



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL APPEAL NO. 39 OF 2014a**

*(An appeal from the Judgment of the Chief Magistrate, Embu in CMCC 118 of 2012 dated 17/10/2013)*

KENNEDY MUREITHI.....1ST APPELLANT

FAITH WAMBUI KARANI.....2ND APPELLANT

VERSUS

PETERSON KARIMI GACEWA..... RESPONDENT

**J U D G M E N T**

1. This is an appeal against the ruling of Chief Magistrate, Embu delivered on 17/10/2013. The magistrate dismissed the appellant's preliminary objection which challenged the respondent's suit for being time barred under the Limitation of Actions Act.
2. The grounds of appeal are that the magistrate erred in finding that the suit was not statutory barred under Section 4(2) of the Limitation of Actions Act and that although the cause of action arose on 25/4/2010 time started running on 20/3/2012. it was contended that the court lacked territorial jurisdiction as the cause of action arose in Kerugoya where the parties reside and that it was wrong for the trial court to find that issues of time expiry are matters of procedural technicalities. The appellant complained that the magistrate did not consider the appellant's submissions and authorities.
3. Both parties filed written submissions in disposal of the appeal.
4. The appellant submitted that the appeal arose out of the ruling dismissing his preliminary objection heard on 25/6/2013. Section 4(2) of the Limitation of Actions Act provides that an action founded on tort may not be brought after three years while an action for libel or slander may not be brought after the end of twelve months. According to the plaint and statement the defamatory report was made at Kerugoya Police station on 25/4/2010 and the plaint was filed on 6/7/2012. Time therefore started running on 25/4/2010 and a period of one year ended on 25/4/11.
5. In the absence of an order for leave to file out of time, the suit was statute barred. According to the magistrate, time started running when when the respondent's conviction and sentence were quashed at the appeal stage. This is wrong as the suit herein was not about malicious prosecution. The court disregarded the case of ***M'RINKANYA & ANOTHER NYERI COURT OF APPEAL NO 124 OF 2003*** cited by the appellant and was also wrong in finding that matters of territorial jurisdiction and limitation of actions are matters of procedural technicalities.
6. The respondent submitted that on 25/4/2010 the appellants recorded statements at Kerugoya police station accusing the respondent of setting up their house on fire which resulted to him being convicted and sentenced to seven years imprisonment. On appeal, the respondent was acquitted and later he filed a defamation suit against the appellants. The appellants raised a preliminary objection in their defence that the suit breached Section 4 of the Limitation of Actions Act and that the Chief Magistrate Embu lacked territorial jurisdiction to hear the matter.

7. It is the respondent's submission that the suit is not time barred as the respondent had to wait for the determination of the appeal before filing the defamation suit. The cause of action arose when the court ruled in favour of the respondent. The magistrate found that the authority of ***M'IKIARA M'RIUKANYA & ANOTHER VS GILBERT KABEERE M'MBIJOWE C.A NO. 124 OF 2003*** was distinguishable in that the issues in the said authority were different.
8. According to the respondent, the magistrate was right in finding that the provisions of section 4 (2) Limitation of Action Act are not mandatory and allowed the court to exercise discretion. The respondent filed the suit in Embu because there was no Chief Magistrate in Kerugoya at that time and since he anticipated a greater award exceeding the jurisdiction of Kerugoya court. The nearest court in terms of travel and time is Embu Court. The respondent cited the following cases;

**(i) ABDULHAMID EBRAHIM AHMED VS MUNICIPAL COUNCIL OF MOMBASA [2004] eKLR** where the court held that section 4(1) of the Limitation of Actions Act takes away the courts jurisdiction to entertain a claim of libel outside the 12 months period from the date when the cause of action arose.

**(ii) TOM ODHIAMBO ACHILLA T/A ACHILLA T.O & CO ADVOCATES VS KENNETH WABWIRE AKIDE T/A AKIDE & CO. ADVOCATES & 3 OTHERS [2015] eKLR** where the court cited the case of ***D.T DOBIE & COMPANY (K) VS MUCHINA*** where it was held that the court ought to act cautiously and carefully and consider all facts of the case without embarking upon a trial.....No suit ought to be summarily dismissed unless it is hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak beyond redemption.

**(iii) SAMUEL KURIA KIMANI VS BOG TRUSTEES PCEA MAKONGENI CHURCH [2014] eKLR** where the where the court held that pecuniary jurisdiction of a magistrate is conferred upon by statute and a suit whose subject matter exceeds a court jurisdiction as expressly provided in a statute is a nullity.

