REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAPSABET

CIVIL DIVISION

CIVIL APPEAL CASE NO. E006 OF 2022

BERNARD KIPTANUI ROTICH::APPELLANT

VERSUS

GABRIEL BARASA:::DEFENDANT

[Being an appeal from the judgment of Hon. S.M. Mokua, Chief Magistrate delivered on 14th February 2022 in Kapsabet Civil Case No. 75 of 2014 between Bernard Kiptanui Rotich Vs. Gabriel Barasa]

JUDGMENT

1. This is an appeal from the judgment of the Chief Magistrate at Kapsabet in **Kapsabet Civil Case No. 75 of 2014,** delivered on 14th February 2022 in which the Appellant/ Plaintiff sued the Respondent/Defendant vide the statement of claim [plaint] dated 15th June 2015 wherein it was pleaded that the Defendant was at all material times the owner and/or beneficial owner of Motor Vehicle Registration No. KAE 311W in which the Appellant/Plaintiff was on the 23rd February 2003 lawfully travelling as a fare paying passenger when it was driven so negligently and recklessly along the Kapsabet-Chavakali road such that at a place called Denja

Corner it lost control and overturned thereby causing bodily injuries to the Plaintiff.

2. It was further pleaded that the Plaintiff suffered loss and damage as a result of the accident at a time that he was twenty eight [28] years, young robust and in good health. That, he was a farmer by occupation involved in the business of buying and selling cattle and was the sole breadwinner of his family. He therefore claimed general damages for loss of income, loss of earning capacity and special damages as against the Defendant/ Respondent.

3. The Defendant denied the claim and the allegations of negligence made against him by the Plaintiff. He contended that if the accident indeed occurred, then it was inevitable and was solely caused by reckless and negligent acts of the Plaintiff. He therefore prayed for the dismissal of the suit with costs.

4. After trial, the Plaintiff's suit was dismissed with costs to the Defendant.

Being aggrieved, the Plaintiff preferred the present appeal on the basis of the eleven [11] grounds set out in the memorandum of appeal dated 4th March 2022.

Basically, the Applicant complains that the trial court erred in law and fact by failing to properly consider the facts of the case and the evidence adduced in support thereof thereby

dismissing the case and failing to appreciate that it had been proved on the balance of probability.

5. It is the Appellant's prayer that the judgment and decree of the trial court be set aside and substituted with a proper finding and award. He also prays for any other orders that the court may deem just and expedient in the circumstances together with costs of the appeal.

The Respondent opposed the appeal which was canvassed by way of written submissions. Both parties filed their respective submissions through their respective advocates, being **Messrs R.M. Wafula & Company Advocates** for the Appellant and **Messrs Onyando & Company Advocates** for the Respondent.

6. The rival submissions were duly considered by this court in the light of the grounds in support of the appeal and those in opposition thereto as may be deciphered from the Respondent's submissions. The duty of this court was to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses **[See, Selle & Another Vs. Associated Motor Boat Company Limited & Others [1978] EA 123].**

7. In that regard, the evidence led by the Plaintiff/ Appellant **[PW1],** as supported by that of his witnesses, being a Clinical Officer, **Josephat Lumbeko [PW2],** a Traffic Police Officer, **PC Christopher Kosgei [W3]** and the Medical Officer, **Dr. Paul Kipkorir Rono [PW4],** was considered against that led by the Defendant/ Respondent, **Gabriel Mahanu Barasa [DW1],** who did not call any witness.

8. From the evidence and pleading what arose as the basic issue for determination was whether the material accident occurred as alleged on the material date and time and whether the accident involved a **Motor Vehicle Registration No. KAE 311W** belonging to the Defendant/ Respondent at the time and if so, whether the accident was caused by the Defendant's negligence, if so, whether the Defendant was liable to the Plaintiff in damages and to what extent or degree.

9. The trial court in its judgment framed what it considered to be issues for determination. The first two issues were the most relevant in the determination of the matter. These included whether there were grounds for filing the suit out of time and whether the Plaintiff proved that an accident occurred. In that regard, the trial court found in favour of the Defendant by concluding that the Plaintiff case was filed out of time and that the Plaintiff failed to prove his case on a

balance of probabilities on account of the Plaintiffs failure to tender evidence to prove the Defendant's ownership of the ill-fated vehicle.

10. On the issue of time, the Appellant after referring to the relevant statutory provisions and case law submitted that the impugned judgment of the trial court was erroneous and bad in law when the court purported to find that the Appellant's case was filed out of time and that the reasons thereof were not proved. That the court acted oblivious of the earlier ruling made at the initial stage of the suit. That, the court did not set aside or vary or review the order allowing the claim out of time and could not therefore sit on appeal of its own decision. That, discretionary impugned orders ought to be challenged on appeal but this was not done thereby validating and sustaining the order allowing the claim out of time.

11. The Respondent on the other hand submitted that the Appellant's claim was filed eleven [11] years after the accident and without firstly seeking leave of the court, therefore rendering the suit time bared.

That, the court had no jurisdiction to subsequently grant leave one year after the suit had been filed without leave. That, the decision by the trial court to grant leave to file suit out time was a wrong exercise of discretion as there were no

good grounds given by the Appellant as to why he filed the suit and subsequently filed an application to seek leave to file the same out of time.

12. The Respondent contended that the Appellant's act of filing suit without seeking leave of the court was an abuse of the court process and the court had no jurisdiction to grant leave to the Appellant to file suit already filed out of time. That, the leave granted on 10th March 2015,was contrary to the provisions of **Section 4[2]** of the **Law** of **Limitations Act.**

It was further contended by the Respondent that the Appellant never gave any explanation for the delay, but purported to allege that the Respondent had tried an out of court settlement as a reason for the delay.

13. The Law of Limitation of actions is expressed in the **Limitation of Actions Act [Cap 22 Laws of Kenya]** and the claim herein being founded on Tort may only be brought within a period of three[3] years from the date on which the cause of action Accrued **[See Section 4.[2]** of the **Act].**

However, under **Section 27** of the **Act**, a party may apply for extension of time whether before or after the commwencement of an action and this may be done under **Section 28** of the **Act.**

14. **Sub-Section [1]** of S**ection 28** of the **Act** provides that: -

> **“An application for the leave of the court for the purposes of Section 27 of this Act shall be made ex-parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.”**

The parameters for grant of leave for extension of time where an application is made after the commencement of a relevant action are set out in **Section 28 [3]** of the **Act.**

15. It was on the basis of the aforementioned provisions of the Limitation of Actions Act that the Plaintiff/ Appellant filed the ex-parte notice of motion dated 30th June 2014 to file this suit out of time for reasons stated in the motion as fortified by the Plaintiff’s averments contained in the supporting affidavit dated 30th June 2014.

The trial court to which the application was made considered the same and allowed it in a ruling dated 10th March 2015 in which the provisions of **Article 159 [2]** of the **Constitution** were invoked.

16. However, at a later stage during the hearing of the matter the Defendant/ Respondent raised a preliminary

objection to the suit to the effect that it was time barred. In essence, the Defendant was challenging the leave granted to the Plaintiff to file the suit out of time and contended that the suit ought to be dismissed because it was time barred. The objection was considered by the trial court which then ruled that the objection was premature and directed the Defendant to raise it at the hearing stage of the main suit.

17. In the Defendant's further amended defence dated 24th January 2017, the Defendant pleaded that he would be raising a preliminary objection that the suit is time barred and ought to be dismissed. Indeed, the trial court considered the objection and upheld it on the basis of the decision **in Rawal Vs. Rawal [1990] KLR 275 and Kenya Orient Insurance Company Vs. Senerro Ole Kurrawo & Others [296] eKLR.**

In that regard, the trial court stated as follows: -

> **"The Defendant contested the aspect of the suit having been filed out of time. The main ground upon which that leave to file suit of time granted was that the Defendant intended to settle the matter out of court. His testimony was that he never engaged the Plaintiff with a view of setting this matter out of court. The suit herein was filed after such a long period. The time it**

took couldn't be considered as reasonable. I have perused the statement by the Plaintiff, it doesn't indicate the reasons why there was delay in filing the claim."

18. It is the opinion of this court that the aforementioned finding was erroneous as it was against the weight of the evidence adduced by the Plaintiff when he sought leave to file suit out of time. He averred in his supporting affidavit that as a result of the injuries sustained due to the accident he was disoriented for more than three years and has been on medication since then. He further averred that the delay in filing the suit was also occasioned by the Defendant's false promises of settling the matter out of court.

19. In Rawal Vs. Rawal [1990] KLR 275, it was stated that: -

"The object of any limitation enactment is to prevent a Plaintiff from prosecution of stale claims on the one hand, and on the other hand protect a Defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims."

And, in **Iga Vs. Makerere University [1972] EA 65,** it was held that: -

> **"A plaint which is barred by limitation is a plaint *"barred by law."* A reading of the provisions of Section 3 and 4 of the Limitation Act [Cap 70] together with Order 7 Rule 7 of the Civil Procedure Rules seems clear that unless the Appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the court. "shall reject" his claim…… The limitation Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for, and when a suit is time barred, the court cannot grant the remedy or relief."**

20. Thus, a cause of action that is barred may nonetheless be revived if the conditions set out in Section 27 of the **Limitation Act [Cap 22 Law of Kenya]** are fulfilled. There must be good grounds for the court to exercise its discretion to grant leave. Herein, the Plaintiff's application for leave was lawfully made under Section 27 of the Limitation of Actions Act and Article 159 of the Constitution. It was therefore incumbent upon the Plaintiff to provide good reasonable grounds for his failure to file the suit within time.

21. Accordingly, the Plaintiff said that he became disoriented for a long period of time. This could be translated to mean that he was impartially disabled after the accident and may have been ignorant that he was required to seek remedy for his injuries within a specified period of time. He indicated that the delay in filing the suit was also due to misleading information from the Defendant of having the case settled out of court.

22. **Section 30[3]** of the **Limitation of Act** provides that: -

> **"Subject to Sub-Section [4] of this Section, for the purpose of Sections 27, 28 and 29 of this Act, a fact shall be taken at any particular time, to have been outside the knowledge [actual or constructive] of a person, if, but only if: -**
>
> **(a) .....**
>
> **(b) .....**
>
> **(c) In so far as there existed, and were known to him, circumstances from which, with approriate advice, the fact night have been ascertained or inferred, he had taken all such steps [if any] as it was reasonable for him to have taken before that time for the**

purpose of obtaining appropriate advice with respect to those circumstances.

23. **Sub-Section 4** of **Section 30** of the **Limitation Act,** reads as follows: -

> **“In the application of Sub-Section [3] of this section to a person at a time when he was under a disability and was in the custody of a parent, a reference to that person in paragraph [a], paragraph [b] or paragraph[c] of that Sub-Section shall be construed as a reference to that parent.”**

And **Sub-Section 5** of the same provision states as follows: -

> **“in this Section, “appropriate advice in relation to any fact or circumstances means the advice of a competent person qualified, in their respective spheres, to advise on the medical, legal or other aspects of that fact or those circumstances, as the case may be.”**

24. The limitation of Actions Act does not extinguish a suit or action itself, but operates to bar the claim or remedy

sought for, and when a suit is time barred the court cannot grant the remedy or relief where circumstances permit the cause of action which is barred as opposed to being extinguished is capable of being revived **[See the Rawal and Iga cases [supra].**

25. The issue pertaining to settlement of claims or negotiations to settle claims out of court was considered in the case of **Rosemary Wanjiru Kungu Vs. Elijah Macharia Githinji & Another [2014] eKLR,** wherein it was observed that: -

> **"Where the Defendant or his representative such as the insurance company leads the Plaintiff to believe that the claim is capable of being settled and in reliance thereof the Plaintiff or his advocate refrains from filing the suit until after the limitation has run its course, that may constitute a good ground for extending time notwithstanding the provisions of Section 27 aforesaid."**

26. ***In Lucia Wambui Ngugi Vs. Kenya Raiulway & Another NBI HCMA NO. 213 of 1989,*** the Court stated that: -

> **"when an application is made for leave under the limitation Act, a judge in chambers**

should not grant leave of course. He should carefully scruitinise the case to see whether it is proper one for leave. Since it has been decided that the Defendant's have no right to go back to the High Court to challenge such orders, it is particularly important that when such an application is made the order should not follow as a matter of course. The evidence in support of the application ought to be very carefully scrutinized, and if that evidence does not make quiet clear that the Plaintiff comes within the terms of the Limitation Act, then either the order ought to be refused or the Plaintiff ought perhaps to be given an opportunity of supplementing his evidence."

27. It was further stated in the case aforementioned that: -

"It must, of course, be assumed for the purpose of the ex-parte application that the affidavit evidence is true, but it is only if that evidence makes it absolutely plain that the Plaintiff is entitled to leave that the application should be granted and the order made, for such an order may have the effect

of depriving the Defendant of a very valuable statutory right."

In this case the necessary ex-parte application was made and after it was given careful consideration by the trial court it was allowed, thereby implying that the suit was deemed to have been properly filed upon grant of leave for extension of time. It was no longer time barred on account of the Limitation Act.

28. Nonetheless, the Defendant raised a preliminary objection at the hearing of the suit praying for the dismissal of the suit for being time barred. The objection was on a point of law, hence capable of disposing of the whole suit if it was sustained by the trial court. However, the objection was not sustained and was instead impliedly dismissed by the trial court for want of maturity. Ideally, the Defendant ought to have appealed the dismissal by way of an interlocutory appeal before the commencement of the hearing of the suit, but the trial court gave him an opportunity to revisit the issue at the hearing of the suit as a whole thereby conferring to itself a jurisdiction it did not have i.e. to sit on appeal of its own decision.

29. In any event, the preliminary objection having been technically dismissed and there being no proper appeal to a

higher court against the interlocutory dismissal it could not be said that the suit was time barred. Therefore, this court disagrees with the finding of the trial court that the suit was filed out of time, hence time barred.

30. The occurrence of the accident having not been substantially disputed by the Defendant and having in any event, been established by the Plaintiff's evidence coupled with that of the Traffic Officer [PW3] it fell upon the Plaintiff to prove on a balance of probabilities that the Defendant was the legal and/or beneficiaries/ owner of the ill-fated Motor Vehicle **Registration No. KAE 311W.**

The question of ownership of the vehicle was a contributing factor in the dismissal of this suit by the trial court.

31. It was the Plaintiff's evidence that the vehicle was a public service vehicle belonging to the Defendant and that he was aboard the vehicle as a lawful fare paying passenger when it was involved in the accident causing him to suffer serious bodily injury. The police officer **[PW3]** confirmed that the motor vehicle belonged to the Defendant and produced a police abstract **[P. Exhibit 3]** to establish as much. The abstract showed that the registered owner of the vehicle was **Gabriel Barasa** or **Baraza Gabriel** who was identified as the Defendant herein.

32. Indeed, even in this suit the defendant was said to be the person known as **Gabriel Baraza.** He testified in court **[DW1]** and identified himself in his full name of **Gabriel Mahanu Barasa.** He disowned his alleged ownership of the accident motor vehicle and attributed his being the Defendant herein to a case of mistaken identity.

33. The police abstract was the only evidence availed by the Plaintiff/Appellant to prove that the Defendant was the owner of the ill-fated motor vehicle at the material time of the accident. It sufficed as proof of ownership in the absence of any other documentary evidence such as certificate of search or any record of ownership from the Registrar of Motor Vehicles and in view of the fact that the Defendant denied ownership but failed to provide any evidence to disprove the Plaintiff's allegation that he was the actual owner of the vehcle given that the Plaintiff was only required to prove ownership on a balance of probabilities and this was achieved by production of the police abstract, a formal official document containing verified information.

34. It was also clear from the Defendant's testimony that he was not quite candid and credible enough in denying ownership of the vehicle. During his cross-examinationhbe alluded to the fact that he was in possession of a search certificate from the Registrar of Motor Vehicles and that he

sold the vehicle to a third party. Although he stated that he was referring to another vehicle, he did not produce the search certificate to confirm that he was referring to a different vehicle other than the material motor vehicle.

35. While production of a certificate of search from the Registrar of motor vehicle by a Plaintiff as proof of ownership of a vehicle is the most effectors way of establishing ownership, it is not the only way to do so. A valid and undisputed police abstract report would be sufficient enough in the absence of any other evidence. **[See, Jotham Mugalo Vs. Telkom [K] Limited [2005] KEHC 475 [KLR].**

36. In **Wellington Nganga Mwaura Vs. Akamba Public Road Services Limited & Another [201] eKLR,** the **Court of Appeal** held that: -

> **"Where a police abstract was produced and there was no evidence adduced by the Defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards**

of probability and not beyond reasonable doubt as in Criminal Cases."

37. The decision aforementioned is a pointer to the evidentiary value of a police abstract as regards proof of ownership of a motor vehicle.

Therefore, in this case, this court contrary to the finding of the trial court would find that the police abstract tendered herein was sufficient and credible proof of the Defendants ownership of the ill-fated vehicle.

38. Other than ownership of the vehicle, there was sufficient and credible evidence from the Plaintiff and the police officer **[PW3]** establishing and proving that the accident was as a result of the negligence of the ill-fated vehicle's driver in the manner of driving the vehicle such that it went out of control and overturned.

Being a passenger in the vehicle there is no way that the Plaintiff could be held responsible for the accident unless the Defendant proved otherwise by necessary evidence which was not the case herein.

39. The Defendant, even if was not the driver of the vehicle at the material time he could be and was rightly held

vicariously liable for the negligent acts and omissions of his driver/agent and/or servant.

All in all, from the totality of the evidence availed in the trial court, it is the finding of this court that the occurrence of the accident and the culpability of the Defendant in respect therefore are factor which were proved by the Plaintiff on a balance of probabilities.

40. The Defendant was therefore fully liable to the Plaintiff for the loss and damage occasioned to him [Plaintiff] as a result of the accident.

With regard quontum of damages, the trial court opined that if it had found in favour of the Plaintiff then it would have awarded the Plaintiff a sum of Kshs. 5[five] million as general damages and proven special damage, in the sum of Kshs. 1,500/-. The additional claims were declined for want of evidence.

41. The additional claims were specified in the amended plaint dated 15th June 2015 and included loss of income and earning capacity and special damages for replacement of the wheel chair plus future medical expenses.

It was pleaded in the amended plaint that the Plaintiff suffered head injury, brain concession [sic], cut wounds on the scalp and chin, blunt trauma to both shoulders and arms, compressed fracture of the lumber spine and paralysis of

both limbs [paraplegia] due to the damaged part of the spinal cord.

42. These injuries were confirmed by **Dr. Aluda** in his report dated 16th April 2014 in which he indicated that the injuries sustained were very severe and have yet to heal but for the occasioned pains.

That, the scars would remain permanent, the fracture sustained healed and both lower limbs were paralyzed resulting in permanent disability such that the Plaintiff would never be able to stand or walk in his lifetime.

43. No proposal were made by the parties at the trial with regard to the award of general damages. Although the Defendant filed his submissions he did not make any proposal in that regard. The Plaintiff appears not to have filed his submissions an omission he attributes herein to lack of proper notification by the trial court on the scheduled date for submissions. Nonetheless, the failure to file submissions by the Plaintiff was in the opinion of this court not fatal or prejudicial since submissions are simply arguments to augment and buttress either party's case which invariably, was to be decided on the basis of the evidence and not the submissions.

44. Indeed, it was on the basis of the medical evidence availed in court that the trial court formed the opinion that a sum of Kshs. 5[five] million would be sufficient compensation as general damages for pain, suffering and loss of amenities and that what was specifically proved as special damages was a sum of Kshs. 1500/-.

As for damages for loss of income and loss of earning capacity the trial court found that these were not proved or justified by necessary evidence.

45. In this appeal, the Appellant did not dispute the trial court's opinion on quantum of damages. He submitted that the award spelt out in the impugned judgment was sufficient to cater for the injuries, suffering and pain as well as the permanent disability and the high level of dependency caused to him [Appellant] as a result of the accident.

46. This court cannot agree more with the trial court and the Appellant with regard to the assessment of damages available to the Plaintiff/Appellant against the Defendant/ Respondent.

In sum, this appeal is hereby allowed to the extent that the impugned judgment of the trial court be set aside and substituted for a judgment in favour of the Plaintiff against the Defendant for the sum of Kshs. 5[five] million being general damages for pain, suffering and loss of amenities and Kshs. 1500/- being special damages.

47. The Plaintiff shall have the costs of the suit in the trial court and of this appeal together with costs and interest.

Ordered accordingly.

Dated and delivered this 11th day of March 2026

HON. J. R. KARANJAH,

JUDGE