



**REPUBLIC OF KENYA**

**High Court at Busia**

**Civil Appeal 17 of 2011**

**JOHN MWANGI NJOROGUE .....1<sup>ST</sup> APPELLANT**

**KENYA BUS SERVICES LTD.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**TOM MBOYA DENGU .....RESPONDENT**

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

1) The Appellants who were Defendants in Busia Chief Magistrate’s Court civil case NO.262 of 2009 **Tom Mboya Dengu –vs- 1) John Njoroge Mwangi 2) Kenya Busia Services** are aggrieved by this holding of the Learned Magistrate,

**“.....the Defendants contended that the Plaintiffs suit should not be sustained it is time barred, and that the leave to extend time granted following an application dated 24.7.09 was of no consequence, the same having been granted on an application that does not meet the requirements of Sections 27,28 and 29 of The Limitation of Actions Act.....The Defendants by asking this Court to find that leave to file this suit was not properly granted is asking this Court to seek an appeal and/or review of its own decision, a jurisdiction the Court lacks.”**

The outcome of this appeal rests substantially on what this Court, an Appellate Court, makes of this holding.

2) The Respondent (hereinafter “Tom Mboya”) was a victim of a road traffic accident which occurred on 31.05.05 where he sustained some bodily injuries. On 9<sup>th</sup> June 2009 he commenced proceedings for recovery of damages in respect to the loss he had suffered in that accident. After trial, judgment was entered in his favour for damages of Kshs.94,000/= plus costs.

3) Well aware that the suit was filed outside the period limited by Section 4(2) of The Limitation of Actions Act (hereinafter The Act) Tom Mboya’s Counsel filed an Exparte Chamber summons seeking extension thereof. That application which was filed simultaneously with the commencement of the suit was allowed on 23.09.2009 in related proceedings filed by his namesake, being Busia CMCC No.261 of 2009 **Tom Mboya Ochieng –vs- John Mwangi Njoroge Kenya Bus Services Ltd.** One quickly notices an error apparent on the face of the order of the Learned Magistrate when he stated,

**“This order to apply in Busia PMCC No.261/2009.”**

As he was dealing with PMCC 261/2009 that should have read PMCC 262/2009. But nothing turns on that error because the parties herein are in agreement that leave to file the claim out of time was granted on that day and in those proceedings.

4) In an amended joint statement of Defence the Appellants herein raised the following objection,

**“The Defendants aver that the Honorable Court lacks jurisdiction as the suit is time-barred by the Limitation of Actions Act and shall raise preliminary objection thereof.”**

5) The defence of Limitation was to come up again in the course of the cross-examination of Tom Mboya. On 16.6.10, he said as follows:-

**“I was late to file this case as I had given another advocate instructions. He was Atyang. All along, thought he had filed the case. Later he closed his office. Its when I learnt he has not filed.”**

6) That the Defence of Limitation was central to the Appellants case became apparent when they submitted on it in their closing arguments. This is what they had to say,

**“The reasons given by the Plaintiff in his application for extension of time and in his evidence in Court for failure to file this suit out of time do not at all fall within the provisions of the above Sections.....it matters not that the application for extension of time was allowed by the Court. The trial Court at the main suit stage is empowered to look into the merits of the Order and be satisfied that the application met the strict requirements of the Law.”**

It was in answer to this submission that the Learned Magistrate held that the trial Court lacked jurisdiction to reopen the matter as to do so would amount to the Court sitting on appeal or in review of its earlier orders.

7) The Learned Magistrate, with respect, erred. It is long settled that a party seeking to challenge an ex parte order granting leave to file a suit out of time must raise it, not as a preliminary or interlocutory point, but at the trial (see for example Civil Appeal No.142 of 1997 UR **Divecon Limited (otherwise known as Diving contractors ltd) AND Shirinkhanu Shadrudin Samani**). The Appellants raised the challenge in their pleadings, at hearing and in submissions. That undoubtedly was the correct procedure.

