



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MURGOR, JJA)

CIVIL APPEAL NO. 252 OF 2012

BETWEEN

KENYA CIVIL AVIATION AUTHORITY.....APPELLANT

AND

HONOURABLE WK.....1ST RESPONDENT

MWK.....2ND RESPONDENT

(Suing as the administrator of the estate of Dr. WK – deceased)

WWK.....3RD RESPONDENT

(A minor suing through Hon. WK, Her guardian and Next friend)

(An appeal from the Ruling of the High Court of Kenya at Nairobi (Khamoni, J.)

dated 28th May, 2010

in

NRB. MISC. CIVIL CASE NO. 498 OF 2009)

JUDGMENT OF THE COURT

The only issue of law for our determination in this appeal is whether *section 7 E (h)* of the **Civil Aviation Act** (CAA), Cap 394, Laws of Kenya, applies to render the suit filed against the **Kenya Civil Aviation Authority** (KCAA), incompetent. The section provides as follows:-

"7E.Limitation of actions

Where an action or other legal proceeding is commenced against the Authority for any act done in pursuance, or execution or intended execution of this Act or 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)

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

[Emphasis added].

The section was part of a raft of amendments brought in by **Act No. 6 of 2002 (Civil Aviation (Amendment) Act, 2002)** which established KCAA on 24th October, 2002. Apparently, no provision was made in the original Act which commenced operations in 1977. The section lasted in that form until 25th January, 2013 when Cap 394 was repealed by **Act No. 21 of 2013**. It was then re-enacted with an amendment to **sub-section (b)** extending the period of limitation from one year to three (3) years. More about the section later.

What is the background to the appeal?

Sixteen years ago on 24th January, 2003, Gulfstream aircraft Reg. No. 5YEMJ crashed on take-off from Busia airstrip, killing and injuring several passengers. One of the passengers was **Dr. (Mrs.) WK** who was taken to hospital in a coma and stayed in that state for three years and nine months until she died on 12th October, 2006. Her husband, **Hon. WK** and daughter, **M**, applied for and obtained a grant of representation of the estate and filed **HCCC No.498 of 2009** on 18th September, 2009. The suit was also filed on behalf of another daughter of the deceased who was a minor. The three are the only respondents before us.

The suit sought to recover special and general damages against five defendant s who were alleged to have been negligent or careless in the execution of their duties and therefore caused the accident. One of them was KCAA which is bound by statute to regulate and provide air navigation and safety services in Kenyan airspace and related ground installation services. It is specifically accused, amongst other things, of negligently authorising and clearing a flight to an unserviceable airstrip; negligently providing air navigation services; carelessly issuing an operator's licence to an unworthy aircraft; failing to inspect the aircraft periodically and demand remedial works; and failing to brief the pilots on the flight. All the other defendants filed their defences and the suit against them is still before the High Court pending hearing.

KCAA, however, raised a preliminary issue in its defence which it subsequently placed before the trial court in a notice of motion dated 22nd March, 2010. It sought to have the plaint struck out against it for failure to disclose a cause of action, since the suit was time barred. It was also alleged that there were no triable issues. **Order VI rule 13 (I) (a)** (now **Order 2 rule 15**) of the **Civil Procedure Rules** (CPR) was invoked. Upon hearing the parties on the motion, the trial court (**Khamoni, J.**) in a brief ruling made on 28th May, 2010, rejected it.

The reasons given were as follows :-

"this Notice of Motion dated 22nd M arch 2010 be and is hereby dismissed with costs to the Plaintiffs/Respondents for the following reasons:-

Firstly, I find no substance in the last ground on the basis of the Notice of Motion which claims that there are no triable issues raised in the Plaint.

Secondly, it is not fair, and no justice will be done, to have this suit struck out in terms of prayer number 1 in the Notice of Motion on the basis of this application by the 4¹¹¹ Defendant only.

Thirdly, the legal effect and implication, indeed the proportion of granting prayer number 1 in respect to each of the defendants has not been disclosed to the Court by the Appellant.

Fourthly, the Applicant has not also disclosed to the court how the minor Plaintiff will, legally be affected from a court order granting that pregnant prayer number 1 in the Notice of Motion. "

The parties were directed to have the main suit set down for hearing and raise their respective defences at the trial.

