REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KWACH, SHAH & PALL, JJ.A.

CIVIL APPEAL NO. 261 OF 1996

BETWEEN

TRANSWORLD SAFARIS KENYA LIMITED.....APPELLANT

AND

SOMAK TRAVEL LIMITED.....RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nairobi (Juma J) dated 16th November, 1995 in H.C.C.C. NO. 2271 OF 1995)

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RULING OF THE COURT

Mr. Ransley, who appeared with Miss Janmohamed, for the appellant in this appeal, made an oral application before this Court for an order that this appeal be heard by a five judge bench of this Court in view of conflicting decisions of this Court on the procedure to be adopted or applied for challenging a grant of extension of time for filing a suit against a tort-feasor out of time when the superior court has extended such time pursuant to provision made in that behalf in section 28 of the Limitations of Actions Act, Cap. 22, Laws of KeTnhyea (ctohnef liAcctt).of judicial opinion on the aforesaid issue is certainly there. Nyarangi, Platt & Gachuhi JJ.A in the case of ORUTA & ANOTHER V SAMWEL MOSE NYAMOTO , (Civil Appeal No. 96 of 1984, Unreported), held unanimously that grant of such leave can only be validly challenged at the trial of the suit filed after grant of such leave. Again in the case of MBITHI V MUNICIPAL COUNCIL OF MOMBASA & ANOTHER , (Civil Appeal No. 3 of 1992, Unreported), Gicheru, Kwach & Muli JJ.A, held in similar vein.

However, Gicheru & Lakha JJ.A & Bosire Ag. JA in the case of MICHAEL MAINA V KENYA POSTS & TELECOMMUNICATIONS CORPORATION , (Civil Appeal No. 109 of 1996, Unreported), held that an order extending such time can only be set aside in an action or proceeding directed to that special end. Whilst saying so that Court did not decide what procedure such "action or proceeding directed to that special end" could be adopted; but it could be gleaned that such procedure could be by review of the ex-parte order.

However, when these conflicting decisions came up for review in the case of MARY WAMBUI KABUNGU V KENYA BUS SERVICES LTD , (Civil Appeal No. 195 of 1995, Unreported), Akiwumi

& Shah JJ.A (Bosire Ag. JA dissenting) held that the proper procedure for challenging the grant of such leave was that it can only be done at the trial of the suit thereby following the ratios decidendi of the ORUTA and MBITHI cases (supra). Shah JA in the KABUNGU case said:-

> "I am afraid with the greatest 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 view, hear the challenges hurled at the exparte 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] 1 K.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 justitiae. All cases relied on in MICHAEL MAINA case were decided prior to coming into force of the Act (The Limitations of Actions Act) and I would with extreme trepidation venture to disagree with the ratio decidendi of that case."

Akiwumi JA with regard to the observations of Bosire AG. JA in MICHAEL MAINA case in his dissenting judgment in KABUNGU case said this:-

> "My last comment relates to the relationship between the Common Law and the Limitation Act. Salmon LJ in his dissenting judgment in COZENS , expressed the view that only very clear words which did not exist in the English Limitations Act 1963, could take away a person's fundamental rights, in the following way:-
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> "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."
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> What is clear from this observation of Salmon LJ, 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 fortiori, 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 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 & 2 an 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 is aside."

It is worth referring to what Gachuhi JA, Platt JA & Nyarangi JA said in the ORUTA case. "Gachuhi JA said:-

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

Platt JA said:-

> "I agree that this Court should respectfully 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 seek to set it aside under the principles of natural justice"

Kwach JA in the MBITHI case said:-

> "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. The court of appeal in England in the COZEN V 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 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 (2) (a) of the Act."

We have set out the area and points of conflict of judicial opinion to put the same in their proper perspective. But the appeal which is now before us is in respect of breach of duty to take care which breach allegedly resulted in an aircraft (balloon in this case) accident. It appears to us that neither Mr. Ransley nor Mr. Hira has considered the issue that the cause of action based on negligence of the pilot in the employment of the appellant (if there be such cause of action pleaded) is not time-barred in the sense of the words "time-barred". Under the relevant legislation applicable to Kenya, the 1953 Carriage by Air Act (Application of Provisions) (Colonies Protectorates & Trust Territories Order), the right to claim damages is extinguished (not timebarred) (the words in brackets are added by us for avoidance of doubt) as per Article 29 of that Order. Extending time under the Act can in our view apply to ordinary negligence which results in death or causes bodily injury to the claimant. But once a cause of action is extinguished it cannot be revived. However, the less we say about it at this stage the better as we have not had the benefit of full argument. There is substantial case law on this issue.

Nor have both Counsel considered the issue that the cause of action in the plaint is based entirely on breach of contract and not on alleged negligence of the pilot. The issue of extinction of the cause of action was pleaded in the defence when probably there was no need to plead the same.

We imagine such pleading was ex-abundanti cautela. Equally Mr. Hira obtained leave for extension of time after being confronted with that part of the defence which refers to extinction of the cause of action. Again it was probably done ex-abundanti cautela. We would also point out that if the superior court were to go by the ratio decidendi of MICHAEL MAINA case it still would have to adjudicate on the appellant's application to set aside the ex-parte order of Juma J. That application is still pending. If the superior court were to go by the ratio decidendi of the other cases referred to by us earlier even then this appeal is still premature.

Having said this, our view is that the application for constituting a five judge bench to hear this appeal is misconceived. Even if the same was not misconceived, a three judge bench can direct its mind to the conflicting authorities and decide which of the conflicting decisions to follow. See DODHIA VS NATIONAL & GRINDLAYS BANK LTD & ANOTHER [1970] E.A. 195 at page 109 I. The oral application by Mr. Ransley is dismissed with costs to the respondent in any event.

Dated and delivered at Nairobi this 5th day of November, 1997.

R. O. KWACH

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR