REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 195 of 1995

MARY WAMBUI KABUGU
Legal Representative of KABUGU MUTUA …..…………….APPELLANT

AND

KENYA BUS SERVICE LIMITED..…………..
………………...RESPONDENTS

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Justice Ringera) dated 7th June, 1995

IN

H. C. C. C. NO. 4045 OF 1988)

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JUDGMENT OF AKIWUMI, J. A.

I have read in draft the judgments of My Lords Shah and Bosire with which I am in full agreement that the appeal should be dismissed on the basis that the Appellant, the Plaintiff in the suit, had on a balance of probabilities, not proved her case. However, an issue that arose during the hearing of the appeal and which has been considered at some length in the judgments of my Lords Shah and Bosire, is whether the learned judge of the superior court was right when, upon the preliminary objection being raised before the trial on behalf of the Respondent, the Defendant in the suit, he had ruled that leave to institute the proceedings which the Appellant had obtained ex parte, from a judge of the superior court under the limitation Act, could not be challenged by way of a preliminary objection, but, as the learned judge put it, "at the trial …. on evidence and submissions.".

Many statutes in this country, including the Limitation Act, which have their origins in English Acts, did not only adopt the wordings of the parent statutes. The relevant provisions of the Limitations Act which came into force in 1967, and which are sections 27 and 28, are almost word for identical with the corresponding sections namely, sections 1 and 2(1) of the English Limitation Act, which came into force in 1963, and which had been enacted to remedy the injustices caused by the earlier Limitation Act of 1939. The view I take of the point in issue has been fully dealt with in the judgment of my Lord Shah has been fully dealt with in the judgment of my Lord Shah and I will content myself, with the following brief remarks.

In the English Court of Appeal case of Cozens v North Devon Hospital Management Committee and Another (1966) 2 All E. A. 799 it was held by the majority, Lord Denning, M. R. and Dankwerts, L. J. (Salmon, L. J. dissenting) that:

"although it was a general principle in regard to ex parte

orders that the party affected by the order could apply for it to be discharged, yet it would be contrary to the intention of the Limitation Act of 1963 to allow a defendant to apply, before the trial of the action, to set aside an ex parte order obtained under s. 2(1) giving leave for the purposes of s. 1(1) (a) …….".

This majority decision was followed by this court in the case of Yunes K. Oruta and Another v Samwel Mose Nyamato Civil Appeal No. 96 of 1984 (unreported). In his judgment in the case of Bernard Mutenga Mbithi v Municipal Council of Mombasa and Another Civil Appeal No. 3 of 1992, (unreported) Kwach, J.A. albeit, abiter dicta, set out the issue most succinctly thus:

"…… the question whether or not the plaintiff was entitled to the extension can only be challenged in the proceedings. This is one of the exceptions to the general rule that a party against whom an ex parte order has been made can only apply to the court which made the order to set it aside.".

This court, in its more recent decision in the case of Michael Miana and K. P. & T. Corp. v Stanley Kigara Kagombe Civil Appeal No, 109 of 1996, (unreported) expressed a somewhat conflicting view to that expressed in the unanimous decision of this court in Oruta. The reasons for this are two fold. Firstly, Cozens, Oruta and the judgment of Kwach, J. A. in Mbithi which might have influenced it in reaching its decisions, were not brought to the attention of this court when it was considering Maina, and secondly, and this is important, the English authority upon which this court placed great reliance in Oruta, namely, Craig v. Kanseen (1943) 1 K. B. 256, which not only, did not deal with the question of limitation of actions but which also, as can be seen, was decided some twenty years before the English Limitation Act of 1963 was passed, some twenty three years before Cozens, and some twenty four years before our Limitation Act was passed, was clearly inapt for the determination of the point in issue in Maina whether an ex parte order made under the Limitation Act, was "void or voidable". For these reasons, I would venture to say that the decision of this court in Maina was per incuriam.