KCAA is now before us protesting the rejection of its motion and puts forward three grounds of appeal:-

"1. The judge erred in law and in fact in failing to consider that the Plaint was time barred under S 7 E (b) of the Civil Aviation Act, Chapter 394 of the Laws of Kenya as it should have been file within 1 year from 12th October, 2006 when the deceased died.

2. The learned judge erred in law in failing to consider that the honourable court had no jurisdiction to entertain the suit as it had been filed out of time and was therefore time barred.

3. The learned judge erred in law when he considered that the overriding objectives under Section I A of the Civil Procedure Act permit a court to consider matters of preliminary objections on limitation to be determined at the full hearing of the suit "

Learned counsel for the appellant **Mr. Paul Ogunde**, instructed by M/S Walker Kontos, Advocates, urged the grounds in written submissions which were briefly highlighted. He also filed and relied on several authorities. He submitted firstly, that a plaint that is barred by limitation is barred by law and is therefore for rejection. The case of **I ga vs. Makerere Universitv [1972] EA 65** was relied on for that proposition. Counsel further relied on the High Court case of **Clatus Odhiambo Macowenga vs. Kenva Civil Aviation Authoritv [2008] eKLR** where the court stated thus:

"The provisions of Section 7E of the Act do not contemplate any other form of computation of time except that of "12 months after the act complained of ". It does not give any exemptions to the general rule. "

According to counsel, the trial court had no jurisdiction to entertain the incompetent suit, as stated by Waki, J. (as he then was) in the cases of **Ogolla & Others vs. KPA Mombasa HCCC No. 538 of 1994** and **Ochieng vs. KPA Mombasa HCCC No. 227 of 1997**. He faulted the trial court for invoking the overriding objective under the provisions of **section I A** of the **Civil Procedure Act** as though the principle was a panacea for all ills and in all situations. He cited in aid the caution by a five-Judge bench of this Court in the case of

Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR that:

"...it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1 A and 1 B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. "

Finally, counsel submitted that the plaintiffs were indolent and allowed time to run in total disregard of the law and therefore the suit as against KCAA should be struck out.

In those submissions, KCAA was supported by the Attorney General who was named as the 5th Defendant in the lower court and was represented before us by **Mr. Ngumbi**; and the Kenya Airports Authority, named as the 3rd defendant, and represented before us by **Mr. Kahari**. The two were not enjoined in this appeal and only participated peripherally. There is indeed on record information that there was an application No. 125 of 20 10 which sought to dispense with the parti cipation of the 1st, 2nd and 3rd defendants, in the appeal.

The Attorney General in written submissions emphasized that the suit was hopelessly out of time as it ought to have been filed one year after the cause of action arose in January, 2003 but was filed six years later in September, 2009. He emphasized the purpose of time limitation, citing the case of **Masulal Maganlal Rawat vs. Maneklal Maganlal Rawal [1989] eKLR** where it was stated:-

"As was stated by Crabbe JA in the case of Mehta v Shah [1965] EA 321 at p 330, the object of any limitation enactment is to prevent a plaintiff from prosecuting "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."

According to the **Mehta case** cited in that decision, the effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.

Responding to those submissions, learned counsel for the respondents **Dr. Khaminwa** highlighted the written submissions in support of the decision of the trial court , firstly, that the wrong procedure was adopted in seeking to strike out the suit; and secondly, that there was no supporting affidavit for the application. More importantly, counsel submitted that limitation of actions clauses no longer apply in view of the imperative introduced by **Article 159 (2) (d)** of the **Constitution** requiring that justice be administered without undue regard to procedural technicalities.

Counsel related the facts of the case to highlight the unique nature of the suit which, in his view, was of grave public importance and hence the reason why it should be allowed to proceed to full hearing. He urged us not to shy away from compensating the immense suffering and huge financial loss incurred by the respondents as a result of negligence and the grisly accident which took away the life of the respondents' loved one. Counsel referred us to the unusual case of **Mutua & Others vs. The Foreign and Commonwealth Office [2012] EWHC 2678 (QB)** (the Mau Mau veterans case), where the court exercised its discretion to allow claims for alleged ill-treatment du ring the emergency period in Kenya, although it was time barred by **section 11(4)** of the **Limitation of Actions Act, 1980**. **Justice McCombe** stated in part:

"the seriousness of the allegations made obviously gives any court pause for thought before it holds that the claim cannot be brought."

