



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL SUIT NO 888”B” OF 1991

GABRIEL K NDIRANGU.....PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF MOMBASA.....DEFENDANT

RULING

At the start of the hearing of this suit, learned counsel for the plaintiff, Mr Obhrai raised a preliminary point of law and submitted that this suit against the Municipal Council of Mombasa, was statute barred under section 3(1) of the Public Authorities Limited Act, (cap 39, Laws of Kenya) as it was not filed within 12 months from the date when the cause of action arose. It provides as follows:

“3(1) No proceedings founded on tort shall be brought against the government or a local authority after the end of twelve months from the date the cause of action occurred.”

In the instant case, the plaintiff sued the defendant, Municipal Council of Mombasa which is a local authority alleging that on or about the 21st day of September, 1990, the defendant through its agent and/or servant without lawful reason authorised the plaintiff’s car registration No KLC 388, Peugeot 304 saloon to be towed from an open air garage where he had taken it for repairs to the defendant’s yard at Port Tudor Municipal Yard. At the time the said vehicle was being towed away, several parts of the said vehicle had been removed in the course of repairs and stored in its boot amounting to Kshs 236,937/85 as more particularly set out in paragraph 5 of the plaint. The plaintiff alleges that the said car was carelessly towed away by the defendant’s agents and employees thereby damaging his car. The extent of such damage is given as Kshs 34,543/20 as appearing in paragraph 5 of the plaint.

The plaintiff avers in paragraph 6 and 7 of the plaint as follows:

“6. The loss and/or damage of the plaintiff’s motor car parts arose out of the negligence and/or carelessness of the defendant’s employees, servants and agents.

7. The plaintiff therefore claims from the defendant for loss and damages as stated in paragraph 5 above herein.”

The plaintiff also made a claim for loss of user of the said car at the rate of Kshs 400/- per day and costs of the suit.

Counsel for the defendant submitted that the plaintiff’s suit is based on tort and that it was filed out of time on the 19th of November 1991. The earliest possible time for filing such a suit given the 12 months limitation imposed by law, was the 20th September 1991 since the cause of action arose on the 21st of

September, 1990. Even if the court were to take it that time started to run against the defendant on the 27th of September, 1990 when the plaintiff was informed by the garage owners of the damage and loss of parts caused to his vehicle by the council employees, Mr Obhrai submitted that the suit was still filed out of time.

Mrs Mary Metho, learned counsel for the plaintiff, made a very elaborate submission in which she castigated the conduct of learned counsel for the defendant for the turn of events. She passionately told the court that counsels for the defendant in this case have always assured her of their intention to settle her claim. This was the position right from the beginning when Mr Mwakiwiwi filed the defence and continued even after Mr Obhrai had taken over the conduct of the defence case. It was therefore shocking that counsel for the defendant could turn round their assurances and raise the issue of limitation. Mrs Metho obviously tried her best in her submission in the face of the abrupt turn of events. She felt betrayed.

The response of Mr Obhrai to the accusations by learned counsel for the plaintiff was that the issue of limitation did not occur to him earlier as he was not the one who had filed the defence. There was Mr Mwakiwiwi and Mr Wahome who handled the matter before him. He told the court that he had never agreed to settle even if previous counsel on record had been exploring the possibilities of settlement.

There is no doubt that the issue of limitation is quite fundamental in any civil suit. It is a matter to be determined on the face of the record, pleadings and is best taken up as preliminary point as Mr Obhrai, counsel for the defendant had done. Commenting on the issue of preliminary objection, LW JA in the case of Mukisa Biscuit Co v West End Distributors Ltd, EA 969 at page 700 had this to say:

“So far as I am aware, a preliminary objection consists of point of law which has been pleaded, or which arises by clear implications out of the pleadings and which if argued as a preliminary point may dispose of the suit. Examples are objections to the jurisdiction of the court, or a plea of limitation, or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

I believe that Mr Obhrai is right. This suit against the Municipal Council of Mombasa which is a local authority was obviously out of time. It is founded on tort and right to have been filed within 12 months of the cause of action as provided under section 3(1) of the Public Authorities Limited Act (cap 39, Laws of Kenya). Although the defence filed was a bare denial and this may have encouraged Mrs Metho to believe that the defendants were likely to settle the matter, my attention has not been drawn to any assurances given prior to the filing of the suit that the defendant was contemplating settling the matter. Time started to run against the plaintiff the moment the cause of action arose on the 21st of September, 1990 and the same expired on the 21st of September, 1991. By the time the suit was filed on the 19th of November, 1991, it was already out of time and no leave of the court was sought prior to the filing of the suit for extension of time.

I have my sympathies for the plaintiff and I believe Mr Obhrai also has similar feelings, but I am afraid the spirit of that law has to be upheld.

I uphold the preliminary objection raised in this matter and hold that the suit before the court is incompetent. The same is dismissed with costs.

Dated and delivered at Mombasa this June 16, 1995

S.O OGUK

JUDGE