Now, when a judge of the superior court grants leave ex parte, under the Limitation Act to institute proceedings which can be challenged at the trail, he in a way, does no more that a judge does when he for instance, grants an ex parte injunction, which can also be successfully challenged before another judge at its inter partes hearing. Furthermore, the question of a judge of the superior court sitting on appeal on the granting of an ex parte order under the Limitation Act by another judge of the superior court, does not in the particular circumstances, arise. Lord Denning, M. R., had this to say about it in Cozens at 801:

"Now I quite agree that in general a party affected by an ex parte order can apply to discharge it. We applied this rule as of course in R v. Morley (Valuation Officer) E.P. Peachy Property Corporation Ltd recently; but the procedure under the Limitation Act 1963 is altogether exceptional. It says in terms that an application shall be made ex parte. This is a strong indication that the judge is to decide the application on hearing one side only. No provision is made for the defendant being heard; and I do not think that we should allow it to be done at this stage. It must be remembered that, even when the Judge grants leave, there is nothing final about it. It is merely provisional. The defendant will have every opportunity of challenging the facts and the law afterwards at the trail. The judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar. He is not in the least bound by the provisional view expressed by the judge in chambers who gave leave.".

My last comment relates to the relationship between the common law and the Limitation Act. Salmon, J.A. in his dissenting judgment in Cozens, expressed the view that only very clear words which did not exist in the English Limitation Act 1963, could take away a person's fundamental rights, in the following way:

“I start from the point that the general rule of the law is that the courts will not make orders, in legal proceedings affecting a party’s rights without giving that party an opportunity of being heard … To my mind very clear words would be required to take away fundamental rights which are ordinarily accorded by the law and indeed by natural justice.”.

What is clear from this observation of Salmon, L.J., is the admission that statute can take away or limit fundamental rights or those given by the general rule of law which can also be described as the common law. It cannot therefore, be said that the common law has an unassailable status. If this is so, even where statute law and the common law are held to be of equal standing, then a fotiori, on the assumption that in Kenya, the common law is of a lower standing than statute law, statute law can make greater inroads into the common law. Although no very clear words to that effect, were employed in the English Limitation Act, it was held in Cozens that the clear intention apparent in the Act, and which would do, made inroads into the common law or general rule of law, by providing in sections 1 and 2, and exception to the general rule that a party against whom an ex parte order has been made, can apply to the court which made the order to set it aside.

I have already alluded to the conclusions contained in the judgments of My Lords Shah and Bosire and the reason thereof, that the appeal be dismissed with costs with which I have already agreed. It is therefore now so ordered.

Dated and delivered at Nairobi this 26th day of May, 1997.

A.M. AKIWUMI

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JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: AKIWUMI, SHAH, JJ.A. & BOSIRE AG.J.A.)

CIVIL APPEAL NO. 195 OF 1995

BETWEEN

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JUDGMENT OF SHAH, J.A.

I have had the privilege of studying the judgment in draft of Bosire Ag.J.A and whilst I agree with the end result of the appeal I am unable to agree with him on the issue as to what steps a defendant, who is confronted by an order made ex-parte by a judge of the superior court pursuant to provision in sections 27 and 28 of the Limitation of Actions Act, cap.22, Laws of Kenya (the Act), can take to challenge such order.

By virtue of section 28(1) of the Act an application for leave of the superior court (for the matter of the subordinate court, if the proposed suit is to be filed in 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) mandates that the such application "shall be made ex-parte." This situation is reinforced by provision in order XXXVI rule 3C of the Civil Procedure rules which reads.

"3C(1) An application under section 27 of the Limitation of Actions Act made before the Filing of a suit shall be made ex-parte by Originating summons supported by affidavit.

(2) Any such application made after the filing of a Suit shall be made ex-parte by summons in that suit supported by affidavit."

In a situation such as I have outlined the defendant only becomes aware of the order extending time when he is served with the summons, plaint and the order extending time. There is no provision in the Act itself to enable the defendant to have the order extending time set aside. In my humble view the only time when such a defendant can challenge the order granting extension of time is at the time of the trial, either on facts brought out at the trial, or by way of arguments at the trial if circumstances and facts allow such arguments at the trial, that is to say if there is no dispute as to facts.

