REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 73 OF 2004

AMOS MUTHINJA M'MUNGANIA ……APPELLANT

Versus

JOHN GAITHO…….....…….…..1ST RESPONDENT

THE KENYA POWER & LIGHTING CO. LTD….....2ND RESPONDENT

JUDGMENT

Appeal

[1] This appeal arises from the judgment of the learned Senior Resident Magistrate M.S.G. Khadambi (now deceased); God rest her soul in eternal peace. The Memorandum of Appeal carries the following seven(7) grounds of Appeal, namely:

1). The learned magistrate erred in law and fact in that having dismissed the Respondent's Notice of Preliminary Objection proceeded to dismiss the appellant's suit.

2) The learned trial magistrate erred in law by that she failed to make a finding that the Respondents having failed to adduce evidence in court to challenge the appellant's case the latter's case remained unchallenged in law.

3) The learned trial magistrate erred in law and fact in that she overturned the order granted to the appellant to file the suit out of time when she had no jurisdiction to make such a finding.

4) The learned trial magistrate erred in law and fact in that she found that the appellant did not prove his case on a balance of probability when there was overwhelming evidence to the contrary.

5) The learned trial magistrate erred in law and fact by finding that the appellant did not prove the fact that the 1st defendant was negligent as per the evidence on record.

6) The learned trial magistrate erred in law in that the appellant did not satisfy the conditions enunciated in Section 27 of the Limitation of Actions Act (Cap. 22).

7) The judgment of the learned trial magistrate against the weight of evidence and same is bad in law as the same was arrived on wrong principles of law.

[2] I note that this appeal had been dismissed for want of prosecution but was reinstated on 9th October, 2013. The direction of the court on 4th December 2013 upon agreement of the parties was that the Appeal shall be determined by way of written submissions. The parties filed their respective submissions which I will consider. I will also analyze the evidence adduced and come to my own conclusions, although I should remember that I neither saw nor heard the witnesses.

Of ground 1: Matter of jurisdiction

[3] Ground 1 seems to be incomplete. But, on a careful consideration of the way it is styled and the kind of submission by the Appellant on ground 1, it seems as if the Appellant is suggesting that, by rejecting the objection on jurisdiction, the trial court ought not to have dismissed his case; the trial court was bound to find for the Appellant as a matter of course. For ease of reference I reproduce ground 1 below:-

1. **The learned magistrate erred in law and fact in that having dismissed the Respondent's Notice of Preliminary Objection proceeded to dismiss the appellant's suit.**

[4] Doubtless, the trial court dismissed the challenge to jurisdictionon 3rd June 2004. By that rejection the court merely confirmed it had jurisdiction and went ahead to try the matter. From the record, the trial court reminded itself of its finding on jurisdiction and categorically stated in its judgment that it will not, therefore, revisit the question of jurisdiction. The matter ended there and nothing much can be made out of it for purposes of this appeal. Of great significance, the trial court did not dismiss the case for lack of jurisdiction; it decided the case on other grounds which I shall also examine meticulously in determining the appeal. Therefore, ground 1 bears nothing in law and it fails for it lacks any merit.

Of ground 3 and 6 on leave to file suit out of time

[4] These two grounds relate to same point and I will handle them together. The trial magistrate was certain from the outset that, upon consideration of the evidence, the Appellant's suit stood dismissed as it was filed out of time. The trial magistrate, after consideration of evidence tendered and submissions of the parties on section 27 of the Limitation of Actions Act made two findings, namely: (1) that advocates ineptitude is not his client's lack of material facts; and (2) therefore, the leave that was granted to the Appellant to file the suit out of time was not meritorious. She gave her reasons which are captured in the following terse but concise statement that:

"An advocates' ineptitude does not amount to his client's lack of material facts."

This reasoning by the trial magistrate was in relation to Section 27 of the Limitations of actions Act: whether that material facts relating to the causes of action was outside the persons' knowledge. But what is my analysis on this matter?

[5] According to the Appellant, the trial magistrate did not have jurisdiction to overturn leave to file suit out of time that had been issued by a Principal Magistrate, which is a court higher than the trial court of Senior Resident Magistrate. The Appellant further argued that since the Respondent did not attend court and did not adduce evidence on leave to file suit out of time, there was no valid reasons for the trial court to set aside the leave. They cited Ringera J (as he then was) in the case of ***V.K. Construction Co. Ltd vs. Mpata Investments Ltd.***

[6] The Respondent took a different view of this point. They argued that once an exparte order to file suit out time is granted, it can be challenged in the trial. The law on this point, the way I understand it, is that any leave to file suit out of time which had been granted ex parte prior to the filing of suit is a matter for trial. Therefore, the only legitimate means of challenging any exparte leave to file suit out time is at the trial. In fact, the law is that matters of limitation of actions should be decided in the trial after the court has taken into account all evidence, circumstances and facts of the case especially those tendered by the plaintiff to bring the suit within the exception in

Section 27 of the Limitations of Actions Act. Fortunately, this subject is replete with very clear judicial decisions which I need not multiply except cite the case of (1) ***Oruta vs Samuel Mose Nyamato [1984] KLR 990*** *(2)****Transworld Safaris Kenya Ltd –vs- Somak Travel Ltd [1997] eKLR****, (3)****Mbithi vs Municipal Council of Mombasa & another. (1990 -1994) E.A****.*and *(4)****Divecon Ltd vs Shrinmkhana S.Samani.*** Therefore, I refuse to accept the proposition by the Appellant that the learned trial magistrate did not have jurisdiction to set aside the leave to file suit out of time herein. Indeed,I belong to the school of thought which posit that matters of limitation of actions should never be tried as preliminary objections or in a summary manner but at the trial upon the evidence of parties.

[7] I will add one more thing: that the requirement of the law (Order 2 rule 4 of the Civil Procedure Rules) that matters of limitation must be specifically pleaded in the defence underscores the intention of the law that limitation should become an issue for trial. See the case of **Divecon Ltd vs Shirinkhanu S. Samani Civil Appeal No. 142 0f 1997,** where the court quoted with approval the words of Gachuhi, J.A., the leading judge in the Oruta case (supra) thus:

''It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the Limitation of Actions Act…''

Accordingly, a proper understanding of Section 27 of the Limitation of Actions Act, the plaintiff bears the legal burden toshowthat material facts relating to his or her cause of action were outside the persons' knowledge. I have looked at the proceedings, as recorded by the trial magistrate. The explanation given by PW1 on this subject was that the advocate he had instructed to follow-up the accident claim cheated him that he had filed suit when he had not. He blamed the said advocate for the delay in filing the suit. He was cross-examined on this particular matter of limitations of action. Again he was re-examined by Mr.Kiogora on the issue of Limitation of Action. All that he did was to blame his advocate for the delay. The question I must ask myself is whether the reason for delay constitutes material fact for purposes of Section 27 of the Limitation of Actions Act. On this I find help inthe words of Kwach JA (as he then was) in the case of ***Mbithi vs Municipal Council of Mombasa*** **(Supra)** that**:**

"Material facts are restricted to three categories of fact, namely, (a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting the cause of action, (b) the nature or extent of the personal injury so resulting; and (c) the fact that personal injuries were attributable to the negligence, nuisance or breach of duty or the extent to which they were so attributable".

The judge went onto state that:

"It is not sufficient that the facts unknown to the plaintiff should be material within the above definition; they must also be of a decisive character; that is to say, they must be such that a reasonable person, knowing them and having obtained appropriate advice with respect to him, would have regarded them as determining that an action would have a reasonable prospect of succeeding and resulting in the award of damages sufficient to justify the bringing of the action. Finally, the plaintiff must prove that a material fact of a decisive character was outside his knowledge (actual or constructive)

[8] From the evidence adduced, the plaintiff was all along aware of his cause of action and accordingly indeed instructed counsel to file suit thereof. Except, there was omission by counsel- he did not file suit within time. He stated that the said counsel kept on lying to him that he filed the suit. The question becomes: is mistake or negligence of counsel a material fact within the meaning of Section 27 of the law of Limitation of Actions Act? Certainly it is not. The omission by counsel only becomes a saddle upon proof that material facts in the sense of section 27 of the Limitation of Actions Act existed and was outside the knowledge of the person. See Kwach JA (as he then was) in the case of ***Mbithi***(supra). The omission is not in itself or solely to be regarded as

a material fact for which extension of time to file suit shall be granted under Section 27 of the Limitation of Actions Act. The Appellant is not, however, left without a remedy as no one shall suffer damage without a remedy. The law has provided remedy to such litigant who has became a victim of the negligence of his legal counsel in a suit for negligence against such counsel. Therefore, the trial magistrate correctly and boldly dismissed the Appellant's suit on account of it being time barred after considering the evidence tendered. On the evidence adduced, the Appellant's suit was a candidate for dismissal. The suit is dismissed. In the foregoing analysis, I have with grounds 3 and 6; both grounds fails in toto.

[9] After this finding and order of the trial court, the trial magistrate set out in other mission of justifying other grounds upon which she could also have also dismissed the suit. I do not think the exercise was necessary. Nonetheless, I will determine the other grounds.

Of ground 2 – no evidence adduced

[10] Needless to state that cross-examination is one of the ways a suit is challenged or controverted. The record shows that the evidence by the Appellant was challenged through cross-examination. It is not, therefore, entirely defensible for the Appellant to argue that since the respondent did not offer evidence, his case *"remained unchallenged in law"*. The trial magistrate evaluated the evidence against the result of cross-examination and the law and came to a conclusion that the Appellant did not prove its case as required. The testimony of PW1 was that he did not know what happened. He just heard application of emergence breaks. Such evidence is far from the threshold of balance of probabilities set by the law. Accordingly, grounds 2,4 and 5 fail in toto.

The upshot

[11] The upshot of all the above analysis is this. That I dismiss the appeal in it's entirely. I uphold the decision by the trial magistrate that the Appellant's suit is accordingly dismissed.

Costs of Appeal

[12] In light of the circumstances of this appeal, I order that each party shall bear own costs of the appeal. It is so ordered.

Dated,Signed and delivered in open court at Meru this 11th day of February, 2016.

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F. GIKONYO

JUDGE

In the presence of:

Mr. Mutegi advocate for Michuki advocate for respondents

Mr. Kiogora advocate for appellant

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F. GIKONYO

JUDGE