REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL APPEAL NUMBER 1 OF 2018

MARGARET MBOGA KILLA.....APPELLANT

-VERSUS-

PAN AFRICAN CHEMICALS LIMITED....RESPONDENT

J U D G M E N T

(Appeal from the judgment and decree of Hon B. Mararo Principal Magistrate delivered on the 16th May 2017 in Nakuru CMCC no. 767 of 2012)

1. On 8th August 2013 the plaintiff herein filed and application seeking leave to file a suit out of time. The application was heard by one ***Hon. R. Aganyo Resident Magistrate,*** who granted the orders as sought.

2. On 6th July, 2012 the plaintiff filed suit. The same was with respect to a road traffic accident that occurred on 30th June, 2009 where one Naomi Essendi Kila sustained fatal injuries.

3. According to the plaint, the deceased was lawfully walking along the Nakuru Eldoret Road when the defendant's motor vehicle registration number KBC 491Z/ZC 906S was so negligently and carelessly driven that it rammed into, and knocked down the deceased causing her fatal injuries. The plaintiff sought the usual prayers; general damages, special damages at Kshs. 70,200/= costs of the suit and interest. She also pleaded the particulars as required by statute.

4. On 25th June the appellant filed an amended plaint pursuant to leave granted on 9th June 2014 where she specifically stated that she was bringing the suit on the behalf of the deceased's estate and the benefit of herself and the deceased's two minor children EM aged 9 years then and VN aged 7 years then.

4. The defence filed its defence to the amended plaint on 10th July 2014, denying the claim and putting the plaintiff to strict proof thereof.

5. The plaintiff testified as the administrator of the deceased's estate of how she learnt of her daughter's death, and what she did thereafter. An eye witness also testified and so did the police officer who produced the police file.

6. The defence called one witness, the turnboy who was on the truck that day to support their defence filed on 3rd September, 2012 in which the plaintiff's allegations were denied. Without prejudice to the denial of same, the defendant blamed the deceased for the accident accusing her of contributing to the same through her negligence particulars of which were laid out in the defence.

7. At paragraph 12 of the defence the defendant averred that the suit was "*statutorily time barred pursuant to the law of limitation Act of the Law of Kenya*" and gave notice that it would raise a preliminary objection.

8. At the close of the hearing of the case the trial magistrate *Hon. Mararo* delivered his judgment on 16th May, 2017. He dismissed the suit on the grounds that the application dated 8th August, 2013, was "something strange". "Something strange happened on the 8/08/2013 when the plaintiff applied and obtained ex-parte orders to have the present suit to be filed out of time and that the suit as it had been filed then be deemed as having been filed within time."

9. He went on to state further that had he found that the suit was filed within time he would have apportioned *liability of 80:20* for the plaintiff against the defendant and would have made the following award; *multiplier of 30 years, multiplicand of Kshs. 9,000/= and dependency of 2/3*

a. 30x2/3x12x9000 …….Kshs. 1,800,000/=

b. Loss of expectation of life ……Kshs. 100,000/=

c. Pain and suffering ……..Kshs. 30,000/=

d. Special damages ……Kshs. 70,200/=

10. It is against this background that the appellant filed this appeal on the following grounds:

1. The learned trial magistrate grossly misdirected himself in dismissing the appellant's suit for being time barred yet the court had on 20th August 2013 had allowed the appellant's suit out and deemed the same properly filed.

2. The learned trial magistrate erred in both law and fact by disregarding the orders of the same court of 20th August 2013 terming the orders irregular in the absence of a review or appeal.

3. The judgment was against the weight of evidence.

4. The learned trial magistrate erred in both law and fact in failing to consider the appellant's submissions while arriving at the decision.

11. Parties agreed to dispose of the appeal by way of written submissions.

12. By the time of taking the judgment date the respondent had not filed submissions.

13. The power of High Court on appeal are found at **Section 78 of the Civil Procedure Act** and **Order 42 of the Civil Procedure Rules 2010.** This being a first appeal the court is mandated to re-evaluate and subject the whole evidence to a fresh and exhaustive examination always bearing in mind that it did not hear or see the witnesses give evidence and that it did not have the benefit of observing their demeanour. This is what the *Court of Appeal* in **Selle & Another vs Associated Motor Boat Company Limited and Others (1968) EA 123** stated;

> **"This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Sarif V Ali Mohammed Solan [1955] 22 EACA 270).**

14. In support of the appeal the counsel for appellant submitted that the trial magistrate had misdirected himself by making the finding that the suit had been filed out of time. That there was a difference between the requirements of **Order 37 rule 6 (2)** and **rule 6(1)** as the application for extension herein was brought AFTER the filing of the suit. The application was meant to be filed exparte and there was no obligation to serve the defendant.

15. That the defendant never raised the issue of extension of time during the trial but only raised it in the trial submissions. He also submitted that the fact of the incident, the cause of death, ownership of the motor vehicle and dependency was not in dispute and that the court failed to narrow down the issues to liability and quantum.

ISSUES FOR DETERMINATION

1. **Was this suit time barred?**

2. **Should this court uphold the holding of the trial court?**

16. On the 1st issue the exparte Notice of Motion was brought under **Order 37 rule 6(2) Sub section 3 & 3A of the Civil Procedure Act. Order 37 rule 6** states;

> **"(1) An application under section 27 of the Limitation of Actions Act made before filing a suit shall be made ex parte by originating summons supported by affidavit.**
>
> **(2) Any such application made after the filing of a suit shall be made ex parte in that suit."**

17. The trial magistrate clearly misdirected himself for faulting the appellant for making the application ex parte in the already filed suit. This is clearly provided for in the rules. The applicant sought orders sought not only for the extension of time but also that the suit she had already filed be deemed to have been filed within time if her first prayer was allowed. The learned magistrate who heard this application was persuaded by the facts deponed by that applicant and granted the prayers.

18. In the subordinate court the defendant respondent cited the case of **Oruta & another v Nyamato[1988] eKLR** where the court of Appeal *(Nyarangi, Platt & Gachuhi JJA)* discussed the law on limitation and the provisions of **Section 27** of the **Limitation of Actions Act and Order 37 Civil Procedure Rules.** With regard to the 'before' or 'after' question *Nyarangi JA* rendered himself thus:

> "Whether the application was made before or after filing the suit, there is no provision for the defendant to be heard before the order authorising the extension of time is granted because the application is meant to be unopposed. It cannot be firmly argued that the Judge who heard the exparte application was wrong in granting the order. The Judge merely complied with the requirement of Section 27 of the Limitation Act. He read the affidavit with annextures and believed the plaintiff on the evidence deponed in the affidavit. When the defendants were served with the summons, they reacted by filing the defence pleading amongst other defences, the defence of Limitation. The defence was followed by the application for setting aside the ex-parte order. The application was in keeping with the practice that the party should be heard on the application that will affect his rights."

19. Clearly therefore there was nothing strange about the orders that were granted by *Honourable Aganyo* regarding the appellant's application for leave. The Judge in **Oruta** went on to state *"The respondent having obtained leave to file action as required by the Law, that order can only be queried at the trial."*

20. Is there anything in the proceedings to show that the respondent queried the order during the trial? The record shows that the only questions that the appellant was asked related to limitation were simply when the accident occurred and when the plaint was filed. None of the facts deponed in the affidavit in support of the application for leave were put to her, nor the manner in which the leave was obtained. No preliminary objection was raised.

21. There is nothing to support the trial magistrates's finding that the orders for leave as granted were 'strange'.

22. The record as it is is that the leave which the appellant was granted to file her suit out of time was not challenged.

23. I have perused that application. It was supported by the affidavit of the plaintiff herein who is the mother to the deceased She explained in great detail the reasons why she had failed to file the matter in time and in any event the delay was not inordinate. The road traffic accident happened on 30th June, 2009, the suit was filed on 6th July, 2012 three (3) years and six (6) days after the road traffic accident, 6 days after the three year limit.

24. The respondent was not prejudiced by the delay and from the record was able to avail its witnesses.

25. The trial magistrate also found that the appellant had failed to comply with **order 2 rule 4 of the Civil Procedure Rules** which states:

> **"Matters which must be specifically pleaded [Order 2, rule 4.]**
>
> (1) **A party shall in any pleading subsequent to a plaint 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— (emphasis mine)**
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable;
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading."

26. I have emphasized the provisions of **order 2 rule 4(1)** because they clearly speak to the party who files any pleadings **after** the plaint. The duty to plead limitation is not thrust upon the plaintiff but upon the party who responds to the plaint. The learned trial magistrate therefore misdirected himself when he mis-applied *Justice Gikonyo's* decision in **Meru HCCA 102 /11** (the only citation I found in the judgment) interpretation of the rules and finding that plaintiff did not plead limitation *"and as such the suit as currently constituted must of necessity fail'.*

27. In **Peters vs Sunday Post Limited (1958) EA 424 at 429** *Sir Kenneth O'Connor P.* said:-

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has h*ad the advant*age of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."

28. Guided by the above authority I have looked at the evidence on record. There is no dispute that an accident happened. There is evidence that the respondent's motor vehicle is the one that hit the deceased who died out of the injuries sustained. The appellant produced evidence to support the claim which evidence was not challenged. On that basis the trial magistrate made findings of fact which guided the award that he made. The appellant is not disputing that award.

29. Hence having reviewed the evidence before me, considered the issues raised for determination I make the following finding:

> **1. The appeal is allowed with costs and costs below.**

2. The order of dismissal is set aside and substituted with the trial magistrate's award in the following terms:

a. Liability at 80:20 for the plaintiff as against the defendant

b. Multiplier of 30 years,

c. Multiplicand of Kshs. 9,000/=

d. Dependency Of 2/3

e. 30x2/3x12x9000 …….Kshs. 1,800,000/=

f. Loss of expectation of life …….Kshs. 100,000/=

g. Pain and suffering ……..Kshs. 30,000/=

h. Special damages ……Kshs. 70,200/=

i. Total …… ..…..Kshs. 2,000,200/= @ 80%

Kshs. 1,600,160/=

Dated, delivered and signed at Nakuru this 9th day of December, 2019.

Mumbua T. Matheka

Judge

In the presence of

Court Assistant Marcin

Ms Wanuma for Odeny for appellant

No appearance for respondent