REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 126 OF 2008

S D V TRANSAMI (K) LIMITED.....APPEALLANT

VERSUS

DANIEL ODAK.....RESPONDENT

(Being an Appeal from the Judgment of the Resident Magistrate's Court at Mombasa (Hon. Resident Magistrate, Ms. R. Makungu) given in Mombasa Resident Magistrate's Court, Civil Suit No. 2531 of 2005 on the 9th day of July 2008)

J U D G M E N T

1. This appeal challenges the judgment and decision by the trial court by which the liability was apportioned at 60% in favour of the defendant then assessed general damages in the sum of Kshs.50,000/= and special damages of Kshs.25,000/= thus an aggregate of Kshs.525,000/=.

2. The judgment aggrieved the appellant, as the defendant then, who then filed the current appeal setting out the 10 grounds of appeal. Even if set out on those many grounds, the challenge on the appeal can be efficiently replaced into four grounds as follows:-

a) Whether grant of extension of time was validly made and if the trial court had the jurisdiction to revisit the lease granted? (Grounds 2, 3, 4 & 5)

b) Whether the claim statute barred? Ground 1

c) Whether the apportionment of liability was based upon evident or erroneously made? (Grounds 6,7,9 & 10)

d) Whether the assessment of damages at Kshs.500,000/= was erroneous(8)

The pleadings filed and evidence led

3. The plaintiffs cause as pleaded in the plaint dated 25/7/2005 was to the effect that on the material day, the deceased, one SAMUEL OPISI WASIDWA, was in the cause of his employment with the defendant when he was directed and authorized to drive Motor-vehicle KAD 864K from Changamwe to Kilifi. On his way to Kilifi, the said motor vehicle developed mechanical problems and got involved in an accident by ramming into a stationary truck from behind. The accident was blamed on and attributed to the negligence of the defendant in failure to keep the motor vehicle in good state of repair thereby failing to regard the safety of the deceased but exposing him to danger and damage the defendant ought to have known to exist or portend without administering the warning on such dangers.

4. The claim was pursued pursuant to the provisions of Fatal Accidents Act as well as Law Reform Act. It was pleaded that at the time of his death the deceased earned Kshs. 8, 845.00 per month which had been lost by the estate and dependants hence the suit for recovery of damages. The suit sought general damages at large and special damages in the sum of Kshs.33,100.00

5. For the defence, the resistance put forth was in the statement of defence dated 2/9/2005 in which the suit was challenged for being bad on account of statute bar and that the extension of time granted ex-parte was subject to rescission. It was additionally pleaded that while the defendant had the duty to take all reasonable care for the safety of the deceased, the deceased equally had the onus to take due precautions for his own safety for which reason all the particulars of negligence and loss were denied and the negligence of the deceased particularized. On a without prejudice basis, the defendant pleaded that the accident was substantially contributed by the driver of motor vehicle No. 470-552P/ZB A000 for leaving the said motor vehicle stationary on a public road and obstructing the deceased way. It is of note however that the said driver was never made arty to the suit and in law no orders can be legally sought nor made against him.

Evidence led

6. At trial, the plaintiff gave evidence and called a police officer from Mariakani Police station who produced the police file as an exhibit. Parties also agreed that court files in HCC No. 292/2003 and Misc. Appl. No. 93/2005 be produced as exhibits. For the defendant, however, no evidence was led but parties agreed that the sum of Kshs.240, 000/= had been paid to the estate pursuant to the then workmen compensation Act.

7. The evidence by the respondent was to the effect he did not witness the accident giving rise to the deceased death. He produced the grant of letters of administration issued to him as well as work identity card for the deceased as well as evidence of monthly salary. He said that the deceased left behind one child and that him and the mother depended upon the deceased who would give them Kshs.500/= and 1000/= respectively per month. He produced the court order extending time to file suit as exhibit P6 and said that funeral expenses amounted to Kshs.35,000/=

8. In cross-examination, the plaintiff confirmed having not witnessed the accident and that he relied on what had been told. He admitted that the suit when filed on the 29/7/2005 was two years outside the period prescribed by the law and that he was unable to say whether the deceased rammed onto the back of a stationary motor vehicle. On delay he said they had family problems at home hence the delay.

9. In re-examination, the witness stated that there were no disputes on getting the grant of letters of administration and that there was nothing which could impede him from instructing an advocate to file the suit within the time prescribed.

10. PW 2, the police officer's evidence was very short and limited to production of the police file regarding the subject accident. He said he was not the officer in-charge and that he was not stationed at Mariakani at the time of the accident. He also confirmed that the state counsel had given an opinion that the deceased was to blame for the accident.

11. The evidence by the two people together with the documents produced by consent comprised the entire evidence the court is expected to apply to the pleadings and come up with a determination.

