IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MAKHANDIA & KANTAI, JJA)

CIVIL APPEAL NO. 252 OF 2015

BETWEEN

SO.....1ST APPELLANT

JM.....2ND APPELLANT

VERSUS

DR. NATHAN M. MURUGU.....1ST RESPONDENT

DR. LUCY MUCHIRI.....2ND RESPONDENT

DR. BESSIE BYAKIKA.....3RDRESPONDENT

THE NAIROBI HOSPITAL.....5TH RESPONDENT

AAR HEALTH SERVICES.....6TH RESPONDENT

MEDICAL PRACTICTIONERS

AND DENTIST BOARD.....7TH RESPONDENT

(Being an appeal from the Ruling of Hon. Justice Mbogholi Msagha delivered on 22nd July, 2015

in

Civil Case No. 468 of 2010)

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JUDGMENT OF THE COURT

This dispute arises from an unfortunate medical procedure in which, believing that the 2nd appellant had invasive cancer of the cervix, the 1st respondent conducted on her a surgery and removed not only her cervix but also her uterus, fallopian tubes and ovaries. Although according to the respondents the surgery was properly carried out, the loss of the organs was negligent as a result of misdiagnosis.

The appellants filed a complaint against the respondents with the Medical Practitioners and Dentists Board (the 7th respondent). Through its Preliminary Inquiry Committee, the 7th respondent exonerated the rest of the respondents from any blame.

Aggrieved, the appellants, who are a married couple moved to the High Court on 13th October, 2010 by a plaint against the respondents in their capacities as either medical practitioners, health service providers or medical practice regulator. The appellants alleged that the respondents were guilty of negligence and prayed for judgment against them jointly and severally for general and aggravated damages, interest and costs.

The respondents in their statements of defence denied that they were negligent and asked the court to dismiss the action. Of relevance to this appeal, the respondents notified the appellants that they would, at the right stage raise an objection *in limine* to the suit as it was statute barred.

Indeed, a notice of preliminary objection was subsequently filed by the 2nd respondent and supported by all the other respondents, the point in contention being that the court lacked jurisdiction to entertain the suit because it had been brought way after the three year limitation period for an action founded on tort.

In sustaining the objection, the High Court (Mbogholi, J.) agreed with the respondent that since the acts of alleged negligence took place in February or March, 2005, the suit filed in October, 2010 was well over 2 years out of time; that the appellants did not seek extension of time within which to file the claim and therefore at the expiration of three years they were locked out of any action against the respondents; that **section 26** of the Limitation of Actions Act which provides that the period of limitation does not begin to run until the plaintiff has discovered the fraud or mistake did not apply because the action was not based on fraud or mistake on the part of the respondents; that the appellants did not plead fraud or mistake; and that they only pleaded negligence as their cause of action.

The Judge relied on the Ugandan case of **Iga V. Makerere University** [1972] E.A. 65 as authority for saying that a plaint which is barred by limitation is a plaint barred by law; and that where a suit is barred by law the court has no jurisdiction to entertain it.

In conclusion, and citing the *locus classicus* on jurisdiction, **Owners of Motor Vessel Lillian S V. Caltex Oil (Kenya) Ltd.** (1989)KLR1, the learned Judge stated that;

> **"Having found that the plaintiffs' suit is time barred, I have no jurisdiction to go even one step further. It follows therefore that the plaintiffs' suit is incompetent and therefore must be struck out. Costs follow the event and the suit having been struck out, the defendants are entitled to costs thereof. It is so ordered".**

Aggrieved by this conclusion, the appellants now bring this appeal contending that the learned Judge erred in: striking out the suit against the 5th, 6th and 7th respondents on the ground that it was statute barred; striking out the suit against the 1st, 2nd , 3rd and 4th respondents on the ground that it was not covered by **section 26** of the Limitation of Actions Act; and failing to direct that the plaint be amended having found it to be curable.

On the force of **Mukisa Biscuit Manufacturing Company Limited V. Westend Distributors Limited** (1969) EA 696, it is common ground that the point raised regarding the jurisdiction of the court was pleaded in the respondents' statements of defence; that questions touching on jurisdiction are questions of pure law, capable of disposing of the entire suit, if argued as a preliminary point. The question raised was, therefore jurisdictional and was properly taken *in limine.*

The learned Judge was persuaded that the pleaded cause of action was in the tort of negligence. Negligence is a specific tort whose origin can be traced from the common law jurisprudence. The case of **Donoghue v Stevenson** [1932] ALL ER 1 established the modern law of negligence, laying the foundations of the duty of care and the fault principle. The elements which constitute a negligent tort are: a person must owe a duty or service to the victim in question; the individual who owes the duty must violate the promise or obligation; an injury then must arise because of that specific violation; and the injury must have been reasonably foreseeable as a result of the person's negligent actions. See **Kenya Breweries Ltd. V. Godfrey Odoyo** Civil Appeal No. 127 of 2007.

The appellants have argued before us that the learned Judge ought to have considered the fact that their claim was premised on three grounds; negligence, contract and fraud. In his submissions, Prof. Wangai, learned counsel for the appellant conceded that the claim on negligence was outside the statutory period but insisted that there was misrepresentation by the respondents with regard to the 1st appellant's medical condition; that her consent to undergo the surgery was obtained by fraud; and that the relationship between the 2nd appellant and the 1st , 2nd , 3rd and 4th respondents was contractual.

In a civil claim, a cause of action is essential as it must be established before the court can exercise jurisdiction. The success or failure of an action will depend on the facts pleaded by a party bringing the action. In their plaint the appellants were categorical that;

> **"42. THAT notwithstanding paragraphs 38, 39 and 40 above, the 1st, 2nd, 3rd, 4th and 5th defendant mismanaged the plaintiffs and/or negligently managed them in a manner that led to injury, damage and loss under the negligent watch and negligent care of the 6th defendant. Further that the 7th defendant in cahoots with the 1st, 2nd, 3rd, 4th and 5th defendants negligently sanctioned and approved of the malpractice, negligence, malicious surgery, injury, damage and loss suffered by the plaintiffs.**
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> **43. FURTHER and without prejudice to the foregoing, the plaintiffs aver that the Hospital employees, servants and in particular the 1st, 2nd and 3rd defendants that if at all treated the plaintiffs, and who were at all material times acting under the direction and supervision of the 5th defendant under the negligent watch of the 6th defendant were negligent and failed to use reasonable care and skills in the treatment, management and care to the plaintiffs, for which negligence the plaintiffs hold the defendants liable.**
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> **44. FURTHER and without prejudice to the foregoing, the plaintiffs aver that the AAR employees, servants, and in particular the 1st, 2nd, 3rd, 4th and 5th defendants that if at all managed an if at all treated the plaintiffs, and who were at all material times acting under the direction and supervision of the 6th defendant were negligent and failed to use reasonable care and skills in the treatment, management and care to the plaintiffs, for which negligence the plaintiffs hold the defendants liable."** (Our emphasis).

To cap it all, in paragraph 46 of the plaint the appellants cited a total of 61 particulars of negligence in respect of the seven respondents.

We cannot help but conclude, in agreement with the learned Judge that the appellants expressly and purely based their cause of action on negligence.

Section 4 (2) of the Limitation of Actions Act, upon which the objection was brought reads as follows,

> **"(2) An action founded on tort may not be brought after the end of three (3) years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of 12 months from such date."**

Unless the appellants applied and obtained leave to institute the claim out of time, satisfying the conditions precedent, they were bound by the law to act within three years. In **Mary Osundwa V. Nzoia Sugar Company Limited** Civil Appeal No. 244 of 2000 the Court explained this by saying that;

> **"Section 27(1) of the Limitation of Actions Act clearly lays down that in order to extend time for filing a suit the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the plaintiff as a result of the tort".**

The Court further clarified that even where the above conditions are satisfied, time will not be extended unless the applicant proves that material facts relating to that cause of action were outside his knowledge; that he had taken all such steps reasonable for the purpose of ascertaining the material facts. No application for extension of time was brought in the circumstances of this case.

Submissions that the claim was also premised on fraud and breach of contract are clearly an afterthought. By merely stating, as the appellants did in the plaint, that there were implied contractual obligations, without stating how the obligations arose and how they were breached is to say nothing in a claim for compensation.

Where in a civil case fraud is pleaded, by dint of **Order 22 rule 4(1)** of the Civil Procedure Rules, it is mandatory to particularize the instances of fraud and how they were committed. In **Vijay Morjaria V. Nansingh Madhusingh Darbar & Another** [2000] eKLR, Tunoi JA (as he then was) stated as follows:

> **"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."**

The appellants' counsel submitted that the omission to plead fraud was curable by an amendment and that the Judge ought to have allowed them time to furnish the particulars. When the respondents replied to the suit and served the appellants with notice of the intended objection, it was at that time that the appellants ought to have seized the moment to apply for the amendment of the plaint.

It should be apparent from what we have said so far that there is no basis for us to interfere with the decision of the learned Judge. This appeal is bereft of merit. It is accordingly dismissed. We make no orders as to costs, given the circumstances of the case.

Dated and delivered at Nairobi this 7th day of June, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR