



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO. 62 OF 2015

ASHWIN RAMJI GUDKA..... APPELLANT

-VERSUS-

WALTER RATEMO RESPONDENT

(Being an appeal from the ruling and order of Hon. Nyagah (R.M.) dated and delivered on the 23rd day of April 2015 in Kisii CMCC No. 255 of 2012)

JUDGEMENT

1. The appellant has challenged the decision of the trial court to allow the respondent's application dated 19th February 2015 in which the respondent sought the following orders;
 - a) That leave be granted for extension of time in which this suit was filed;
 - b) That pursuant to prayer (a) herein above being granted, this suit be validated and deemed as properly filed in court;
 - c) That cost of this application be provided for.
2. The respondent's case was that on 6th June 2009, he was working as a mason in the appellant's construction site behind RAM Plaza within Kisii Town when the entire building suddenly collapsed. The respondent averred that under their contract of employment, the appellant had a duty to take all reasonable precautions to ensure his safety while working and the accident occurred as a result of the appellant's breach of his statutory duty of care. He thus sought compensation for the injuries he claimed he had sustained as a result of the accident.
3. The appellant entered appearance and filed a statement of defence denying the respondent's claim. He also challenged the suit on the grounds that the court lacked jurisdiction to determine the matter and that the suit was caught up by the provisions of the Limitation of Actions Act.
4. Thereafter, the respondent filed the application dated 19th February 2015. He deposed, in the affidavit in support of his application that due to the accident, he had been sickly for a long period of time and had been unable to file his suit within time.
5. The appellant filed grounds of opposition contesting the application by the respondent. He contended that the suit touched on labour relations and the lower court lacked jurisdiction to adjudicate upon the matter. He also stated that he had filed a preliminary objection to the suit and the respondent's application was only calculated to circumvent it. He also contended that there had been an inexplicable delay by the respondent in filing the application and he could not, as a consequence, benefit from the equitable discretion of the court.
6. The application was argued orally by the parties' learned counsel. Concurring with the respondent's position, the trial court in its impugned ruling dated 23rd April 2015 found that since the suit was anchored on an alleged breach of contract, the applicable provision of the law was **section 90** of the **Employment Act** which gave a limitation period of three years. The learned magistrate went on to find that the case was also based on negligence and therefore time for filing the suit could be extended under the provisions of the Limitation of Actions Act.
7. The court allowed the respondent's application for the reason that the respondent had proved disability under **section 22** of the **Limitation of Actions Act**. It also found that the respondent's claim that he was ignorant of the statutory period of limitation satisfied the requirement under **section 27** of the **Limitation of Actions Act** for extension of time.

8. Aggrieved by that decision, the appellant lodged the instant appeal which was canvassed by way of written submissions.

9. In his submissions, the appellant's counsel argued that the application for extension of time did not come within the ambit of section 27 of the Limitation of Actions Act which provides for extension of time in case of ignorance of material facts in actions for negligence. He argued that the material facts alluded to by the Act pertained to facts relating to the cause of action and not ignorance of the law. He also submitted that no treatment chits were supplied to prove that the respondent was disabled and thus the trial court's finding that the respondent was suffering from a disability was erroneous. Counsel accused the lower court of being driven by sympathy to allow the application against binding authorities of superior courts.

10. For the respondent, it was argued that he had annexed treatment notes demonstrating that he had suffered severe head injuries which, according to counsel, rendered him incapable of conducting the due diligence required to prosecute the suit. Counsel submitted that despite his severe injuries, the respondent made haste to file the suit a month after the statutory period. He dismissed the appeal as a ploy to delay the hearing and final determination of the respondent's case.

11. I have had occasion to consider the memorandum of appeal and the learned submissions by counsel. I have had due regard to the record of the trial court.

12. On the material before court the issue for determination crystallizes into one: Whether the trial court's finding that the respondent had satisfied the conditions set in Law under **sections 27 and 28** of the **Limitations Act** was legally sound.