12. When the trial court set to execute that mandate, in the reserved judgment delivered on the 9/7/2008, and on the issue of propriety of the suit and extension of time, it delivered itself as follows:-

> **"Counsel for defendant raised the issue of time limitation but the court vide its Order dated 18th July 2005 and allowed the defendant to file a suit out time. Thus the issue of discarding the said order does not arise.**
>
> **Were the defendants aggrieved by the said *exparte* orders, the proper forum for him to address those grievances could have been in the High Court.**
>
> **The correct position in my mind is that the plaintiff is now properly before the court".**

13. That is the decision, that is now attacked by grounds 1, 2, 3, 4 & 5 of the Memorandum of Appeal and the 1st and 2nd issues isolated by this court hereto before. How to deal with the question of propriety of an order given *ex-parte* and extending time to sue is a well beaten path. In ***TRANSWORLD SAFARIS KENYA LTD VS SOMAK TRAVEL LTD [1997] eKLR***, the Court of Appeal having considered the previous conflicting decisions on the matter concluded that the ex-parte order once issued is not final, attracts no appeal or need for the court to be moved in the file in which it was granted but can only be challenged before the trial court.

14. That is the position that I do consider to have crystallized and not subject to any uncertainty. It is not subject to any doubts here and could not raise any doubt before the trial court because there was placard before the trial courts a binding decisions by the Court of Appeal which he appears to have opted not to consider nor refer to in his decision. I wish to observe the importance of binding nature of *stare decisis* and stress that a trial court has the duty to apply the law cited to it and where it choses not consider what is placed before it, it amounts to failure to consider a relevant matter which then entitles the appellate court to intervene and interfere with decision thereby arrived at.

15. In the context of the facts and materials placed before the court, it was openly erroneous for that court to find that the issue of extension could only be raised in the High Court and not before him. That finding, as said before was clearly against the law as crystallized and cannot be left to stand but must be set aside.

16. I do set it aside with the consequence that I hold that the trial court was duly bound to revisit and determine whether the time was validly extended *ex-parte*. This begs the question; what material was placed before the court which granted extension to justify the grant of extension of time?

17. The evidence from the miscellaneous application and even evidence by the plaintiff as PW 1 was all telling. He told it to the court and it is on record that there was no dispute in getting the grant of letters of administration and that nothing could have impeded him to (sic) instruct his counsel to file suit within the requisite time.

18. I understand the law to dictate that since extension of time is by statute sought and obtained *exparte*, it is only before the trial court that the respondent/defendant gets his day to challenge whether there were material that merited extension. That appears to have been the approach by the Appellant's counsel in cross examination when he led the respondent to look at the file in which the extension was granted and elicited the answer that there was nothing which stopped him from suing in time.

19. I do find that once that answer was given without contestation even upon re-examination it was the duty of the trial court to

pronounce on the propriety of extension of time. That he was mandated by law without regard to the fact that the order was given by a superior court.

20. Having come to the conclusion that he was not empowered to do so, he misconstrued the law and it rests upon this court on appeal to correct that error. I do find that once there was demonstrated lack of reasons to extend time, the order extending time was due and subject to being set aside and therefore this court proceeding as a first appellate court, I now direct that the order extending time to file suit issued in Misc. Application No. 93 of 2005 and produced at trial as Exh.P6 is hereby set aside.

21. On being set aside, the suit remains bare and exposed for having been filed way out of time and without leave. It was not properly before the court and was thus incompetent inviting being struck out. It was therefore not the kind of a suit that deserved further judicial time to delve into further issues like finding on liability.

22. Even on this appeal, once I do find that the suit was improperly before the court, the outcome follows that the trial court's judgment cannot stand but must be set aside. I do set it aside and in place of the trial courts finding that the matter was properly before it, I substitute an order that the suit was incompetent and I give an order that it be struck out.

23. However there is one matter that neither of the parties commented upon in their submissions but I consider important to comment upon. It concerned the pecuniary jurisdiction of the court. In the judgment, I find these words by the court at page 66 of the record:-

> **"Going by the jurisdiction of this court, the upper ceiling that I can award as a resident magistrate is 500,000/= and not 1,180,000/= as proposed by counsel. My hands are thus tied to the maximum amount payable total to 500,000/=. I will award the same subject to appointment of liability. Specials awarded are 25,000".**

24. The trial court having appreciated its limit of pecuniary jurisdiction at Kshs.500,000.00, he clearly had no power and exceeded his jurisdiction when he ended up with an award of 525,000 comprising general and special damages.

25. I do appreciate the law to be that the cap in pecuniary jurisdiction is firm and inflexible. The cap is not only upon damages at large. It affects and limits all pecuniary awards, special damages included. Accordingly, even if the suit had been properly before court, it would have still been incumbent upon this court to set aside the award aggregating Kshs.525,000.00 for having been made in excess of jurisdiction.

26. The upshot is that this appeal succeeds in full. The judgment of the lower court is set aside and substituted with an order that the suit is struck out with costs. The appellant also gets the costs of this appeal.

Dated, **signed** and **delivered** at **Mombasa** this **15th** day of **May 2020.**

P J O OTIENO

JUDGE