Fair trial considerations were also applied in the exercise of discretion in that case.

In further submissions, Dr. Khaminwa cited the **Rawal case** (supra), the **Mehta case** (supra) and the **IGA case** (supra), which were also cited by the appellant, for the proposition that limitation of actions provisions merely bar action after a certain period but do not extinguish the cause of action. It follows, according to counsel, that causes of action may be revived by application of **section 27** of the **Limitation of Actions Act (LAA), Cap 22, Laws of Kenya**. Counsel cited several court decisions where extension of time was granted under those provisions and the principle s applicable. As for the 3rd respondent, **Wairimu Wanyiri**, who was a minor at the time of filing suit, counsel submitted that she cannot be stopped from filing suit in her own right after attaining the age of majority.

In a brief reply, Mr. Ogunde emphasized that limitation by statute was substantive and there is a presumption of constitutionality of legislation until and unless it is declared unconstitutional. Finally, counsel observed that there were no proceedings pending for extension of time and therefore the submissions made in that regard were irrelevant.

We have considered the appeal, the submissions of counsel and the law.

As stated earlier, the main issue is one of law which we now advert to.

The application made by KCAA before the trial court was predicated on **Order VI rule 13 (I) (a)** (now **Order 2 rule 15**) of CPR.

Simply put, the appellants asserted that the pleadings made in the plaint did not disclose any or any reasonable cause of action for the reason that they were time barred. It was urged in submissions of the respondents that the application ought to have been filed through a Chamber Summons and that it should have been supported by affidavit, but those submissions are clearly a misreading of the rule. The rule itself provides that applications made under **rule 13 (I) (a)** shall not be supported by evidence which therefore eliminates affidavit evidence. Only the ground or ground s relied on need concise statement, and the concise statement listed in the notice of motion dated 22nd March, 2010 is the limitation period based on **section 7E (b)** of CAA. **Order 51 rule 1** CPR directs that all application s be brought by way of a notice of motion unless the court or a particular rule directs otherwise. For those reasons, we find no basis for the criticism leveled at the manner in which the application was made.

The appellant submitted before us that the issue raised was jurisdictional and once the court finds that there was no jurisdiction, it has to 'down its tools,' in the language of the *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR*. That is indeed so, but in the process of laying down tools, we have to consider the rule invoked which donates the power to strike out the pleading, or to order that the suit be stayed, or dismissed, or to enter judgment, as the case may be. That calls for exercise of judicial discretion.

As correctly pointed out by the appellant, the accident occurred on 24th January, 2003 and the suit was filed on 18th September 2009. That is six years later. Even if the cause of action is taken to have arisen upon the death of the deceased on 12th October 2006, the suit would still have been filed more than one year after that cause of action arose. We do not understand the respondents to dispute those facts. The issue is whether the provisions of **section 7 E (h)** (supra) applies.

As stated earlier, the section has now been amended to extend the limitation period to three years. The suit would have been validly filed if the amendment applied. But that amendment, coming as it did in the year 2013, was not retrospective in application. It is rather contended that the section was not applicable because it is a procedural technicality which the current **Constitution in Article 159 (2) (d)** outlaws.

With respect, that argument is erroneous. Firstly, because there is always a general presumption that every Act of Parliament is constitutional. Courts should therefore presume a statute or statutory provision to be constitutional unless the contrary is established, and it is the duty of the person who alleges that a statute or statutory provision is unconstitutional to prove such unconstitutionality. See *Ndyanabo vs. Attorney General of Tanzania* (2001] EA 495 and *Mark Ngaiwa vs. Minister of State to Internal Security and Provincial Administrative & Another* [2011] eKLR.

