REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 20 OF 2009

S W (A minor suing through next of friend G M W).....APPELLANT

VERSUS

PAUL TEMU NDEREMO.....……..…….....1ST RESPONDENT

CAMP CARBATULA CATHOLIC.....2ND RESPONDENT

(An appeal from the Judgment of Senior Principal Magistrate's Court at Nyeri delivered on 30. 4. 2008 by the Hon. Lucy Gitari, S. P. M. delivered on 30.7.2011 in Nyeri C.M.C.C. No. 231 of 2008)

JUDGMENT

This appeal seeks to overturn the decision of the learned Magistrate in **Nyeri C.M.C.C. No. 231 of 2008 whereby** the appellants suit in the lower court was dismissed on grounds that the same was filed out of time. Even though the memorandum of appeal has seven grounds, in my view the appeal can be determined on one ground, namely, whether the learned magistrate erred in law in dismissing the appellants suit on grounds that it was statute barred under the provisions of the Limitation of Actions Act.

Its pleaded in paragraph **4** of the plaint that the cause of action arose on 9th January 1999, but the plaint was filed in court on 27th June 2005. Section **4 (2)** of the Limitation of Actions Act[1]provides as follows:-

> *" 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"*

By the time the plaint was filed in court, a period of over 5 years had lapsed. The effect of the statute of limitation is that certain causes of action may not be brought after the expiry of a particular period of time. In other words the Act bars the bringing of particular actions after the specified periods of limitation but does not necessarily extinguish such causes of action. In *Rawal vs. Rawal**[2]*** the court stated:-

> *"The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after along lapse of time. It is not to extinguish claims". See also Dhanesvar V Mehta vs. Manilal M Shah.**[3]***

The same position was taken in *Iga vs. Makerere University**[4]*** where it was held:-

> *"A plaint which is barred by limitation is a plaint "barred by law."A reading of the provisions of sections 3 and 4 of the Limitation Act..... together with Order 7 rule 6 of the Civil Procedure*

Rules seems clear that unless the appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the court "shall reject" his claim...The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time-barred, the court cannot grant the remedy or relief".

What this means is, a cause of action that is barred may in certain cases be revived if the conditions set out in section 27 of the *Limitation of Actions Act*,[5] are fulfilled. That section 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 purposes of this section; and

(d) the requirements of subsection (2) are fulfilled in relation to the cause of action.

(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.

(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.

The appellant claims that he obtained leave to institute the proceedings and that the said leave was sought and obtained in the High Court in Misc App No. 73 of 2003. Unfortunately the appellant did not deem it fit to include the order granting leave in the record of appeal and it's not clear why the appellant did not find it necessary to do so. More disturbing is the fact that the said order does not appear to have been produced in the lower court or attached to the plaint at the time of instituting the suit. The only reference to the said leave appears at page**16** of the record where counsel addressing the court stated as follows:-

"On 14/6/05 Justice Khamoni granted leave and we filed the suits within 14 days. Secondly both plaintiffs are minors. The suits are within time. The reply to defence we did state that the plaintiffs obtained leave to file suits out of time."

The reply to defence dated 23rd August 2005 appearing at page **11** of the record contains only three paragraphs and it does not mention the said leave at all. In my view, it was necessary for the appellant to attach the order granting leave to the plaint filed in the lower court and even serve it upon the defendant

together with the plaint.

It appears from the judgement of the lower court that the parties had agreed that the judgement in CMCC No. 481 of 2005 on whether or not the suit was time barred would apply in the appellants case in the lower court. Pursuant thereto, the learned magistrate in CMCC No. 481 of 2005 concluded that the said case was time barred and owing to the fact that the parties had agreed that the said decision would apply to the appellants case the court held that the said finding applied equally to the case now the subject of this appeal. Thus, the court ruled that the appellants case was time barred. Unfortunately, the proceedings in question, that is CMCC No. 481 of 2005 though forming the basis of the lower court's decision now the subject of this appeal are not part of the record of appeal now before me.

In determining whether or not the learned magistrate erred in holding that the appellants suit was time barred, it is necessary to examine her reasoning or grounds for so holding and her analysis of the said issue so as to appreciate or fault the basis or her findings. In my view, the said finding in so far as the parties had agreed would apply to this case would have assisted this court in determining whether or not to fault the finding now the subject of this appeal. But the appellant did not deem it fit to make it part of the record of this appeal, though the finding affected the appellants case thereby denying the court the opportunity to assess and appreciate or fault the learned magistrates reasoning on the issue.

The bar of limitation must be raised by a party to a suit in the defence to a claim or in a counterclaim. This was the holding in *Abdullahi Ibrahim Ahmed (Suing as The Personal Representative of The Estate Of Anisa Sheikh Hassan (Deceased)) v. Lem Lem Teklue Muzolo**[6]*** *where the court expressed the* view that the issue of limitation must be specifically pleaded before a court can make a decision on it. similar position was held by Law JA in *Okoth and Others vs Godwin Wanjuki Wachira*.[7] In this regard I note that the Respondents raised this issue in paragraph **9** of their defence appearing at page **10** of the record. Even if the issue of limitation had not been raised in the defence, limitation is in my view a jurisdictional matter.[8]

As observed above, the order granting leave was not included in the record of appeal. However, I will proceed on the basis that leave was properly obtained and address the issue whether leave having been so granted, the magistrate could properly hold that the suit was time barred. It is settled law that where an order has been made extending time as in the present case, such an order is not final and the defendant has an opportunity to challenge the facts and the law during the hearing and the court can proceed to correctly find that the suit was time barred.

Addressing the above **Akiwumi JA** in *Mary Wambui Kabugu vs Kenya Bus Services Ltd*[9] had this to say:-

> *"When the judge of the superior court grants leave ex parte, under the Limitation of Actions Act to institute proceedings which can be challenged at the trial, he in a away, does no more than a judge does when he for instance, grants an ex parte injunction, which can also be successfully challenged before another judge at its inter- partes hearing. Furthermore the question of a judge of the superior court sitting on appeal on the granting of an ex parte order under the Limitation of Actions Act by another judge of the superior court, does not in the particular circumstances, arise. In general a party affected by an ex parte order can apply to discharge it but the procedure under the Limitation of Actions Act is altogether exceptional. It says in terms that an application shall be made ex parte. This is a strong indication that the judge is to decide the application on hearing one side only. No provision is made for the defendant being heard. It must be remembered that even when the judge grants leave, there is nothing final about it. It is merely provisional. The defendant will have every opportunity of challenging the facts and the law afterwards at the trial. The judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar. He is not in the least bound by the provisional view expressed by the judge in chambers who gave leave. ....."*

The above position was reiterated in the case of *Yunes K. Oruta & Another vs Samuel Mose Nyamato*[10] I therefore hold that even if leave was obtained as stated, it was open for the respondents to raise the issue

of limitation at the trial and challenge the said orders as enumerated in the above cited authorities.

The appellant argues that the learned magistrate erred in not appreciating the law of disability as provided for under the Limitation of Actions Act.[11] Counsel submits that the claimant was a minor aged one year and some months, hence a person under a disability. Section 22 (1) of the Act on extension of limitation period in case of disability provides as follows:-

> *" 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"*

However, counsel did not address himself to the provisions of proviso to section 22 at (5) (a) which provides that:-

> ***(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;*

There is nothing on record to show that the person under disability in this case, namely the minor was not at the time of the alleged disability in the custody of a parent. In other words my understanding of the above provision is that the disability in question can only if it is established that the minor was not under the custody of a parent. On this basis, I find no merit in the ground alleging that the learned magistrate did not appreciate the law relating to disability.

Counsel contents that the learned magistrate *"overturned"* the ruling of the high court. My understanding of this argument is that counsel seeks to persuade the court that since leave was sought and obtained before a judge, the same was binding upon the magistrate. In other words, the learned magistrate could not deviate from the said ruling having being rendered by a superior court. To address this question, it is important to recall the provisions of Section **28** of the Act which is entitled "Application for leave of court" and address our minds to the definition of "court" under the said section. Section **28 (5)** of the Act provides as follows:-

> *"In this section and in section **27** of this Act "court", in relation to an action, means the court in which the action has been or is intended to be brought:"*

Leave was sought and obtained in the High Court. The suit was filed in the lower court. Clearly by virtue of the above sub-section, the action ought to have been filed in the High Court where leave was applied for and obtained. It follows that the appellant ought to have sought leave in the court where the action was filed or intended to be filed. My interpretation of the above is that no leave was sought and obtained in the magistrates court where the plaint was filed. The effect is that leave was not properly sought and obtained in the court where the suit was ultimately filed. Thus, the issue of the magistrate overturning a high court order cannot arise because there was no proper leave before her and even if there was as held above, leave obtained ex parte can be challenged at the hearing. In any event the appellant complicated his position by failing to head to the clear wording of section 28 (5) cited above and file the suit in the court where leave was obtained.

After due consideration of the appeal before me, the law, authorities and submissions by both advocates, I find that the appeal has no merits and I hereby dismiss it with costs to the respondents.

Orders accordingly

Dated at **Nyeri** this **8th** day of **February** 2016

John M. Mativo

Judge

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[1] Cap 22, Laws of Kenya

[2] [1990] KLR 275

[3] [1965] EA 321

[4] [1972] EA 65

[5] Supra

[6] *[2013] eKLR* Coram: Nambuye, G.B.M. Kariuki & Ouko JJ.A.

[7] {1978-80} 1 KLR 768

[8] See Pauline Wanjiru Thuo vs David Mutegi Njuru Civil Appeal No 278 of 1998

[9] Civil Appeal No. 195 of 1995

[10] Civil mAppeal No. 96 of 1984

[11] sUPRA