. Consequently, this application can only succeed if the applicant can avail herself of the provisions of section 27 of the Act as read with section 31 thereof, which enact that the

limiting provision shall not afford a defence to an action founded on tort where the court gives leave on account of the appellant's ignorance of material facts relating to the cause of action which were of decisive character. Although what amounts to "ignorance of material facts of a decisive character" is not always easy to distinguish, by section 30(1) of the Limitation of Actions Act, when read with subsection (2) thereof, material facts of decisive character are said to be those relating to a cause of action which would enable a reasonable person to conclude that he had a reasonable chance of succeeding and getting damages of such amount as would justify the bringing of the action."

22. A similar issue faced Potter J in the case of *Gathoni versus Kenya Co-operative Creameries Limited [1982] KLR 104* in which the court held *inter alia* that *"The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But rightly or wrongly the Act does not help persons like the appellant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done."* Potter J went further to state that physical disability did not count for a reason for extension of time. The learned Judge also held that for purposes of **section 27** a fact shall be taken at any particular time to have been outside the knowledge (actual and constructive) of a person if, but only if (1) he did not know that fact and (2) in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken at that time for the purpose of ascertaining it; and (3) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, with respect to those circumstances. The definition of the phrase **"appropriate advice"** is given in **section 30(5)** to mean, in relation to any facts or circumstances, the **"advice of a competent person qualified in their respective spheres, to advise on medical, legal or other aspects of that fact or those circumstances as the case may be."**

23. The question that now arises for determination is what the import of all the above provisions and decisions is on the appellant's case. It means, first of all that extension of time under **section 27(1) of the Limitation of Actions Act** is limited to claims founded on tort and the same must relate to the torts of negligence, nuisance or breach of duty and the damages must be in respect of personal injuries to the plaintiff as a result of the tort. It must therefore be established from the appellant's case that he not only met the conditions set out under **section 27(1) of the Limitation of Actions Act**, but it must also be plain from the pleadings that certain material facts relating to the appellant's case were at all times outside his knowledge (actual or constructive). The appellant must also have shown by the application for leave that he was not aware of that material fact and secondly that he did the best in the circumstances to ensure that he ascertained that fact and finally that he took all reasonable steps (if any) as it was within his power to do, to obtain appropriate advice on that fact.

24. From the pleadings and the record, I find that the appellant did not meet the threshold for **section 27(1) of the Limitation of Actions Act** and secondly he did not demonstrate to the court that the fact which prevented him from filing his suit in time was outside his knowledge (actual or constructive). In the submissions dated 2nd September 2019, the only reason why the appellant was unable to file his suit in time is that he had gone on a business trip to Sudan. Clearly a business trip to Sudan cannot be said to have been a fact outside the appellant's knowledge (whether actual or constructive). In the circumstances, I wholly agree with the learned trial magistrate that the appellant's case was bad for limitation of time.

25. Before I conclude this judgment, there is another issue as to whether the learned trial magistrate was right in overturning a ruling made by a court of concurrent jurisdiction. It is my considered view that this was in order. In the case of *Oruta & Another versus Nyamato [1988] eKLR*, the court held:-

"The respondent having obtained leave to file action as required by the law, that order can only be queried at the trial but not by application to discharge it, otherwise the provisions of the Act in providing for obtaining an order ex parte will be rendered nugatory. In my view, Okubasu J was right in refusing the appellant's application to discharge the ex parte order. Likewise, I would refuse the appellant's appeal. The appellant can raise the objection at the trial and the trial judge will have to deal with the matter on the evidence to be adduced at the trial."

25. In the instant case, the respondent pleaded at paragraphs 6 and 11 of the statement of defence that he was going to challenge the leave earlier granted to the appellant allowing him to file suit out of time. This was a pertinent issue which the learned trial magistrate had to deal with during the trial, irrespective of the fact that the appellant had been granted leave to file suit out of time. This scenario was very much akin to the scenario in the *Oruta Case (above)*. In his judgment, the learned trial court rightly held the view that leave obtained ex parte under **sections 27 and 28 of the Limitation of Actions Act** can be challenged during the trial. The trial court relied on the case of *Amos Muthinya Mimungana versus John Gatho & Another [2016] eKLR*. The learned trial magistrate noted that the reason given by the appellant for failure to file suit out of time did not meet the threshold of **"material facts"** as defined under **section 30 Limitation of Actions Act**. See *Rosemary Wanjiru Kung'u versus Elijah Macharia Githinji & Another [2014] eKLR*.

27. The learned trial court also held, and I wholly agree with him that the leave envisaged under **section 27(1) of the Limitation of Actions Act** can only be granted in respect of personal injuries to the plaintiff. The claim in the appellant's case was a material damage claim in respect of his motor vehicle registration number KBM 235R. In effect therefore, the leave granted to the appellant was granted in error. See the case of *Mary Osundwa versus Nzoia Sugar Co. Ltd [2002] eKLR* in which the court held, and correctly so, that **section 4(2) as read with section 27(1) of the Law of Limitations Act** that

"This section does not give jurisdiction to the court in cases involving contract or any other cause of action other than those in tort."

Conclusion

28. In light of all the above, I find and hold that the appellant's appeal lacks merit and is accordingly dismissed with costs to the respondent.

29. Orders accordingly.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned electornically at Kiambu on this 21st day of May 2020

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CHRISTINE W. MEOLI

JUDGE