**(iv) KENYA POWER & LIGHTING CO VS ANN WAMBUI WANJIRU [2009] eKLR** where it was held that the rules of interpretation are clear that where two statutes are in conflict in certain provisions the latter statute shall be deemed to have amended the former. The civil procedure act was enacted before the Magistrate's Court Act. A suit filed outside the territorial jurisdiction in breach of section 15 of the Magistrate Act cannot be said to be incompetent.

**(v) AMI DEVELOPMENT SERVICES LIMITED & 6 OTHERS VS TRUSTEES OF THE KENYA LOCAL GOVERNMENT & 2 OTHERS I.Z. ENGINEERING CONSTRUCTION LTD & ANOTHER [2005] eKLR** where the case of ***READ VS BROWN [1888] 22 Q.B.D 128*** was cited. Cause of action was defined as every fact which the would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the court.

9. The duty of the 1<sup>st</sup> appellate court was discussed in the case of ***SELLE AND ANOTHER VERSUS ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS [1968] EA 123***, where it was observed thus:-

*“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in 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 on the case generally”*

10. One of the grounds of appeal is that the magistrate did not have territorial jurisdiction to handle the matter as the cause of action arose in Kirinyaga where both parties reside.

11. Section 3 of the Magistrates Court Act provides that;

(1) *There is hereby established the Resident Magistrate's Court, which shall be a court subordinate to the High Court and shall be duly constituted when held by a chief magistrate, a senior principal magistrate, a senior resident magistrate or a resident magistrate.*

(2) *The Resident Magistrate's Court shall have jurisdiction throughout Kenya.*

12. Section 15 of the Civil Procedure Act provides that;

*Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—*

(a) *the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain;*

13. **Explanation.(1)**—Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

14. In the case of **WILLIAM OMOLLO ANYANGO VS JACOB OCHOLA & ANOTHER [2015] eKLR** the court cited the cases of **MOHAMED SITABAN VS GEORGE MWANGI KAROKI CA NO. 13 OF 2002** where the court held that

*“a magistrate's court is not subject to the local jurisdiction contemplated by Section 15 of the Civil Procedure Act. Section 15 of the CPA applies only to courts lower than the resident magistrate's court. When it enacted the Magistrates Court Act, legislature was aware of the provisions of section 15 of the CPA which had been enacted prior”.*

15. The court also cited the case of **DOSHI ENTERPRISES LTD VS ORIENTAL STEEL FABRICATIONS & BUILDERS NRB HCCC NO 627 OF 2009** where it was held that filing a case outside the provisions of section 15 of the CPA does not make that suit a nullity. In the case of **RUTH GATHIGIA KAMUNYA & ANOTHER VS GEORGE KIMANI [2015] eKLR** the court held that Section 15 of the CPA was not meant to apply to the Resident Magistrates court.

16. In the case of **SIMON KIARIE VS SAMUEL MUIGAI THUKU [2005] eKLR** the court held that the magistrate courts have territorial jurisdiction through out Kenya by virtue of section 3(2) of the Magistrate Court's Act. Section 15 of the CPA governs the court administrative jurisdiction.

17. In the case of **JUSTUS KYALO MUTUNGA VS LABH SINGH HARNAM [2012] eKLR** the court held that Section 3 of the Magistrate Court's Act was meant to amend Section 15 of the CPA. The court also cited the cases of **MOHAMED SITABAN VS GEORGE MWANGI KAROKI CA No. 13 of 2002** and **DOSHI ENTERPRISES LTD VS ORIENTAL STEEL FABRICATIONS & BUILDERS NRB HCCC NO. 627 of 2009 (supra)**.

18. In the case of **SAMUEL KURIA KIMANI VS BOG TRUSTEE PCEA MAKONGENI CHURCH [2014] eKLR** the court held that in view of Section 3(2) of the Magistrate's court Act, the court's territorial jurisdiction is not subject to limits or restrictions within Kenya, it is instead as expansive as the boundaries of this country. As for territorial jurisdiction there was no error in the trial magistrate's finding that the court had jurisdiction.

19. In view of the above decisions based on the relevant provisions of the law, the magistrate was right in holding that the court had jurisdiction to hear the matter for it was not limited to territorial jurisdiction.

20. Section (2) of the Limitation of Actions Act provides that;

*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.*

21. In the case of **WYCLIFFE A SWANYA VS TOYOTA EAST AFRICA & ANOTHER [2009] eKLR**, the appellant argued that the cause of action arose when he started feeling the effects of slander. The court of appeal held that according to the provisions Limitation of Actions Act no action of libel or slander may be filed after the end of 12 months from the date the cause of action accrued. The court held that this meant that the time started to run on the date when the slanderous remarks were made.
22. In her interpretation of Section 4(2) of the Limitations of Actions Act, the learned trial magistrate reached a finding that the use of the word “may” gives discretion to the court to entertain a suit that has been filed out of the time allowed by the law. In fact, the issue of the suit having been time barred is the bone of contention in this appeal.
23. It is therefore important to examine the relevant provision of the law and in particular the meaning of the relevant key words, for example “action”.
24. The Concise Oxford English Dictionary defines the word “action” as “*the process of doing something to achieve an aim*”. In regard to legal actions, the word is defined as “*a law suit or legal proceedings*”.
25. Black's Law Dictionary contains several definitions anchored on different kinds legal actions, for example, those founded on tort, on recovery of land, recovery of debts among others. The definition of action is reduced to:-

*“A civil suit stating a legal cause of action and seeking only a legal remedy”.*

26. Section 27 of the Act allows a party to seek leave for extension of time in case of ignorance of material facts. Section 4(2) does not shut out a party whose action is founded on tort from bring the action even where the action has accrued.
27. The purpose of Section 27 was to afford the party whose action is out of time a remedy. In the construction of Section 4(2), the words “may not” must be examined in light of other provisions. The Court of Appeal in the case of **M'IKIARA M'RINKNKANYA & SABASTIAN NYAMU VS GILBERT KABEERE M'MBIJIWE** which had similar acts held:-

*“The use of the phrase “may not” does not however give the court absolute discretion whether or not to apply the limitation periods prescribed for various causes of action. If the legislature intended to give absolute discretion to the courts it would have expressly provided so in the Act. The Act should be construed as a whole in order to discover the legal meaning of the phrase.*

*After prescribing limitation period of various actions, the legislature provided safety mechanisms or escape routes from the rigors of the Act in order to avoid injustice by providing for the extension of the limitation periods in the restricted cases specified in Part III of the Act”.*

28. The court in the M'Rinkanya case faulted the High Court judge who had ruled that the phrase “may not” accorded discretion to the court to entertain a time-barred suit.
29. In this case, the learned magistrate referred to limitation of time requirement as a technicality which could be cured by Article 159 of the Constitution and entertained the suit which was time barred and for which no leave for extension of time had been obtained. The requirement of filing suits within time is not a technicality but non-compliance of substantive law.
30. The magistrate stated that the respondent had to wait for the criminal case and for the appeal against the judgment to be disposed of. This was a misdirection in that criminal proceedings are independent of civil proceedings. The respondent ought to have instituted civil proceedings even as the criminal case was going on. There was no justification in waiting for the criminal proceedings to be finalized. The magistrate erred in finding that the time of the action started to

- run when the criminal appeal was determined.
31. The magistrate also misdirected herself when she said that the Court of Appeal in the *M'RINKANYA CASE (SUPRA)* was not relevant. It was relevant in that it discussed the misapprehension that the court had discretion to entertain time-barred actions and overruled the superior court.
  32. In the case of *DANIEL MUNGAI KARANJA VS ATTORNEY GENERAL & ANOTHER [2016] eKLR* the court held that the mere fact that a person has been charged with a criminal offence regarding the subject matter which the accused considers defamatory against his person by the complainant is no reason to wait the conclusion of the criminal case in which he is the accused to be concluded to file a suit for defamation against the person he alleges to have defamed him.
  33. In the case of *NZOIA SUGAR COMPANY LIMITED VS COLLINS FUNGUTUTI CIVIL APPEAL No. 7 of [1988] KLR 399* the court held that a judge cannot lawfully award damages for defamation in an action which was time-barred.
  34. In the case of *BOSIRE ONGERO VS ROYAL MEDIA SERVICES [2015] eKLR* the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.
  35. I come to the conclusion that the magistrate erred in law and in fact in dismissing the preliminary objection on the grounds that the suit of the respondent was within time.
  36. The ruling delivered on 17/10/2013 is hereby set aside and substituted with a finding that the preliminary objection be and is hereby upheld and the respondent's suit accordingly dismissed with costs for being time-barred.
  37. The respondent to meet the costs of this appeal.
  38. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 4TH DAY OF MAY, 2016.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Njiru for Kahiga for Appellant**

**Ms. Muriuki for Ithiga for Respondent**

**Both parties present**