I am not alone in what I say. In the case of Yunes K. Oruta & Another v. Samwel Mose Nyamato, (Civil Appeal No. 96 of 1984), unreported (Nyarangi, Platt & Gachuhi JJ.A.) it was held that the issue of challenge to the granting of leave to file suit out of time can only arise at the trial. Gachuhi JA, in the leading judgment in ORUTA case said:

"It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the limitation of Actions Act particularly where leave to file an action against the defendant has been granted ex-parte."

Gachuhi JA, in the ORUTA case relied on the decisions of the majority judgments of the Court of Appeal in England in the case of Cozen V. North Devon Hospital Management Committee & Another (1966) 2 All E.R. 799. In the COZEN case it was held:

"Although it was a general principle in regard to ex-parte orders that the party affected by the order could apply for it to be discharged, yet it would be contrary to the intentions of the Limitation Act 1963 to allow a defendant to apply, before the trial of the action, to set aside an ex-parte order obtained under section 2(1) giving leave for the purpose of section 1(1)(a)".

It must be remembered that sections 1 and 2 of the English Limitation Act of 1963 are in pari materia with sections 27 and 28 of the Act.

Gachuhi J.A said further in the ORUTA case:

"The respondent having obtained leave to file action as require by the law, that order can only be queried at the trial but not by application to discharge it otherwise the provision of the Act in providing for obtaining an order ex-parte will be rendered nugatory."

Platt J.A said in ORUTA case:

"I agree that this court should repectfully adopt the reasoning in Cozen v. North Devon Hospital Management Committee (1966) 2 All E.R. 799. It follows that the defendant can only challenge the extension of time in trial itself and not by a preliminary application. This is an exception to the general rule that the parties affected by an ex-parte order can seek to set it aside under the principles of natural justice."

Nyarangi J.A in the ORUTA case stated in his characteristic style:

"I am quite clear that the judgment of Gachuhi J.A is right"

But the ORUTA case does not stand by itself. It was referred to in the case of Mbithi v. Municipal Council of Mombasa and Another, (Civil Appeal No. 3of 1992), unreported (Gicheru, Kwach & Muli JJ.A). Kwach J.A in the MBITHI case said this:

"It would appear that notwithstanding the provisions of section 27 of the Act, the question whether or not the plaintiff was entitled to the extension can only be challenged in the proceedings. This is one of the exceptions to the general rule that a party against whom an ex-parte order has been made, can apply to the court which made the order to set aside. The court of Appeal in England in the Cozens vs. North Devon Hospital Management Committee (1966) 2 All E.R. 799, held that although it was a general principle in regard to ex-parte orders that the party affected by the order could apply for it to be discharged, yet it would be contrary to the intention of the Limitation Act 1963 to allow a defendant to apply, before the trial of the action, to set aside an ex-parte order obtained under section 2 (1) giving leave for the purposes of section 1(1)(a) of the Act."

Kwach, J.A went on to say, in the MBITHI case, that Cozen's case was cited with approval in the case of Yunes Oruta & Another v. Samel Nyamoto (Civil Appeal No. 96 of 1984 - unreported).

I see the correct reasoning in the ORUTA and MBITHI cases. The judge who heard the application for extension of time must first hear it (in case of application filed before filing of suit) ex-parte. He has no discretion in the matter. He is bound by the requirements of the Act. If the evidence shows prima facie that the requirements of the Act are satisfied, leave should be given. It is in the action only that the defendant can challenge the facts in due course. This is, because, in my view, the requirements of section 27 of the Act are explicit and the judge cannot go beyond the scope of those requirements. He cannot for instance grant leave out of sympathy, or because the applicant did not know the law etc.

