



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CIVIL APPEAL NO. 116 OF 1997

BETWEEN

MARY WAHITO (A MINOR SUING THRU' NEXT FRIEND

GLADYS WAIRIMU WAIGURU.....1ST APPELLANT

GLADYS WAIRIMU WAIGURU.....2ND APPELLANT

AND

KENYA POSTS & TELECOMMUNICATIONS CORPORATION.....1ST RESPONDENT

DAVID CHEMOS CHEBEN.....2ND RESPONDENT

**(Appeal from a Judgment and Decree of the High Court of
Kenya at Nyeri (Justice Ang'awa) dated the 27th
June, 1994
in
H.C.C.C. NO. 89 OF 1992)**

JUDGMENT OF THE COURT

This is an appeal against the decision of the High Court of Kenya at Nyeri (Ang'awa, J.) dismissing a claim by the appellants for damages, arising out of an alleged negligent driving by the second respondent of a motor vehicle belonging to Kenya Posts & Telecommunications Corporation, the first respondent in this appeal.

The action by plaintiff was not filed until one year and four months after the accident and the respondents pleaded that under Section 109 of Kenya Posts and Telecommunications Corporation Act Cap 411 Laws of Kenya (the Act) the suit was time barred and could not be maintained. The validity of this defence is the sole subject for consideration in the appeal before us.

The facts giving rise to the cause of action are that the second respondent was employed by the first respondent as one of its drivers. On the new year's day, 1st January, 1991, he was instructed to drive the first respondent's motor vehicle registration number KUL 819 from Nyeri to Mukurwe-ini to deliver engineering equipment for the installation of STD exchange line. Also, on board the vehicle were technicians being ferried to the site. At about 10:15 a.m. along the Mukurwe-ini-Gakindu Road in the course of such journey the accident in respect of which the action is founded occurred. Section 109 of the

Act is as follows:-

"Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect -

(a) the action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceedings, has been served upon the Managing Director by the plaintiff or his agent;

(b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof."

In the trial before the learned judge, Mr. Billing who appeared for the respondents invoked the protection of the above section and urged in the main that owing to the lapse of time, the action is unsustainable. However, we did not have the benefit of his submission in this appeal since he made no appearance. In a reserved judgment the learned Judge found for the respondents and dismissed the suit accordingly as above stated. Against that judgment, the appellants have now appealed on two main grounds.

Mrs. Waweru, counsel for the appellants, submitted in their main ground of appeal that the learned Judge erred in deciding that the suit was time-barred under section 109 of the Act. She argued that from the wording of the section it is not every act done by the first respondent corporation giving rise to a cause of action which is protected. She averred that negligence is not a statutory duty and that the negligent acts of the driver are not authorised acts in the execution of a public duty. She referred us to the decision of Githinji, J. in *Stanley Kigara Kagombe vs Michael Maina & Another Nairobi H.C.C.C. NO. 3762 of 1993* (unreported) wherein the learned Judge held:-

"But I do not think that the suit as filed is prima facie time-barred. I say so because from the wording of S.109, it is not every act done by the corporation giving rise to a cause of action which is protected. It is only acts done or omissions

"in pursuance or execution, of this act or of any public duty or authority or in respect of any alleged negligence or default in the execution of this Act or any such act or authority".

which are protected. In other words, it is only intra vires acts or acts done in execution or intended execution of public duty or authority which are protected. Section 109 is definitive and restrictive unlike S.3 (1) and (2) of Public Authorities Limitation Act (cap 239) and Section 4 of the Limitations of Actions Act which prohibit any proceedings or action being brought outside the prescribed limitation periods. ----- I conclude therefore that the limitation period in Section 109 of KP & TC Act does not apply to these proceedings and that it is the general limitations period of 3 years in section 4(2) of the Limitation of Actions Act which applies. If that period is applied to these proceedings then the suit is brought within the prescribed time and application for leave to extend the limitation period would be unnecessary."

In arriving at this decision the learned judge dealt with the matter before him upon sole reliance of the decision of the House of Lords in the locus classicus *BRADFORD CORPORATION VS. MYERS* [1916] 1 AC 242. In that case the defendants, a municipal corporation, were authorised by Act of Parliament to carry on the undertaking of a gas company and were bound to supply gas to the inhabitants of the district, and they were also empowered to sell the coke produced in the manufacture of the gas. The defendants contracted to sell and deliver a ton of coke to the plaintiff, and by the negligence of their agent the coke was shot through the plaintiff's shop window. More than six months afterwards the plaintiff commenced an action of negligence against the defendants. The defendants pleaded s.1 of the Public Authorities Protection Act, 1893, as a bar to the action. It was held that the act complained of was not an act done in

the direct execution of a statute, or in the discharge of a public duty or the exercise of a public authority, and that the Public Authorities Protection Act, 1893, afforded no defence to the action.

However, Viscounts Haldane and Maugham expressed the views that it was difficult to know where the line between protection and non-protection should be drawn and that what causes of action fall within these categories may be very difficult to say abstractly or exhaustively.

In the case before us the second respondent was not on a frolic of his own on the material day, which was a National Holiday in this country. He was officially assigned duties by his employer, the first respondent. Those duties involved the installation of telecommunications equipment for the use of the public. It was a public duty provided for by the Act. The accident occurred when the second respondent was driving to the site of the works. There is no evidence that he deviated from the normal route. He was engaged in the performance of his public duties in the service of the first respondent as driver. His driving was not merely an incidental act or something subsidiary thereto but directly a duty which the second respondent was required by the first respondent corporation to undertake and that duty was in connection with the latter's statutory operations. It must follow therefore that the respondents are protected by Section 109 of the Act.

But, we would agree with Githinji J. that all duties of a public officer are not necessarily public duties and that all drivers, whether with the employment of the first respondent or not, owe a general duty of care to all road users. We think that the learned Judge in Kagombe's case (supra) is also right when he held that the legislature did not intend to protect all proceedings and actions against the first respondent corporation.

However, it is apparent that the Legislature in enacting the Act intended to limit, as against the general public and in favour of the first respondent corporation and its employees, the period for bringing certain actions already fixed by existing statutes like the Limitation of Actions Act. Cap 411 is not inferior to any other statute. In HALSBURY'S LAWS OF ENGLAND Vol.28 paragraph 601 it is stated:

"All statutes of Limitation are analogous and should receive a uniform construction; they are beneficial statutes, and are to be construed liberally and not strictly. Besides the general statutes relating to limitation of actions there are special statutes fixing special periods of limitations in particular cases."

We derive most help from this statement of law. Section 109 is a special section in the statute which fixes special periods of limitation in particular cases. In this appeal, we would think that the learned Judge (Ang'awa, J.) came to the correct conclusion when she held that the neglect complained of arose in the execution of a public duty and that section 109 of the Act applies.

It was further argued by Mrs. Waweru that the learned trial judge was in error to ignore the order extending time to institute the suit. It is to be noted that the order so obtained was sought and granted ex-parte.

It was challenged during the trial and its validity became an issue which the learned Judge considered at length and held that the order for extension should not have been granted. This ground of appeal, therefore, is rejected and must fail.

For these reasons we dismiss the appeal with no order as to costs.

Dated and delivered at Nairobi this 11th day of December, 1997.

J. E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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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