



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
HCCA NO. 20 OF 2015
(FORMERLY MERU HCCA NO. 19 OF 2012)

ELLYJOY NYAGUTHI KIRIMO (Suing as the legal representative of the
estate of MARGARET CIAMURANGO KIRIMO).....APPELLANT

- VERSUS -

CYPRIAN MUGENDI IGONGA.....1ST RESPONDENT

IGNATIUS GITARI.....2ND RESPONDENT

DUNCAN MWANGI.....3RD RESPONDENT

*(Being an Appeal from the judgment and decree of the Principal Magistrate's Court at
Chuka (N.N. MURAGE - SRM) delivered on 14/2/2012 in Chuka PMCC No. 63 of
2011).*

JUDGMENT

1. Ellyjoy Nyaguthi Kirimo ("the Appellant"), commenced the present proceedings before the Chuka Principal Magistrate's Court Civil Suit No. 63 of 2011 as the personal representative of the estate of the late Margaret Ciamurango Kirimo ("the deceased"). The deceased had met her death in a road traffic accident on 12th August, 2007 at Naka river bridge after being run over by motor vehicle registration No. KAG 241 T. ("the said vehicle") The Respondents were sued in their capacity as the driver, beneficial owner and registered owner of the said vehicle, respectively. The Appellant pleaded that the Respondents were negligent in the occurrence of the accident which claimed the life of the deceased. She therefore claimed against the Respondents for special damages of Kshs.30,000/- and damages under the Law Reform and Fatal Accidents Acts. Before filing the plaint on 10th August, 2011, the Appellant had applied for and obtained leave of court on 21st July, 2011 to commence the said proceedings.

2.The 1st and 2nd Respondent filed a joint defence while the 3rd Respondent filed none. In their defence, the 1st and 2nd Respondent denied being either the driver or the beneficial owner of the said vehicle. They also denied the occurrence of the accident. In the alternative, they claimed that the accident was substantially contributed to by the negligence of the deceased. In addition, they pleaded that the claim was statute barred.

3. After trial, the trial court found that the suit had been filed out of time and dismissed the same with costs. Aggrieved by that decision, the Appellant appealed to this court citing six grounds which can be summarised into two, firstly, that the trial court erred in dismissing the suit by disregarding the leave that

was granted to commence the proceedings and secondly that the trial court erred in failing to assess the damages that would have been awarded.

4. This being a first appellate court, it is incumbent upon the court to re- assess the facts afresh with a view to arriving at its own independent findings and conclusions. (**See Selle .v. Assorted Motor Boat Co. Ltd (1968) EA 123**). However, in so doing, the court has always to remember that it never had the opportunity of seeing the witnesses testify.

5. The record shows that the parties adopted the proceedings in **Chuka PMCC No.62 of 2011 Ellyjoy Nyaguthi Kirimo (suing as the legal representative of the Estate of the late Stanley Murithi Kirimo) -v- Cyprian Mugendi Igonga & 2 Others**. In that case, PW1 P.C John Manyara, a police officer attached to Chuka Police Station appeared in court with a police file relating to an inquiry on a fatal road accident which occurred on 12th August, 2007 along Embu-Chuka road. He told the court that after investigation, the 1st Respondent was charged with seven (7) counts of causing death, amongst other counts, all of which he was convicted. Count 1 was in respect of the late Margaret Ciamurango Kirimo. He produced the Police Abstract as PExh 2. He told the court that the accident occurred when a crowd was viewing a body that had been shot by the police. PW2, was the Appellant. she told the court that on the material day, she was called and informed that her mother ("the deceased")and brother had died in a road traffic accident. That she applied for a grant which was issued in her favour. She produced a limited grant and death certificate in respect of the deceased. She also produced a receipt for Kshs.30,000/- being the costs of obtaining the grant. She produced an order dated 21st July, 2011 as PExh 10 granting her leave to file suit against the Respondents. In cross-examination, she admitted that the case was time barred on 13th October, 2010 but she had applied for extension on 12th July, 2011. She told the court that the delay in lodging the suit was because Invesco Assurance had collapsed; that she was unaware that the said insurance company had begun operations in early 2010.She admitted that she had only sued the Respondents and not the Insurance Company and that there was no order barring her from suing that Company.

6. Since the evidence of the 1st and 2nd Respondent was similar as in Chuka PMCC No. 62 of 2010, by the consent of the parties, the court adopted the 1st Respondent's testimony in that case. The defence was that on the material day, the 1st Respondent was driving along Embu- Chuka road. The road was under construction and one lane was dug up and there was only one lane in use. That when he was driving down Naka bridge, he met a crowd of people, he tried to hoot but the people did not move. That there was a corner and a CID vehicle was parked there. That he could not do anything as on either side of the road there was a river. That he stepped on the brakes of the said vehicle but he still hit the people. He denied being careless. That the deceased and other people were on the road and he blamed them for the accident. In cross-examination, the 1st Respondent admitted that he had seen that the road was under repair; that he applied brakes but still hit the crowd; that he was charged and pleaded guilty; that since there was a corner, he was required to drive slowly. That there were signs on the road and that he knew that there was only one lane that was in use. He denied being careless.

7. At the hearing of the appeal, counsel for the Appellant combined ground Nos. 1 to 5 of the appeal and argued ground 6 separately. It was submitted for the Appellant that the trial court failed to appreciate the import of Section 27 (1) of the Limitation of Actions Act (hereinafter "the Act"); that the Act does not extinguish a cause of action; that once leave is granted the bar is lifted; that a reason for the delay had been given. That Article 159 of the Constitution of Kenya enjoined the court to hear the matter and determine it on merit. That since the Respondents had appeared and defended themselves, there was no prejudice that had been suffered. That the trial court had determined the matter on a technicality yet Sections 1 A and 1 B of the Civil Procedure Act mandated the court to apply the overriding objective which gives the court a lot of latitude in interpreting the law. In support of these submissions, Counsel for the Appellant relied on the cases of **p.m.n. v. Kenyatta National Hospital & 6 Others [2015] eKLR**, **Rawal .v. Rawal [1990] KLR 275 and John Gakure & 148 Others .v. Gawa Pharmaceuticals Co. Ltd & 7 Others [2010] eKLR** Counsel concluded that the trial court fell into serious error in failing to assess the damages awardable.

8. On behalf of the Respondents, it was submitted that the decision of the trial court was in tandem with

Sections 27 (2), 28 and 29 of the Limitation of Actions Act. The cases of **James Mbugua .v. Paul Kibet Biwott & Anor [2005] eKLR** and Mohamed **Osman Abdalla .v. Benson Kimani [2004] eKLR** were relied on in support of that submission. That the Appellant's case had not met the threshold set in section 27(2) of the Act. That on the Authority of **Suleiman Ahmed Adow .v. Kamulat Supplies Ltd [2002] eKLR**, failure by the trial court to assess the damages was not fatal. It was urged that the appeal should be dismissed.

9. This court has carefully considered the record and the submission of counsel. The first ground was that the trial court erred in ignoring the leave that was granted and in dismissing the suit for being time barred. The record shows that upon realising that her suit was time barred, the Appellant applied for and was granted ex parte, leave to file the suit against the Respondents on 21st July, 2011. The Appellant produced the order giving her leave and told the court that she delayed to bring the suit because Invesco Assurance Company had gone under. That she brought the suit because the said Insurance Company had began operations. The trial court found that the leave granted to the Appellant could not stand as the Appellant had not satisfied the provisions of Section 27 of the Act.

10. Section 4 (2) of the Act bars any action founded on tort if brought after the end of three (3) years from the date on which the cause of action arose. However, under section 27 of the same Act, the limitation period is extended in the case of ignorance of material facts in actions for negligence, nuisance or breach of duty. In order to operationalise section 27 aforesaid, section 28 of the Act allows for applications for leave of court for extension of time to be made ex-parte. In the case relied on by the Respondents of **James Mbugua .v. Paul Kibet Biwott** (Supra) the court held:-

"It is trite law that grant of leave to file a suit out of time can only be challenged during the trial, See DIVECON LIMITED .V. SHIRINKHANU SADRUDIN SAMANI Civil Appeal No. 142 of 1997 (unreported). The Respondents' counsel was perfectly right in raising the issue of limitation even when no evidence had been led by the respondents regarding the occurrence of the accident in question."

11. In **Mary Wambui Kabugu .v. Kenya Bus Services Ltd C.A No. 195 of 1995 (UR)** while considering how exparte leave should be challenged, the Court of Appeal delivered itself thus:-

"By virtue of section 28(1) of the Limitation of Actions Act, Cap 22, Laws of Kenya (the act) an application for leave of the superior court (for that matter of the subordinate court) has to be made ex-parte. The proposed defendant is not a party to that application. Indeed he cannot be for the simple reason that section 28(1) mandated that such application be made ex parte..... In the court's view, the only time when such a defendant can challenge the order granting extension of time is at the time of the trial, or by way of arguments at the trial if the circumstances and facts allow such arguments at the trial, that is to say if there is a dispute as to facts. It will be up to the judge presiding at the trial to decide the issue but not as a preliminary point."

This position was a re-affirmation of what that court had held in the case of **Yunes K. Oruta & Anor .v. Samwel Mose Nyamato C.A No. 96 of 1984 (UR)**. to the best of my recollection that position has to date not changed.

12. The reason why the issue of grant of leave is to be challenged at the trial is because, leave is ordinarily granted ex-parte, a respondent is ordinarily not given the right to challenge the same until the trial when it is expected that he will test the successful applicant's evidence if it satisfies the test set out in section 27 (1) of the Act. Once a defence of limitation is raised, it is expected that a plaintiff will at the trial tender evidence to satisfy the court that the leave that he was granted ex-parte dislodges that defence by dint of section 27 of the Act. In the present case, the trial court considered the issue and found that the reasons given for the delay in bringing the suit did not satisfy the test set out in the aforesaid section 27 of the Act. The reason advanced by the Appellant was that Invesco Assurance had gone under and she only commenced the suit after the said company commenced operations. To my mind, that cannot be a valid ground under Section 27 of the Act. The Insurance Company was not the owner of the said vehicle.

Indeed the Appellant did not even the said company. She knew who the right defendants were and it is them whom she sued. Section 27 of the Act applies to a plaintiff who is ignorant of material facts giving rise to the cause of action. This is not the case with the Appellant in this case. In this regard, I find no fault in the findings by the trial court. The trial court's determination of the issue of limitation was not a technicality. It was an issue of substantive justice as section 4 (2) of the Act is a right that enures to a defendant against an indolent plaintiff while section 27 grants a right on a plaintiff who has been disadvantaged in bringing a suit in time. However, the section imposes a clear duty upon such a plaintiff to discharge.

13. Whilst this court agrees with the holding in the cases of *P.N.M v. Kenyatta National Hospital & 6 Others (supra) and Rawal .v. Rawal* (supra) that the Limitation of Actions Act, Cap 22 Laws of Kenya does not extinguish a cause of action, nevertheless, once leave is granted the plaintiff must establish at the trial that the conditions set out in section 27 (1) (a) to (d) of the Act exist before the right set out therein can enure to such Plaintiff. To this court's mind, neither Article 159 of the Constitution nor sections 1A and 1B would have permitted the trial court to rule otherwise than it ruled. Accordingly, grounds 1 to 5 are rejected.

14. The second issue is that the trial court erred in failing to assess damages. It does not require any authority that a trial court must assess damages even if it dismisses a claim for damages. This is so because a trial court's decision is subject to appeal. It is not a final court the appellate court is entitled to ascertain what such trial court's view on damages was. This ground succeeds.

15. When the Appellant testified, she did not tender any evidence as to the age of the deceased, her earnings if any, or whether she had any dependants. It is only in the submissions that it was submitted that the deceased was aged 73 years, living a vibrant life and a farmer. This cannot be considered as evidence. It amounts to evidence from the bar and is unacceptable. In my view, there being no evidence on which to assess loss of dependency no award could be made on that heading and I make none. On loss of expectation of life, I assess damages at Kshs.100,000/-. A receipt of Kshs.30,000/- was produced as proof of special damages. I will therefore make an award of Kshs.130,000/-. In view of the circumstances under which the accident occurred, I will apportion liability at 50% - 50%.

16. Although ground 6 succeeded, that ground is not sufficient to disturb the trial court's judgment. In the premises, the appeal is without merit and the same is dismissed with costs.

DATED and Delivered at Chuka this 1st day of September, 2016.

A. MABEYA

JUDGE

Judgment read and delivered in open court in the presence of all parties.

A.MABEYA

JUDGE