In the High Court case of Mweu v. Kabai & Another (1972) E.A. 242, Trevelyan J. (as he then was) after hearing very full arguments on an ex-parte application, declined to extend time to file suit on the grounds that (i) knowledge of possible legal liability is knowledge of a decisive character, (2) the applicant knew that the other driver could be sued and (3) ignorance of the statutory period of limitation could not be a material fact within the section. Whilst considering the application Trevelyan J said at page 243 G:

"I will only add that the application for leave is, under s.28, made ex-parte, so that if leave be given the issue may be re-activated in the proceedings authorized, and that the sections to which I have drawn attention are based on, and follow, those (though they are otherwise numbered) in the English Limitation Act, 1963."

At page 245 of the MWEU case Trevelyan J states:

"I recognize that I have no discretion in the matter one way or the other. The Skingsley case says, and

says, clearly enough, that if evidence showing prima facie that the requirements of the Act are satisfied, leave should be given leaving the defendant to challenge the facts in the action in due course."

The Skingsley case referred to by Trevelyan J. is that of Skingsley v. Cape Asbestos Co (1962) 2 LI. Rep.201. In that case Lord Denning M.R. said at page 203

"In my opinion, therefore, Mr. Skingsley had adduced evidence which shows prima facie that the requirements of the Act are satisfied. If so, leave should be given for the purposes of Sect.1 of the Act. It is not a matter of discretion. Once the evidence satisfied the statute, the judge must grant leave. But it must be remembered it is ex-parte. So, in due course, the defendants will have an opportunity of challenging the facts and fighting the case."

In the same case (Skingsley) Davies L.J. said;

"Whether or not the defendants at the trial will be able to challenge the facts presently placed before this court, we, or course, do not know.

Russell L.J. said (in the Skingsley case):

"The statute does not seem to me by its language to confer a discretion but merely a jurisdiction to decide whether the requirements of the statute are or are not fulfilled. That decision of course involves points on which judicial mind may, as in the present case, differ."

So that, in my view, the trial judge will not be sitting in appeal on the findings of the judge who granted leave in the first instance. His job would primarily be to decide if the leave was factually and legally properly obtained. There may be cases where medical evidence may be misleading enough to enable one judge to grant such leave but when correct medical data may be brought forward by the defendant, the picture may drastically change. There may be clear cases where the applicant may swear to facts which are not true, which can only be challenged at the trial. There may even be cases where a judge, because of the work-load in the superior court, may not have time to apply his mind to the strict requirements of the Act which Act of course limits the granting of such leave in respect of personal injury, Fatal Accidents Act, and the Law Reform Act claims only. Often the interpretation of section 27,28 and 29 of the Act, as explained in section 30 of the Act may not have been brought to the attention of the judge.

On 11th October, 1996 this court in the case of Michael Maina & Another v. Stanley Kigara Kagombe (Civil Appeal No. 109 of 1996, unreported) (Gicheru, Lakha JJ.A and Bosire Ag.J.A.) said:

"It follows, therefore, that, in our judgment, the order of Githinji, J. granting an extension stands and is binding on the parties. But that means that the order stands until it has been effectively set aside. And such an order, where the objection to it is of the character here set up by the appellants, can only be so set aside in an action or proceeding directed to that special end. The appellants' complaint that the respondent's suit was time barred cannot succeed, the provisions of S.109 of the Kenya Posts & Telecommunications Act, Cap 411, notwithstanding"

I am afraid, with the greatest of respect to the judges of appeal who heard the Michael Maina case, I am unable to agree with them when they said that (or what it amounted to) Ringera J. was not entitled to declare, as he did, that the order of Githinji J. was erroneous. The trial court is entitled to, in my humble view, hear the challenges hurled at the ex-parte order and decide whether or not the ex-parte order was correctly obtained by the applicant. That Bench followed the decision in Graig v. Kanseen (1943) 1K.B. 256 which decision seems to turn on to the issue as to whether or not an order which is a nullity can be set aside ex debito justiciae. All cases relied in Michael Maina case were decided prior to the coming into force of the Act and I would with extreme trepeditation venture to disagree with the ratio decidendi of that case. It is of interest to note that pursuant to what was ruled in the Michael Maina case the appellants went back to the superior court and sought a review of the order of Githinji J. On 14th November, 1996 Githinji J. ruled thus:

"The Court of Appeal, as I have indicated before, held that the order granting ex parte leave was binding unless it is set aside by an action or proceeding directed to that special end. To that extent the decision of the Court of Appeal in Michael Maina and Kenya Posts & Telecommunication Corporation v. Stanley Kagambe C.A. No.109 of 1996 is not only inconsistent with its decision in Yunes K. Oruta but also revolutionary."

Speaking for myself I would go by the ratios decidendi of the decisions in ORUTA and MBITHI cases and say that the issue as to whether or not leave to file suit out of time was granted properly or not is a matter to be challenged at the trial stage and not by a review application.

Despite my obvious different views on the issue of limitation this appel succeeds in any event and I would dismiss the appeal with costs, as I entirely agree with Bosire Ag.JA when he says that the learned trial judge was bound to come to the conclusion that the appellant did not on a balance of probabilities prove her case.

Dated and delivered at Nairobi this 26th day of May, 1997.

A.B. SHAH

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JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: AKIWUMI, SHAH, JJ.A. & BOSIRE AG.J.A.)

CIVIL APPEAL NO. 195 OF 1995

BETWEEN

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JUDGMENT OF BOSIRE AG. JA.

The appellant, Mary Wambui Kabugu, is the widow of Kabugu Mutua who was knocked down on or about 8th October, 1980 at about 8.30p.m. by motor vehicle registration No. KVM 957, which was then owned by the respondent and, as a result sustained serious bodily injuries. The appellant did not become aware of the accident until about three days later when after inquiries at several police stations, mortuaries and hospitals, she found her husband admitted at Kenyatta National Hospital in critical condition, and learnt from the nurses who were attending him that he had been knocked down and injured by the defendant's motor vehicle.

This appeal arises from a suit Kabugu Mutua instituted in the superior court for damages for the injuries he sustained in that accident. In the suit, which was filed sometime in 1988, over seven years after the accident, he alleged in the plaint that the accident occurred due to negligence on the part of the respondent's driver in the manner and speed at which he drove the accident motor vehicle. The respondent in a written statement of defence denied its driver was in anyway to blame for the accident and, also, averred that the suit was statute barred.

Kabugu Mutua did not, however, live long enough to prosecute his suit to the end. He is said to have been violently killed by thugs on or about 24th March, 1993. Upon application the appellant was, on 31st January 1994, substituted as the legal representative of her deceased husband's estate for purpose of that suit. The suit came for a hearing on 8th May, 1995 before Ringera, J. The appellant was the only witness who testified in support of the plaintiff's case. In her evidence she stated that she neither witnessed the accident in which her husband was injured nor did she know whether or not the driver of the accident motor vehicle was ever charged for causing the accident. Because of that the respondent opted not to call any witnesses or adduce any evidence on the accident.

It should be noted at the outset that before the trial commenced counsel then appearing for the respondent, Mr. Njuguna, tried to raise, in limine, the issue of limitation in bar of the action. He stated from the bar that on 27th September, 1988, which was many months after the suit had been filed, leave had been obtained, presumably under Section 28 of the Limitation of Actions Act, cap 22 Laws of Kenya, to institute or proceed with the suit nothwithstanding that the time limited for bringing an action in tort had expired. Mr. Njuguna urged the view that the leave was improperly given. Before he could elaborate, the trial judge cut him short and made the following observation:

"Where leave is granted to file suit out of time it can only be challenged at the trial not by way of preliminary objection but on evidence and submissions".

In his final submissions in the suit and in obedience to that observation Counsel for the appellant, Mr. Waigua, submitted that the deceased's husband lost his mental faculties and orientation as a result of the injuries he sustained in the subject accident that he became disabled for sometime. Consequently, he was ignorant of material facts and his circumstances were, therefore, within the ambit of Section 27 of the Limitation of Actions Act as entitled him to leave. With regard to the accident he submitted that the appellant had adduced evidence to show an accident did occur in which her husband had been injured and, because the respondent did not adduce controverting evidence liability could be apportioned equally between the parties.