Secondly, the section is not a technical or procedural provision but a substantive one occupying pride of place in the body of the statute. Even if it was a procedural provision, we would do well to recall the caution of this Court in the *Mumo Matemu case* (supra) against derision of procedural provisions and indiscriminately riding on **Article 159 (2) (d)** of the Constitution. Thirdly, it has been consistently stated by the courts that **Article 159 (2) (d)** is not a panacea for all ills. We go back to the Supreme Court decision in *Raila Odinga vs Independent Electoral and Boundaries Commission & Others*[2013] eKLR where the Court stated:-

".....Our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities. The operative words are the ones we have rendered in bold. The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law. In the instant matter before us, we do not think that our insistence that parties adhere to the constitutionally decreed timelines amounts to paying undue regard to procedural technicalities. As a matter of fact, if the timelines amount to a procedural technicality; it is a constitutionally mandated technicality."

In our view, the timeline set in **section 7 E (d)** of CAA goes to the jurisdiction of the court and cannot be termed as a mere technicality. The Court of Appeal for East Africa dealing with the policy behind statutory limitation periods in the *Mehta case* (supra) expressed itself as follows:

"The overriding purpose of all limitation statutes is based on the maxim interest reipublicae ut sit finis litium, and it has been the policy of the courts to lean against stale claims. There is no reason why the legislature in this particular instance should enlarge the time within which the personal representative of a deceased plaintiff should have himself brought on the record. Such a construction as canvassed by counsel for the respondent would not only make article 175A nugatory or redundant in the 1877 Act, but would also operate to the prejudice of a defendant who has been lulled into a false sense of security and who would have lost all evidence for his defence...The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand to protect a defendant after he had lost the evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case. It is most desirable that legislation which prejudicially affects the rights of citizens should be readily accessible". [Emphasis added].

This Court too, in the case of *Haron Onyancha vs. National Police Service Commission & Another* [2017] EKLK considered the effect of a statutory bar to a case and applied the case of *IGA vs. Makerere University* [1972] EA 65, where it was held:-

"A Plaintiff which is barred by limitation is a Plaintiff "barred by law". Reading these provisions together it seems clear to me that unless the appellant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the Court "shall reject" his claim. The appellant was clearly out of time, and despite opportunity afforded by the Judge he did not show what grounds of exemption he relied on, presumably because none existed. 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 sought. "

From all the above learning, we find no difficulty in following the law as it was when the suit was filed in the High Court and declare it incompetent, as against KCAA which is the only party before us, for the reason that it was time barred. Whether, as a result of that finding, the suit should have been struck out or stayed under **Order VI rule 13 (1) (a)** is the discussion that follows.

The respondents argued, and correctly so on authority, that limitation of actions provisions merely bar action after a certain period but do not extinguish the cause of action. The focus of that argument was to show that the respondents were at liberty to seek extension of time to file the suit even if it was time barred in the first place. They rely on the provisions of the **Limitation of Actions Act (LAA)**, particularly, **section 27** which provides for extension of limitation periods in case of ignorance of material facts in actions for negligence, nuisance or breach of duty relating to personal injury cases. Which begs the question--does the LAA apply in this matter?

In the case of *Nzoia Sugar Company Ltd vs. Kenya Ports Authority* [1990] KLR, **Githinji, J.** (as he then was) examined **Section 66** of the **Kenya Ports Authority Act (KPAA)** which is identical to **section 7E (d)** of CAA, and how it interfaced with the LAA. He stated thus:-

"Section 31 of the Limitation of Actions Act provides that where a period of limitation is prescribed for any action or arbitration by any other written law, that written law shall be construed as if Part III of the Limitation of Actions Act were incorporated in it. The effect of that provision is that section 66 of Kenya Ports Authority Act is deemed to have incorporated Part III of the Limitation of Actions Act. Part III of the Limitation of Actions Act provides for extension of the limitation period in three instances viz:-

- (i) as provided in section 22, in case of disability.**
- (ii) as provided in section 26 in case of fraud or mistake and**
- (iii) as provided in section 27 in case of ignorance of material of acts in action for negligence .**

The period of limitation in section 66 of the Kenya Ports Authority Act can therefore be extended if the application falls in any of the three categories."

We agree.