13. The appropriate spring board to launch from would be an analysis of the reasons proffered by the respondent at the trial court in support of his case that he had satisfied the requirements of **section 27 and 28** of the **Limitation of Actions Act**.

14. In his Notice of Motion dated 19.2.15, the applicant depones at paragraph 6 and 8 of the supporting affidavit as follows;

“Para 6. That I was seriously sick for a long period as a result of the injuries I sustained from the said accident and therefore I was not able to file this suit within time. See copy of medical chits marked A.

“Para 8. The material facts relating to the cause of action and the limitation period were at all times outside my knowledge until after the lapse of limitation period which information I have recently received from my advocate on record thus necessitating this application.”

15. The respondent was under an obligation to prove the facts surrounding his inability to file suit in time due to indisposition for a long time and the lack of knowledge of facts relating to the cause of action.

16. Was the respondent ignorant of the facts surrounding his injuries? The relevant provision of law is **section 27(2)** of the **Limitation of Actions Act** which states;

“S 27(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.

17. In our instant suit the respondent was at all material time aware of the facts surrounding his injuries. He knew how he got injured. He knew what caused the injury. A reading of paragraph 8 of the affidavit in support of his Motion clearly shows that the respondent misapprehended the requirements of the Law under S 27(2) of the Limitation of Actions Act.

Despite stating that the material facts relating to the cause of action were outside his knowledge, he fails to shed any light how and in what respects and circumstances that this was so.

18. The camel's back is broken when in the same paragraph 8 of the affidavit he states the limitation period was outside his knowledge. Clearly, this assertion even assuming it was true, cannot possibly come to the aid of the respondent.

19. Ignorance of law is not one of the facts alluded to under **S 27(2)** of the **Limitation of Actions Act**. It is trite law that ignorance of the Law is no defence. The Latin maxim *“ignorantia juris non excusat”* is the well known principle whose import is that a person who is unaware of the Law may not escape liability for violating the law merely on the basis that he was unaware of its content.

20. The trial magistrate thus fell into a grave error when he made a finding that since the respondent was not aware of the limitation period, he was entitled to extension of time. The trial court misapprehended and misapplied the decision in **George Musyoki –vs- Sarova Hotels (2014)eKLR** and ignored the binding decision (despite being aware of it) in **Mweu –vs- Kabai & Another (1972) E.A.** The learned magistrate stated;

“The plaintiff also relies on the ground that the material facts relating to the cause of action and limitation period were at all

material times outside his knowledge. He points out that he only came to know that time for filing the suit had lapsed after his Advocate informed him of the lapse. In the Mweu Vs. Kabai & Another [1972]E.A the court held that “**ignorance of the statutory period of limitation could not be a material fact within the section**”. However, in a more recent authority of George Musyoki Vs. Sarova Hotels [2014]eKLR it was held that;

“Extension of time under the Limitation of Actions Act can be had if there is compliance with the requirements of part II of the Act as follows:

a.

b.

c.

d. Ignorance of material facts in actions of negligence etc Section 27”

Guided by the authority of George Musyoki Vs. Sarova Hotels [2014]eKLR I do find that on a balance of probabilities the plaintiff was not aware of the limitation period until his Advocate brought the same to his attention.”

21. That holding has no legal backing and is not sustainable.

22. The respondent in addition relied on the ground that he was sick for a long period of time as a result of the injuries he sustained from the alleged accident and he was therefore not able to file the suit in time. The relevant section is section 22 of the Limitation of Actions Act.

“S 22 If, on the date when a right of action accrues for which a period of limitation is prescribed by this Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of six years from the date when the person ceases to be under a disability or dies, whichever event first occurs, notwithstanding that the prescribed period of limitation has expired:

Provided that—

(i) this section does not affect any case where the right of action first accrues to a person who is not under a disability and through whom the person under a disability claims;

(ii) when a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to another person under disability, no further extension of time is allowed by reason of the disability of the second person;

(iii) an action to recover land or to recover money secured on a mortgage of land may not be brought by a person by virtue of this section after the end of thirty years from the date on which the right of action accrued to that person or to some person through whom he claims;

(iv) this section does not apply to an action to recover a penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of a written law;

(v) in actions for damages for tort—

(a) this section does not apply unless the plaintiff proves that the person under the disability was not, at the time when the right of action accrued to him, in the custody of his parent; and

(b) this section has effect as if the words “six years” were replaced by the words “three years”.

23. Suffice it to note that the respondent’s application at the trial court was anchored on **sections 27, 28, 30 and 31** of the **Limitation of Actions Act**. The application was not brought pursuant to **S 22** of the **Act**. Whereas this may be looked at as a matter of form but not substance, it is trite law that an opposite party ought to be clear on the claim confronting it.

24. The failure to anchor the application under **S 22** of the **Act** notwithstanding, it was incumbent upon the applicant to prove that he was sick and disabled in such a manner that he was not in a position to institute the suit in time.

25. The respondent annexed document marked RN – A from Ram Hospital Ltd which is a treatment record of the respondent. It is dated 6.6.09. It shows the respondent was admitted for 7 days and discharged on 12.6.09 while in a stable condition.

26. No further evidence was adduced before the trial court to support allegations of a long period of and extent of sickness or disability. The medical report annexed did not indicate the degree of disability, if at all.

27. Notwithstanding that disability under **S 22** of the **Limitation of Actions Act** was not pleaded and despite lack of evidence to support the alleged long illness, the trial magistrate assumed the role of the prosecutor, judge and the jury and proceeded to state as follows;

*“The plaintiff depones that he was sick for a long time after the accident and he was not in a position to file this suit on time. In essence the plaintiff is relying on the ground of disability as laid down under **section 22 of the Limitation of Actions Act**. From Annexure A part of the injuries sustained by the plaintiff included fractured ribs. Counsel for the defendant argued that the plaintiff was treated and discharged and that he never sought further medical attention. This could be true but in my opinion the injuries sustained by the plaintiff were serious and could have taken time to heal. For that reason the defendant can bring himself under the defence of disability.*

28. I agree with counsel for the appellant when he states that it is rather curious that the learned trial magistrate who is not a medical expert and in total disregard of the medical report, could make a finding that the degree of injuries caused upon the respondent were that severe as to render the respondent herein disabled.

29. The burden of proof lay on the respondent to demonstrate long sickness or disability. To prove a fact a party must tender evidence. The Court of Appeal in **Mbuthia Macharia –vs- Annah Mutua Ndwiga & Another [2017]eKLR** stated thus;

“...The Judge alluded to the provisions of section 107 of the Evidence Act, which deals with the burden of proof in any case and aptly stated that it lies with the party who desires any court to give judgement as to any legal right or liability, is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden and we need not repeat, save to emphasize the same principle of law is amplified by the learned authors of the leading Text Book;- The Halsbury’s Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus;

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14 The legal burden of proof normally rests upon a party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

30. Finally, this ruling will not be complete without a consideration of whether the period of delay in filing of a suit is a relevant factor in allowing an application for extension of time. This has, been triggered by the finding of the trial magistrate in this case where in his ruling he states;

“I have found that the limitation period in this suit is three years. I have also found that the plaintiff only exceeded the limitation period with a month. A duration of one month is not long enough as to occasion the defendant any prejudice. However, failure to extend time because of such a short duration would be prejudicial to the plaintiff who would be condemned unheard.”

31. S 4(2) of the **Limitation of Actions Act** provides;

“4 (2) 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:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

This statutory provision leaves no ambiguity. Once time has lapsed, unless a satisfactory explanation falling under S 22 or S 27(2) is given, a claim will be statutorily barred.

32. With the result that the appeal herein is allowed. The ruling (erroneously indicated as a judgement) of the trial court dated 23rd April 2015 vide Kisii CMCC No. 255 of 2012 is hereby set aside and substituted thereof with an order dismissing the notice of motion dated 19th February 2015. The appellant shall have costs of the application and the appeal.

Dated, Signed and Delivered at Kisii this 7th day of October 2020.

A. K. NDUNG’U

JUDGE