Mr. Njuguna conceded that the appellant had proved by evidence, that an accident occurred, but did not think that any evidence was adduced to establish negligence on the part of the driver. On the issue of limitation he submitted that the appellant's husband having deponed in an affidavit in support of his application for leave that he became aware of the fact of his accident in 1986 any disability he may have had ceased then, and he was obliged to but did not file suit within twelve months thereafter. Consequently, his suit having been filed in 1988, more than twelve months after 1986, it was statute barred. In effect his submission on that score was that leave to file suit out of time was improperly granted. The appellant did not however, adduce any evidence on the leave her late husband had obtained to bring the action.

In his judgment Ringera J, after setting out the relevant facts held, firstly, that the appellant had failed to prove on a balance of probabilities, that the accident in which her husband was seriously injured was caused by negligence on the part of the respondent's driver, and that on that ground alone he would dismiss the suit. Secondly, that on the material that was before him the defence of limitation was available to the respondent on the ground that :"…the purported leave granted to file the suit out of time was obtained as a result of what appears to me to be improper exercise of discretion." He went on to state further that on the evidence which was before him the appellant's husband was not under ignorance of the material facts of the accident; in his view, because he was discharged from hospital about three months after the accident and therefore must have sufficiently recovered as to have become aware of the material facts. On the basis of those two grounds he dismissed the suit. He then proceeded to assess damages which he would have awarded had the action succeeded. The figure he assessed is not material considering what I propose to say hereafter.

The age long principle of law is that he who alleges must prove. The appellant's case in the court below was that her husband was seriously injured in a road traffic accident due to negligence on the part of the respondent's driver. She did not, however, adduce evidence to establish that fact or any blame on the respondent. Her evidence on the accident was simply that she looked for her husband who had not been seen for three days and found him admitted at Kenyatta National Hospital with multiple injuries and in critical condition. She did not, of her own knowledge, know how he had sustained those injuries. The nurses who told her about the accident which gave rise to this suit were not called to testify. Nor did the appellant call any eye witness or witnesses to the accident to testify on it. She did not also call any other evidence from which some inference could be drawn as to the cause of the accident. In those circumstances the learned trial Judge was bound to come to the conclusion he did that the appellant did not on a balance of probabilities prove her case. On that ground alone I would dismiss the appeal. There is, however, the thorny issue of limitation. The trial Judge reopened the issue of leave to bring the suit out of time and concluded that the evidence which had been laid before a Judge of equal jurisdiction in support of the application for leave, was insufficient and the leave should not have been given. He was of the view that that Judge had improperly exercised his judicial discretion in the matter with the result that the leave he had granted was inconsequential.

The jurisdiciton of the court to grant leave to file a suit out of time is donated by <u>Section 28 of the Limitation of Actions Act.</u> Section 27 of the Act sets out conditions which must be satisfied before such leave may be granted. If an applicant satisfies those conditions the court handling his application has no discretion in the matter. It must grant the lave sought. Lord Denning M.R., while commenting on an English statutory provision in <u>pari Materia</u> with our section 27, above, stated in the case of <u>Skingley v. Cape Asbestos Co. Ltd</u>(1968) 2 Lloyds L.R. 201, AT p.203, thus:

"In my opinion, therefore, Mr. Skingsley had adduced evidence which shows <u>prima Facie</u> that the requirements of the Act are satisfied. If so, leave should be given for the purposes of section 1 of the Act. It is not a matter for discretion. Once the evidence satisfied the statute, the Judge must grant leave. But it must be remembered that it is <u>ex parte</u>. So, in due course, the defendants will have an opportunity of challenging the facts and fighting the case. All I say is that leave should be granted."

So to the extent that the trial Judge held that a Judge who hears an application under S.28, above, exercises judicial discretion, I am respectfully unable to share the same view. Like the learned Law Lords in the case I have cited, above, I think that the language in the section merely confers jurisdiction to grant leave if the requirements of section 27 of the Act are fulfilled.

An issue which immediately presents itself is whether, as happened in the matter under consideration, a trial Judge of the suit authorised has the jurisdiction to revisit the issue of leave and ignore it if he comes to the conclusion that it should not have been given. Lord Justice Russell, in the English case cited above recognized that in the exercise of the jurisdiction conferred to the court to give leave, different Judges may come to different conclusions on the same points. The relevant section does not, however, expressly or by implication state that the matter may be revisited at the trial. The English Courts have, however, held that the leave which a Judge in chambers grants is provisional and may either be confirmed or rescinded when the suit authorised by the leave comes for trial and after the defendant has been heard.

The English Court of Appeal said so in Skingley's Case (supra), among other cases. The rationale for that conclusion is the age long principle in the English Civil practice that ex parte orders are provisional. That until the other side is heard on the matter the leave, which by the relevant provision of the Limitation Act, 1963, must be given upon an ex parte application, is provisional.

The Kenyan Limitation of Actions Act, is substantially the same or in pari materia with the relevant provisions of the English Llimitation Act, 1963. Because of that courts in Kenya have tended to adopt the English reasoning on the handling of orders given in applications for leave to file suits out of time pursuant to an application under Section 28 of the Limitation Act. For instance in the case of Mweu v. Kabai & Another (1972) EA.242, Trivelyon J held, obiter, that the issue of whether or not leave under that section was properly given may be:

"….re-activated in the proceedings authorised and that the sections to which I have drawn attention are based on, and follow those (though they are otherwise numbered) in the English Limitation Act, 1963."

That was a High Court decision. This Court in decisions in the cases of

Yunes Oruta & Another v. Samwel Mose Nyamato Civil Appeal No. 96 of 1984, and Bernard Mutonga Mbithi v. Municipal Council of Mombasa & Another, Civil Appeal No. 3 of 1992, given on 22nd June, 1988 and 22nd January, 1993, respectively, followed the same reasoning applying the English Court of Appeal decision in Cozens v. North Devon Hospital Management Committee (1963) 2 ALL ER 799. Kwach JA, who gave the leading Judgment of the Court in the second case to which the other members agreed with stated, I think obiter, as follows:

"It would appear that notwithstanding the provisions of section 27 of the Act, the question whether or not the plaintiff was entitled to the extension can only be challenged in the proceedings. This is one of the exceptions to the general rule that a party against whom an ex parte order has been made can apply to the court which made the order to set it aside."

In a more recent decision of this court in the case Michael Maina & K.P. & T. Corp. v. Stanley Kigara Kigombe Civil Appeal No. 109 of 1996 a conflicting view was expressed. Both decisions of this court, above, were not drawn to the attention of the court in the case. It is not clear whether the court would have come to the same conclusion had its attention been called to the both cases. Be that as it may in those two earlier decisions of this court, on the question of leave under Section 28 of the Limitation Act, English decisions and principles were applied. I do not think that had the provisions of Section 3 of the Judicature Act, Cap 8 Laws of Kenya been drawn to the court's attention in those cases it would have come to the same conclusion.

It must, however, be noted that English decisions have to be looked at against the law and practice of civil courts in England, and when applied in this country local law and circumstances must be taken into account. The correctness of the English decisions when viewed on the basis of the law and circumstances in England cannot be doubted. However, viewed in the context of the Kenyan circumstances their application may in certain cases raise difficulties. For instances when considering whether or not leave should be granted to an intending plaintiff to file action out of time English Courts invoke common law principles to modify the requirements of the Limitation Act, 1963. Salmon L.J, in the Cozen Case (supra), said:

"I start from the point that the general law is that the courts will not make orders in legal proceedings affecting a party's rights without giving that party an opportunity of being heard."

So English courts incorporate common law principles into statutory provisions unless they are expressly excluded by the statute. Accordingly the statutory requirement that an intending plaintiff who otherwise has no right of action because of the limitation provisions may apply ex parte for leave to file suit out of time, is modified by common law principles. That is possible in England because, as I stated earlier, unless the common law principle is expressly excluded by statute, it occupies an equal position to statute law (see Leach v.R.(1912) AC.305). So where a statute tends to deprive a party of his right at

common law the courts will construe the statutory provision to incorporate the common law right. In case of leave to file a suit out of time English courts consider the leave granted as subject to the defendant's common law right to be heard on the issue and, hence the re-activation of the issue of leave in the proceedings authorised.

Why is the Kenyan situation different? In Kenya unlike England we have the Judicature Act, which, under Section 3 (1) thereof sets out what constitutes the Law of Kenya and the ranking in status of that law. The constitution which is a written law is at the top; and subject thereto local statutes and specified English Statutes; subject thereto the common law, doctrines of equity and statutes of General Application in England as at the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date. In Kenya therefore, a common law, principle or practice of English courts is subordinate to local statute law and may only be applied if it does not conflict with the statute. That being so, and whereas a local statute may be substantially the same or in pari materia as an English one, because of the ranking of our laws common law principles may not be applied slavishly to modify the clear provisions of a local statute.

Also, of significance is the principle that a Judge of equivalent jurisdiction should not appear to be sitting on appeal against the decision of his colleague. That is likely to cause embarrasment more so if the Judge at the trial of the authorised suit does not receive any additional evidence to that given in the application for leave and is forced to come to a different conclusion. Jurisdiction of our courts is conferred by statutes and the High Court, for instance, does not have the jurisdiction to sit on appeal against decisions of the same court. It may review or set aside its own decisions on specific grounds which are clearly spelled out in the relevant provisions of the law. There is no jurisdiction donated under the Limitation of Actions Act to interfere with leave given under section 28 of the Act. Nor can inherent jurisdiction be invoked to interfere unless an appropriate application is brought in exercise of that jurisdiction where no clear empowering provision exist to set aside or vary the order. It should be noted that under Section 28 (1), above, rules may be made to provide for the hearing inter partes of an application made under the section but after a suit has been filed. Section 28 when read closely in conjunction with O.XXXVI rule 3C, above, it becomes clear that parliament in enacting the section deliberately intended to deny the defendant a hearing in an application under that section. Moreover if it had intended that the defendant be heard it would not have been difficult to say so. Indeed in the case of Bernard Mutonga Mbithi (supra) the court did not think a defendant should be heard in an appeal by an intending plaintiff against the refusal of leave. . So that to reopen the matter of leave at the trial is to act utra vires the Act, whose object as Denning M.R. put it in the case of Clark v. Forbes Stuart (1964) 2 ALL ER 287,

"… to remedy hardship whereby a person might suffer from a disease such as pulmoconiosis caused by somebody's fault and not know of it until after the three years period of limitation had expired."

It will be absurd, in my view, if, for instance, as in the Benard Mutonga Mbithi case, above, where this court had considered the issue of leave, for the trial Judge to come to a different finding.

To my mind, therefore, apart from merits of the suit authorised, which is one of the factors the Judge handling the application for leave has to generally consider to discern whether a cause of action is disclosed and which in any case a Plaintiff is under a duty to establish, a trial court has no right of reactivating the issue of leave. I think therefore, that the trial Judge of the matter before us fell into error when he proceeded to consider whether or not leave was properly given. But because I have come to the conclusion that the appellant did not establish her case at the trial of her suit I would dismiss the appeal my conclusion on the issue of limitation notwithstanding.

I do not consider it necessary to deal with the issue of the appellant's legal capacity as legal representative of her deceased husband's estate in absence of a grant either of probate or letter of administration the issue having not been convassed at the trial, and counsel for the Respondent, Mrs Thuku, having not complied with the provisions of rule 91 of the Rules of this court.

In the result and for the reasons I have endeavoured to give above I would dismiss the appeal with

costs.

Dated and delivered at Nairobi this 26th day of May, 1997.

S.E.O. BOSIRE

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AG. JUDGE OF APPEAL