More recently , in the case of **Richard Oduol Opole vs. Commissioner Of Lands & 2 others [2015] eKLR** this Court unraveled the apparent conundrum inherent in the provisions of the LAA vis-a- vis the **Public Authorities Limitation Act (PALA), Cap 39**, and found that the two may be read together. It stated:

"Section 3 (1) and (2) of the Public Authorities Limitation Act, Cap 39 stipulates:

(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.

(2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued. "

Section 2 (1) of the Public Authorities Limitation Act specifies "proceedings' as civil proceedings in the High Court or the subordinate court, which are specified in subsection (2) as proceedings against the Government and includes proceedings against the Attorney General or any Government department or any public officer as such.

Equally, section 42 of the Limitation of Actions Act, provides that the Limitation of Actions Act does not apply to proceedings to which the Public Authorities Limitations Act applies.

But the answer to whether the provisions of the Limitation of Actions Act, Cap 22 may be read together with the provisions of the Public Authorities Limitation Act, would probably be found in section 6 of the Public Authorities Limitation Act which states thus:

"Notwithstanding the provisions of Section 31 of the Limitation of Actions Act, Sections 22 of the Act shall not apply in respect of the provisions of this Act; and in Section 27 of the Limitation of Actions Act the reference to Section 4 (2) of that Act shall be read and construed as reference to section 3 (1) of this Act; but subject thereto and notwithstanding Section 42 of the Limitation of Actions Act, part III of that Act shall apply to this Act."

From the above provision, it is evident that the Public Authorities Limitation Act in and of itself incorporates Part III of the Limitation of Actions Act.

So that, as seen above, the law allows the two respondents here, who have sued on behalf of the estate of the deceased, to apply for extension of time. From the submissions made before us by counsel for the respondents, however, it is apparent that there has been no application made in that regard. There may or may not have been good reasons for failure to do so. But the circumstances of the case, as passionately urged by Dr. Khaminwa peculiarly raise the matter to some public importance and involve several other parties in the same case whose defenses are still pending hearing on merit.

As this Court stated in the case of **Kivanga Estates Limited vs. National Bank of Kenya Limited [2017] eKLR:-**

"It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations. "

In that tricky balancing act, we respectfully choose to err on the side of fair hearing and give time to the respondent s suing on behalf of the estate of the deceased to seek extension of time to file the suit against KCAA, on terms appearing in the final orders.

In the case of the minor, 3rd respondent, different considerations apply. The disability is covered under **section 22** of LAA but the

section does not envisage an application for leave to extend the limitation period. It empowers a party to file a suit despite the expiry of the limitation period and gives the court jurisdiction to disregard the limitation period if the suit falls within the scope of the section. Simply put, time does not run until the person ceases to be under such disability. "Disability" as contemplated under the section does not include physical disability or illness but refers to persons who are minors or are of unsound mind as explained in **section 2 (2) (b)** of LAA. In **Gathoni vs. Kenya Co-Operative Creameries Ltd [1982] KLR 104**, this Court observed as follows:

"The disability relied on by the applicant being a physical disability, the nature and the extent of which was not revealed, the learned judge dismissed this ground because disability in the statutory context of section 2 (2) (b) of the Limitation of Actions Act does not include physical disability ... Of course, if the applicant were under a relevant disability, she would not need the leave of the court to commence her action."

The upshot is that, save for the discretion exercised by this Court in respect of the 1st & 2nd respondents, this appeal is otherwise meritorious and is for allowing.

Final orders:

- (i) The appeal is allowed.***
- (ii). The order made by the High Court on 28th May 2010 in respect of Kenya Civil Aviation Authority is hereby set aside.***
- (iii). We substitute therefor an order staying the suit against Kenya Civil Aviation Authority for a period of sixty (60) days from the date of this judgment to give an opportunity to the 1st and 2nd respondents to file an application for extension of time.***
- (iv). The application for extension of time shall be filed and served within fourteen (14) days of this judgment.***
- (v). In default of compliance with (iv) above, the suit against Kenya Civil Aviation Authority shall stand struck out without further reference to the court.***
- (vi). The 1st and 2nd respondents shall bear the costs of this appeal.***

Dated and delivered at Nairobi this 6th day of August, 2019.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR