REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. OF 102 OF 2011

MOHAMED ABDIKADIR MOHAMMED ……APPELLANT

Versus

SAMMY KAGIRI ……1ST RESPONDENT

KIBUTHI JOHN MUG0 ……2ND RESPONDENT

JUDGMENT

[1] This appeal is against the judgment by Hon. M. Maundu,Principal Magistrate dated 12th August, 2011.The appeal raises three significant grounds, namely:

> **1. That the learned trial magistrate erred in law in dismissing the appellant suit on the basis that the same was time barred yet leave to file suit had been obtained vide Miscellaneous Case No. 5 of 2010 Isiolo.**
>
> **2. That the learned trial magistrate misdirected himself in find that leave was not validly obtained when the same was not challenged at all by the respondent.**
>
> **3. That the learned trial magistrate erred in law and in fact in failing to find for the appellant and award him damages in accordance with the law.**

[2] On 26th February, 2015 the court directed that the appeal shall be canvassed by way of written submissions. Parties filed their respective submissions as directed. The major ground of the appeal could be summarized to be; that the trial magistrate erred in dismissing the suit before him despite the fact that leave to file suit had been sought, obtained and produced in evidence. The Appellants quarrel was that the trial magistrate ought not to have disturbed the extension of time that had been granted to the Appellant because the Respondent had no specifically pleaded the relevant statute of limitations as required under Order 2 rule 4 of the Civil Procedure Rules. According to the Appellant, the challenge to extension of time was raised for the first time in cross-examination, which was not right at all. The Appellant cited the cases of **Achola & Another vs Hongo & Another [2004]1 KLR 462** and **Kuingani Farmers Co. Ltd vs Mbugua [1984] KLR 476** to support his said proposition. On that basis and in line with the duty of the court to serve substantive notice, the appellant beseeched this court to set aside the judgment by the trial magistrate and enter judgment for the appellant as follows:-

> **(a) 100% liability against the respondent**
>
> **(b) Kshs. 808,175 with costs.**

[3] The Respondents opposed the appeal. Their main point of opposition was that the trial court rightly held that the appellant lied and misled the court in obtaining leave to file suit out of time. They also submitted that, upon perusal of the Isiolo PMCC Misc. Application No. 5 of 2010, they are convinced that the application for leave was clearly incompetent and the entire proceedings thereto should, therefore, be annulled. They submitted further that the court did not have jurisdiction to issue the extension of time sought because in the previous Order XXXVI Rule 36 of the CPR such leave was to be applied for *ex parte* by way of an Originating Summons returnable before a judge. Again, they urged that, in any case, the extension was irregular and invalid for the reasons upon which the application was premised did not meet the threshold of the law. See Section 27 of the Limitation of Actions Act. According to them, the suit in the lower court was, therefore, filed out of time, hence, it was rightly dismissed.

[4] The respondents did not stop there. They argued that the submissions by the appellant insinuate that once leave had been granted, the trial magistrate was debarred from interrogating the leave. The respondents visibly disagreed with that position expressed by the Appellant as the only forum to interrogate ex parte leave to file suit out of time was at the trial. Therefore, the trial magistrate was within his right to apply his mind on limitation of actions at the trial. Based on the foregoing, the Respondents asked this court not to disturb the decision by the trial magistrate. They cited judicial authorities in their submissions. They also sought costs of the appeal.

DETERMINATION

[5] This appeal rotates around one linchpin; whether the trial magistrate was right in dismissing the appellant's case on the ground of Limitation of Actions Act when the defence of limitation had not been specifically pleaded as required in Order 2 rule 4 of the Civil Procedure Rules. First things first: It is already settled law that an *ex parte* order of extension of time to file suit should be challenged at the trial of the suit. This is an exception to the rule that a party against whom an *exparte* order has been made should apply to the court which made the order to set it aside. The trial court will then consider all the facts and evidence before it and may or may not disturb the extension of time that had been granted. Therefore, I refuse any suggestion or insinuation that, once *ex parte* leave to file suit out of time has been granted, it cannot be disturbed by the trial court. That would be a dangerous proposition of law. But, the defence of limitation must be pleaded specifically by the Defendant, and I will examine this aspect in great detail later. These points are replete with judicial authorities and I need not multiply them. Those cited by the respondent are some of them and are directly relevant to this point. But see (1) **ORUTA vs. SAMUEL MOSE NYAMATO [1984] KLR 990** (2) **TRANSWORLD SAFARIS KENYA LTD vs. SOMAKTRAVEL LTD [1997] eKLR**, (3) **MBITHI vs.MUNICIPAL COUNCIL OF MOMBASA & ANOTHER. (1990 -1994) E.A**. and (4) **DIVECON LTD vs.SHRINMKHANA S. SAMANICIVIL APPEAL NO. 142 0F 1997.**

[6] As I have promised, I will now turn to the other crucial matter on the purport of Order 2 rule 4 of the Civil Procedure Rules. For clarity I will reproduce Order 2 rule 4 of the CPR which provides that:

> **"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 Statue of Limitation or any fact showing illegality –**
>
> > **(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 raised issues of fact not arising out of the preceding pleading**
>
> **(2) . . .**
>
> **(3) . . .**

In my understanding, our law on pleading, as encapsulated in Order 2 rule 4 of the CPR, is that, the party relying on limitation should specifically plead it. He may or may not do so for any or no reasons at all. Thus, the plaintiff is entitled to wait to hear from the defendant whether limitation is taken up as a defence. If the defence is taken, it is up to the plaintiff to bring his case within any of the exceptions to the Limitation of Actions Act or other statute of limitation as may be the case. There are good reasons for the position of the law that the defence of limitation should be pleaded specifically. First, it is intended to avoid ambush upon or taking the plaintiff by surprise on such a fundamental issue as limitation of actions. Second, the Plaintiff is notified of the defence of limitation; in effect he is told that his claim is not maintainable in law. And, third, the plaintiff gets the opportunity to plead such facts as are necessary to bring his claim within the exception of Section 27 of the Limitation of Actions Act. Ordinarily, he will do so in his reply to defence. Accordingly, a party who wishes to invoke or rely on a defence of limitation must specifically plead it in his defence or any other subsequent pleading, if he is to rely on limitation as a basis of defeating the plaintiff's claim.

[7] What does the record in this case say? I have perused the defence and it did not plead any limitation as a defence. The best the Respondents did, in most generalized fashion, was to make mere denial in its paragraph 8of ''… *the allegations of paragraphs 8,9 and 10of the plaint and shall require strict proof thereof*". Paragraph 10 of the plaint had averred that leave to file suit out of time was sought and granted vide Misc. Application No. 5 of 2010 Isiolo. That kind of averment cannot be said to have specifically pleaded the relevant statute of limitation on whose provisions the respondent was to defeat the appellant's action. The challenge to extension of time was raised during cross-examination and then in the submission of parties. The Respondents did not amend their pleadings to plead limitation. In effect, the Appellant was denied all and every opportunities to plead such necessary facts as to bring his case within the exception of section 27 of the Limitation of Actions Act. I must admit that the requirement of Order 2 rule 4 of the CPR is not a merely matter of form which can be diminished by Article 159(2) (d) of the Constitution of Kenya, 2010. It is a rule which serves substantive justice and a pertinent component of fair hearing, for it prevents a party from taking the other by surprise on an important matter as defence of limitation. I am conveying a subtle judicial hint; that, a defence of limitation ,if successful, is not a mere pin-prick thrust, or just a rapier-like stroke; it is a sure downright bludgeon-blow on the plaintiff's suit. It will completely defeat the plaintiff's claim. Therefore, for a party to enjoy the exception to the rule and challenge an *ex parte* order of extension of time, must give the other party proper notice of his defence on limitation so that the party to be affected will have an opportunity to plead such facts as are necessary to bring his case within the exception of Section 27 of the Limitation of Actions Act.

[8] I am of the above orientation and it is clear the direction the court is taking. As it will become clear in my ultimate decision, I think I should not determine the other arguments by parties on the validity of the leave to file suit out of time or the jurisdiction of the court which granted it. It suffices to state that, the trial magistrate adopted the wrong approach in allowing the introduction of a fundamental defence of limitation when it had not been pleaded specifically by the Respondents. Thus, the trial magistrate erred in his decision to dismiss the suit on the basis of un-pleaded issue-limitation. This is not a case where the thinking in the case of **ODD JOBS vs. MUBIA (1970) EA 476** would apply. The exception to the general rule which allows the court to determine a case on an issue that is not pleaded, will apply where the issue is placed before the court, the parties address the issue and no party is taken by surprise or otherwise made to suffer any prejudice. See the case of **JOSEPH AMISI OMUKANDA V INDEPENDENT ELECTIONS & BOUNDARIES COMMISSION & 2 OTHERS [2014] EKLR,** where the Court of Appeal, held as follows**:**

> **"There is however a well-known exception to the general rule when the court can determine an issue even though it was not pleaded. This applies where the parties have raised an un-pleaded issue and left it for the decision of the court. The exception will apply where the issue is placed before the court, the parties address the issue and no party is taken by surprise or otherwise made to suffer any prejudice. (See *Odd Jobs Vs Mubia (1970) EA 476).***

In the upshot, I would not agree that perforce, the trial magistrate was obligated to decide the case on un-pleaded issue of limitation when it had not been specifically pleaded or properly placed before the court;

it was introduced during cross-examination and the Appellant was left with no opportunity to bring facts which would bring his case within the exception of section 27 of the Limitations of Actions Act. This was a surprise and surely prejudiced the Appellant. Accordingly, I set aside the judgment of the trial court.

[9] As I stated earlier, I will not go into the merit or otherwise of the other issues canvassed by the respondents because, i believe, this is an apt case for remission back to the trial court. Those issues will fall directly in controversy before the trial court which shall try and determine them. In light thereof, I order that the lower court file be send back to the lower court for hearing by another magistrate of competent jurisdiction other than the trial magistrate herein. No order as to costs given the result of my analysis of this appeal. It is so ordered.

Dated, signed and delivered in open court at Meru this 3rd day of March 2016

F. GIKONYO

JUDGE

In the presence of

Mr. Rimita Advocate for the appellant

Mr. Thangicia advocate for respondents

F. GIKONYO

JUDGE