8) Once raised, the trial Court is obliged to revisit the question of leave. This what Aganyanya J (as he then was) said of the role in Eldoret 79 of 1987 **Joseph Njihia Njuguna -vs- Eldoret Municipal Council**,

**“Though I am the one who granted the ex parte leave for the institution of this suit out of time though it had initially been filed without one, I should now decide whether it should have been granted in the first place. I must decide whether, after having heard the parties herein, the Plaintiff satisfied the conditions for extension of time under Section 27 and 28 of the Limitation Act .....”** (my emphasis)

The trial Court should not have divested itself of this jurisdiction.

9) It is now my duty to decide whether leave was properly granted. But perhaps I should first state what might seem to be rather oblivious. The claim by Tom Mboya was founded on Tort and would not be brought after the end of three years from the date when the cause of action accrued (Section 4(2) of The Limitation of Actions Act). Tom Mboya’s cause of action accrued on 31<sup>st</sup> May 2005 when he sustained the bodily injuries and he should have filed his action by 30<sup>th</sup> May 2008. So, his action filed on 9<sup>th</sup> June 2009 was out of time.

10) So as to deserve the grant of leave, Tom Mboya needed to satisfy the conditions set out in Section 27 (2) of The Act which provides:-

**“(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.”**

In addition, as the application was made simultaneously with the commencement of the suit, regard must be given to the provisions of Section 28(3). Those provide:-

**“(3) Where such an application is made after the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if the like evidence would in the absence of any evidence to the contrary, be sufficient-**

**a) to establish that cause of action, apart from any defence under section 4(2); and**

**b) to fulfill the requirements of section 27(2) in relation to that cause of action.**

**And it also appears to the court that, until after the commencement of that action, it was outside the knowledge (factual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on such a date as (part from section 27) to afford a defence under Section 4(2).”**

11) The application for leave filed by Tom Mboya was premised on the following grounds:-

i) That due to business in Uganda which required his close personal supervision he was away from Kenya.

ii) He had lost contact with his advocate in Kenya.

During the hearing he was more elaborate. What he said bears repetition,

**“I was late to file this as I had given another advocate instructions. He was Atyang. All along, thought he had filed the case. Later he closed his office. Its when I learnt he had not filed.”**

There is an implicit concession by Tom Mboya, I would think, that he had actual knowledge of all material facts relating to his cause of action that would have enabled him file a suit on time. That is why he had timeously given instructions to his first advocate. He was now blaming that advocate for the lateness. If the Respondent’s allegations are true then his advocate may be liable to him for professional negligence. But the omission, inaction or negligence of Counsel is not a ground upon which leave can be granted. The conditions and circumstances set out in Sections 27(2) and Section 28 (3) of the Act are limited and rigid. The Court of Appeal in Civil Appeal No.233 of 1998 Crispin Ned Ngari & Anor And Churchill Odero noted as follows:-

**“It can be seen straightaway that the requirement of the two Sections of the Act are stringent. If the Court is satisfied on evidence before it that the said requirements are met it has no option but to grant the application. If those requirements are not met the Court must reject the application.”** (my emphasis).

12) In the circumstances of the case leave was not grantable. The leave granted by the Learned Magistrate on 23.09.2009 should never had been granted in the first instance. And this would have become more than apparent had the trial Court revisited the matter in the course of trial as had been

invited by the Appellants.

13) I must reach the decision that the appeal succeeds. The judgment of the Lower Court and all orders subsequent thereto are hereby set aside. Costs to the Appellants.

**DATED, DELIVERED AND SIGNED ON THIS 6TH DAY OF MAY 2013.**

**IN THE PRESENCE OF:**

**KADENYI .....COURT CLERK**

**BALONGO FOR OWINYI FOR .....APPELLANTS**

**IPAPU FOR ..... RESPONDENT**

**F. TUIYOTT**

**JUDGE**

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