



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, LAKHA, J.J.A. & BOSIRE, AG.J.A.)
CIVIL APPEAL NO. 109 OF 1996**

BETWEEN

MICHAEL MAINA

KENYA POSTS AND TELECOMMUNICATIONS CORPORATION.....APPELLANTS

AND

STANLEY KIGARA KAGOMBERESPONDENT

(Appeal from the Judgment and Decree of the High Court of
Kenya at Nairobi (Justice Ringera) dated 28th day of
March, 1995

in

H.C.C.S. NO. 3762 OF 1993)

JUDGMENT OF THE COURT

This is an appeal by the unsuccessful defendants from a decree of the superior court (Ringera, J.) delivered on March 28, 1995 whereby he ordered the appellants to pay general and special damages arising from a road accident.

On November 10, 1991 the first appellant drove a Motor Vehicle Registration Number KZD 578 owned by the second appellant and as its agent along Karatina Nyeri Road when he collided with the respondent's Motor Vehicle Registration Number KRG 893 Datsun thereby seriously injuring him. His injuries included permanent blindness of the right eye, fracture of the right frontal bone, right clavicle, right 3rd 7th ribs, a fracture of the base of the first right metacarpal bone and the right leg, facial injuries and ruptured right quadriceps tendon and damage to the right eye. Following the accident, the first appellant was charged with the offence of careless driving contrary to Section 49(1) of the Traffic Act, Cap 403. He was found guilty and sentenced to pay a fine of Kshs.2,000/=. At the time of the accident, the respondent was aged 43 years and employed by Messrs. Hughes Limited (Agricultural Division) as a salesman/mechanic and his work entailed intensive driving. As a result of the accident and loss of vision, he was given an early retirement on medical grounds on July 17, 1992.

The appellants denied negligence on the part of the first appellant and pleaded that the accident was solely caused or alternatively substantially contributed to by the negligence of the respondent but, in any event, the suit was time barred by Section 109 of the Kenya Posts and Telecommunications Corporation Act, Cap 411. At the trial before the superior court the main thrust of the appellants' case was the defence of limitation which under the said Act required the suit to be filed within one year from the date of the accident and a brief submission on the issue of damages was also made.

The respondent gave evidence in support of his claim and so did the first appellant in support of the defence. The learned judge in a comprehensive and able judgment extending to about 43 pages dealt with the issues at hand and held that the suit was not statute barred. He also held that the accident was caused by the sole negligence of the first appellant and that the appellants were jointly and severally liable to the respondent to the full extent. He awarded general damages of Kshs.1,719,200 and special damages of Kshs.80,000 with interest and costs.

Against that award the appellants have now appealed to this Court and the only ground of appeal urged was that the respondent's suit was statute barred. There was no ground of appeal on the issues of liability or quantum and none was urged before us. The respondent, however, was also dissatisfied with the decision of the superior court and filed a cross-appeal both on the issue of limitation and the quantum of damages.

On the first ground of limitation the respondent contended that he had in fact obtained an order of the superior court (Githinji, J.) extending time for the filing of the suit, so that even if the appellants were successful in their contention that the claim was statute barred, it would be of no avail to them.

These then were the respective and rival contentions of the parties on appeal before this Court. In our view, logically the first question for determination is whether an extension was so obtained and, if so, its legal effect.

An application was indeed made on behalf of the respondent to extend the limitation period in the suit. This was by a formal application made ex-parte as is provided by Section 28 of the Limitation of Actions Act, Cap 22. It came up before the superior court (Githinji, J.) who in a considered Ruling delivered on October 13, 1993 granted the application and extended the period of limitation until August 3, 1993 when the suit had been filed. Githinji, J. clearly had jurisdiction to deal with the application and it appears that he granted the same regularly. At the date of the hearing, that ruling was in place, no application having been made by the appellants to set it aside and no appeal having been preferred against it. Assuming, without deciding, that Githinji, J. was in error in so doing, was Ringera, J. entitled to declare, as he did, that the same was invalid or that the discretion was not properly exercised? This will depend on the determination of the question which is one of the greatest importance from the point of view of proper administration of justice, namely, whether the order made by Githinji, J. was void or voidable. A helpful authority on this difficult question is the case of *Craig vs. Kanseen* (1943) 1 K.B. 256 where Lord Greene, M.R. at page 262 stated as follows:

"Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled *ex debito justitiae* to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary. I say nothing on the question whether an appeal from the order, assuming that the appeal is made in proper time, would not be competent.

The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity, or whether it was something worse, which would give the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper *ex parte* proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity, and not something which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained."

These principles have been applied locally; see *Ali bin Khamis vs. Salim Bin Khamis Kirobe & 2 others* (1956) 23 EACA 195 and *Govindji Popatlal Madhavji vs. Nasser Alibhai & Another* 1960 E.A. 167. As we have already intimated, Githinji, J. had the jurisdiction to deal with the application before him and there was no statutory requirement that it could not be ex-parte as it properly was. Even if his

decision were erroneous it does not render his order void for as was said by the Privy Council in *Malkarjun v. Narhari* 27 I.A. 216 at 225:

"In so doing the Court was exercising its jurisdiction. It made a mistake it is true: but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed."

As indicated above, the order of Githinji, J. granting an extension of time was *intra vires* his jurisdiction and is consequently not a nullity. If it were, the superior court may, in its inherent powers, upon the motion of the party aggrieved, set aside what in effect purported to be its own order. *Malkarjun v. Narhari* (*supra*) seems to show that where an error is a mere irregularity an appeal may be necessary, but if it renders the order a nullity this is not the case.

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 and Telecommunications Corporation Act, Cap.411, notwithstanding. In these circumstances, it is not necessary for us to determine if S.109 of the said Act applies to the facts of this case.

It remains for us to consider the question of damages as this is also properly raised by the respondent in his crossappeal. There are three complaints: first, it is urged that the general damages in the sum of K.Shs.500,000/= should be increased by a further sum of K.Shs.500,000/=. We have carefully considered the basis of the learned trial judge in making his award and are unable to find that there is any error in principle on this limb of the award. Nor does it appear to us that having regard to comparable awards with similar injuries this award is so low as to warrant an interference. We sustain the award of general damages made by the learned trial judge.

Secondly, it is argued that the learned trial judge erred in disallowing the claim for loss of earnings from the date of premature retirement on July 17, 1992 to the date of trial on March 28, 1995. This loss constituted special damages which the respondent had not pleaded by way of special damages. Nor were they quantified in the plaint although the same were capable of exact calculation. Special damages which are not pleaded and claimed specifically, cannot be allowed and, in our judgment, the trial judge was right in disallowing the same.

Thirdly and finally, it was contended that as regards damages for lost earnings, the learned trial judge erred in holding that a multiplier of 8 was fair and reasonable. It is not in dispute that the respondent was employed at a basic monthly salary of K.Shs.12,700/= and doubtless this would have been reviewed upwards. There is, however, no evidence of whether the respondent was in gainful employment after his premature retirement. In the circumstances, the learned trial judge was in no error in applying the multiplicand of K.Shs.12,700/= per month. He applied a multiplier of eight. His remainder of earning life was taken as 16 on the basis of retirement at 60. This, however, may not be necessarily correct. It could well be beyond that by about upto 10 or more years. There are the vicissitudes of life that must be borne in mind and also the fact of immediate capital payment in a lump sum. But the respondent had a steady employment without being prone to any great occupational hazards. We have considered the awards in comparable cases. In the particular circumstances of this case, with the greatest respect, in our judgment, the learned trial judge erred on the lower side. Having given most anxious consideration to the facts of this case and doing the best we can, a multiplier of 12 is, in our judgment, fair and reasonable. On that basis, the general damages related to loss of earnings shall be increased by a sum of K.Shs.600,000/= (rounded up).

For the reason above stated, the decree appealed against is varied by deleting the award of general damages awarded and substituting therefor the figure of K.Shs. 2,319,200/= as general damages. Save as aforesaid, the decree of the superior court is upheld.

The appeal is, therefore, dismissed with costs. The appellants shall also pay to the respondent one-half of the costs of the cross-appeal.

Dated and delivered at Nairobi this 11th day of October, 1996.

J.E. GICHERU

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

S.E.O. BOSIRE

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AG.JUDGE OF APPEAL

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

DEPUTY REGISTRAR