



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, GATEMBU & M'INOTI, J.J.A)

CIVIL APPEAL NO. 337 OF 2012

BETWEEN

DOMINIC NJUGUNA WAIRIMU.....APPELLANT

AND

JOSEPH WAMBUGU KIBE.....RESPONDENT

(An Appeal from the Ruling/Order dated 22nd January, 2010 (Waweru, J) in

H.C. MISC. CIVIL APPLICATION NO. 43 OF 2008 (O.S))

JUDGMENT OF THE COURT

1. This appeal raises the question whether the lower court correctly refused to grant the appellant leave to appeal out of time under Section 27 of the Limitation of Actions Act.

Background

2. The record shows that on or about 30th April 1994 Dominic Njuguna Wairimu, (the appellant) was driving motor vehicle registration number KUX132 along Thika Road, Nairobi when his vehicle was involved in a collision with vehicle registration number KWK 316 registered in the name of Joseph Wambugu Kibe (the respondent). He was then 36 years old and an employee of a firm known as Lutz General Building Enterprises where he was working as a Field Manager. As a result of the collision, he sustained severe injuries including a head injury that resulted in loss of consciousness for about three months as well as loss of memory.

3. On 9th August 2004, almost 10 years after the road traffic accident, the appellant applied to the High Court at Nairobi, for leave to file suit out of time. That was in Miscellaneous Civil Application No. 1055 of 2004, where he invoked the jurisdiction of the court under Section 3A of the Civil Procedure Act. Explaining the reasons why it had taken him that long to initiate action, he deposed in support of his application, that the accident on 30th April 1994, “left him in deep comatose due to severe head injuries;” that he lost consciousness following the accident; that he “regained consciousness after about three months in Agha Khan Hospital”; that he had been in and out of hospital since the accident and was recovering slowly; that he suffered loss of memory from that time up to the middle of 2004; that he was unable, in the intervening period, to remember or comprehend anything and was confined to his home. He summed it up thus: “my almost complete disability together with my complete loss of memory are the reasons why I did not file a claim for the injuries sustained in this accident within the stipulated time.”

4. On 15th October 2004, the High Court (P. Kihara Kariuki, J, as he then was) allowed the appellant’s application and granted him unconditional leave to file suit out of time. He was ordered to file his plaint within 30 days. The appellant complied and filed suit against the respondent, as the registered owner of vehicle registration number KWK 316, in High Court Civil Suit No. 1178 of 2004 on 1st November 2004. He pleaded that the accident was occasioned by the negligence of the respondent and sought judgment for general and special damages as well as future medical expenses. In its defence to that suit, the respondent denied having caused the accident and averred that the same was caused or substantially contributed to by the appellant. In addition, the respondent pleaded in its defence that the appellant “has obtained, wrongfully, leave to file suit notwithstanding the fact that three years had expired after accrual of cause of action” and that he had done so by “withholding material facts from the court and by misrepresenting the facts.”

5. On 1st April 2005, the respondent moved the High Court by a chamber summons for an order to strike out the suit on the grounds, inter alia, that the application on the basis of which leave to file suit out of time was granted was “wholly incompetent as it does not comply with the mandatory provisions of the Limitation of Actions Act and the Civil Procedure Rules.” That application was opposed. It was heard by Nambuye, J (as she then was) who in a ruling delivered on 27th July 2007 struck out the suit on grounds that the appellant had wrongly invoked Section 3A of the Civil Procedure Act when seeking extension of time; that the inherent powers of the court under that section could only be invoked or applied “where there is no provision catering for the particular situation sought to be remedied”; that in this case the appellant should have filed an originating summons under Order 36 rule 3 of the Civil Procedure Rules as opposed to a chamber summons. In effect, the appellant’s suit was struck out for having been originated “through a wrong process.” As a lifeline, the Judge granted the appellant leave “to initiate fresh proceedings through originating summons for leave to file suit out of time.” The appellant did not appeal that ruling.

6. Approximately 6 months after the ruling delivered by the court on 27th July 2007 in High Court Civil Suit No. 1178 of 2004, the appellant returned to the drawing board, as it were, and on 1st February 2008, filed an Originating Summons, *Ex Parte*, in

Miscellaneous Application No. 43 of 2008 seeking “unconditional leave to file suit out of time against the respondent.” The application was based on Sections 27 and 28 of the Limitation of Actions Act, Section 3A of the Civil Procedure Act and Order 36 of the Civil Procedure Rules. In support of that application, the appellant swore an affidavit setting out the background as indicated above and explaining how the injuries he had sustained had impacted on his inability to commence action within the stipulated time period.

7. The Originating Summons was heard, *Ex parte*, by Waweru, J who, in his ruling dated 20th January 2010 and delivered on 22nd January 2010, that is the subject of this appeal, dismissed the same. The Judge held that the appellant did not meet the requirements of Section 27(2) of the Limitation of Actions Act. In rejecting the application, the Judge also considered that the cause of action had arisen “more than fifteen (15) years ago”; that “memories fade with passage of time. Documents are misplaced or lost. Witnesses change location or die and may no longer be available to testify.”

The appellant was aggrieved and filed this appeal.

The appeal and submissions by counsel

8. In his memorandum of appeal the appellant complains that the Judge was wrong in refusing to allow his Originating Summons for leave to file suit out of time; that the Judge failed to consider evidence presented before him and erred in failing to hold that the appellant gave sufficient reasons for his failure to file suit within time; that the Judge based his decision on extraneous matters that were not supported by evidence; and that the Judge paid undue regard to procedural technicalities with the result that the appellant was shut out from being heard.

9. During the hearing of the appeal, the parties were represented by learned counsel. Mr. Z. K. Muriithi appeared for the appellant while Mr. A. B. Shah with Mr. G. Gathu appeared for the respondent. Counsel relied entirely on their written submissions. The appellant submitted that the reasons given by the appellant for the delay in filing suit, namely his medical condition and his financial incapacity, were sufficient to warrant an extension of time; that an extension of time should therefore have been granted in the interest of justice; that the suit that the appellant initiated in 2004 was struck out on account of a mistake by his advocate. Citing the decision of ***Githiaka vs. Nduriri (2004) 2 KLR 67***, counsel urged that mistake of an advocate should not be visited on the appellant; and that his suit was struck out on procedural technicalities.

10. According to counsel, the Judge erred in considering matters that were not before him when he alluded to memories fading with passage of time and documents getting lost; that there was no evidence to support those statements and that the Judge should have confined himself to the matters set out in the pleadings and affidavits before him. In that regard, counsel referred to the case of ***EpcO Builders Ltd vs Marjan & another (2006) 2KLR 1***. Furthermore, counsel submitted, in taking the view that 15 years had lapsed since the cause of action arose, the Judge did not consider the intervening factors with the result that the decision he reached was a wrong exercise of discretion.

11. Opposing the appeal, the respondent after setting out the background to the appeal submitted that the appellant did not proffer any reason to warrant an extension of time to file suit; that under Section 27(2) of the Limitation of Actions Act, he was required to prove that material facts or facts of a decisive character relating to his cause of action were outside his knowledge until the end of the three year period of limitation; that the appellant was required under Section 27(2)(a) of the Act to have filed the application for leave to file suit out of time within one year of his becoming aware of the material facts of a decisive character that were outside his knowledge. It was incumbent upon the appellant, it was submitted, to show that his failure to proceed in time was due to material facts of a decisive character, within the meaning of Section 30 of the Act, being outside his actual or constructive knowledge. In support, counsel referred to the case of ***Gathoni vs. Kenya Co-operative Creameries Ltd [1982] KLR 104***.

12. It was argued for the respondent that the appellant was discharged from hospital two months after the accident and knew or ought to have known what he was supposed to do if he was minded to make a claim but did nothing until ten years later when in August 2004 he filed the application for extension of time that was subsequently struck out. Having regained consciousness, the appellant should have taken steps to pursue his claim after being discharged from hospital on 26th June 1994, counsel argued.

13. Stating that the appellant was unduly dilatory, counsel pointed out that the appellant obtained a P3 Form on 24th March 1999 and a police abstract report on 20th December 1999. It is inexplicable therefore, counsel contended, why the appellant waited another four years to make his application for extension of time on 9th August 2004 that was granted and later struck out. In any event, the subsequent application the subject of the impugned ruling did not fulfill the requirements of Section 27(2) of the Act as, among other things, it was made 14 years after

the appellant was aware of the material facts of a decisive character relating to the cause of action. Distinguishing the case of *Githiaka vs. Nduriri* on which the appellant relied, counsel submitted that unlike the power to grant extension of time under Rule 4 of the Rules of this Court, the court has no discretion in determining an application under Section 27 and 28 of the Act if the requirements of the Act are not satisfied.

14. According to counsel, the complaint that the Judge entertained extraneous considerations in considering the application is misplaced. In having regard to the fact that 15 years had lapsed since the cause of action accrued and in observing that memories fade and documents get misplaced or lost, the Judge was merely stating what is the common course of events and cannot be faulted.

15. As to the complaint that Judge's decision was based on procedural technicalities, counsel argued that Article 159(2)(d) of the Constitution on which the appellant anchored his argument does not do away with established laws on procedure and that the express provisions of the Act cannot be circumvented.

16. Counsel concluded by submitting that even if the court had a discretion to extend time, which it did not, the appellant is guilty of inordinate and inexcusable delay in bringing the application to seek leave to file suit out of time and grave injustice would result to the respondent if the appellant was to be granted leave to file suit well over 15 years after the cause of action arose. That if the appellant considers that his advocates are responsible for his predicament, he should pursue his remedy against them advocates.

Analysis and determination

17. We have considered the appeal and the submissions by learned counsel. The sole question for determination is whether the learned Judge erred in rejecting the appellant's application, made under Section 27 and 28 of the Limitation of Actions Act, for leave to file suit out of time. The reasons why the Judge declined to grant the appellant leave to file suit out of time are stated in the ruling thus:

“If leave as now sought is granted, it means that the defendant in the intended suit will be facing a suit in which the cause of action arose more than fifteen (15) years ago! This would not be just at all to the defendant. Memories fade with the passage of time. Documents are misplaced or lost. Witnesses change location or die and may no longer be available to testify.

But more importantly, section 27 (1) (d) of the Act requires that the requirements of section 27 (2) of the same Act be fulfilled in relation to the cause of action.”

18. In support of his application for extension of time the appellant stated that he sustained serious injuries in a road traffic accident on 30th April 1994; that he had instructed another advocate to seek leave and file suit out of time; that the advocate used the wrong procedure to obtain leave and his subsequent suit, namely HCCC No. 1178 of 2004 was struck out on 27th July 2007; and that he remained desirous of pursuing his claim. In his supporting affidavit sworn on 1st February 2008, the appellant deposed that he lost consciousness after about three months following the accident during which time he was unable to remember or comprehend anything; that for a period of 10 years he could hardly walk or support himself; that his “almost complete disability together with complete loss of memory is the reason why [he] did not file a claim for the injuries sustained in this accident within the stipulated time”; that thereafter he instructed Kinuthia Kahindi & Co Advocates to seek leave and file suit out of time; that the said advocates sought and obtained leave on 7th October 2004 in Misc. Application No. 1055 of 2004 on the basis of which he thereafter filed HCCC 1178 of 2004 that was subsequently struck out on 27th July 2007. Thereafter, on 1st February 2008, the appellant filed the application by originating summons that gave rise to the impugned ruling.

19. In order to surmount the defence of limitation on grounds of ignorance of material facts under Section 27 of the Limitation of Actions Act, in addition to fulfilling the requirements under Section 27(1)(a), (b) and (c), namely that the action is for damages for negligence, nuisance or breach of duty; that the damages claimed consist of or include damages in respect of personal injuries, the applicant must demonstrate that the requirements of Section 27(2) are fulfilled in relation to the cause of action. Section 27(2) of the Limitation of Actions Act provides that:

“2. The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which-

a. either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

b. in either case, was a date not earlier than one year before the date on which the action was brought.”

20. Expounding on those provisions, Kwach, JA in *Bernard M. Mbithi vs Mombasa Municipal Council & another [1993] eKLR*, stated that:

“The Court will grant an application for leave to bring an action after the expiry of the normal three-year limitation period if the plaintiff proves that material facts relating to his cause of action were or included facts of a decisive character which were at all times outside the knowledge of the plaintiff until a date which was either after the end of the three-year period or not earlier than twelve months before its end and was, in either case, not more than twelve months before the date on which the action was brought. Material facts are restricted to three categories of fact, namely, (a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting the cause of action; (b) the nature

or extent of the personal injury so resulting; and (c) the fact that the personal injuries were attributable to the negligence, nuisance or breach of duty or the extent to which they were so attributable.

It is not sufficient that the facts unknown to the plaintiff should be material within the above definition; they must also be of a decisive character, that is to say, they must be such that a reasonable person, knowing them and having obtained appropriate advice with respect to them, would have regarded them as determining that an action would have a reasonable prospect of succeeding and resulting in the award of damages sufficient to justify the bringing of the action.

Finally, the plaintiff must prove that a material fact of a decisive character was outside his knowledge (actual or constructive)."

21. In **Ngari & another Vs Odero (1999) 2EA 24** this Court stated that the requirements of Section 27(2) are stringent and that if the same are not met, the application for leave to file suit out of time must be rejected.

22. As already indicated, the appellant by his own account regained consciousness some three months after the accident. It took him about ten years thereafter to engage an advocate to pursue his claim. Notwithstanding that his advocate made a false start in the manner in which he made the application for leave to extend time, it is not clear why the appellant did not take any action to pursue his claim until 2004. The record shows that appellant obtained a P3 Form and Police Abstract report in 1999 and there is no suggestion that he did not pursue his claim earlier due to ignorance of material facts. The learned Judge was therefore correct in holding that the appellant did not fulfil the requirements of Section 27(2) of the Act.

23. Despite the unfortunate circumstances and the compassion we might have for the appellant, we are unable to find fault in the ruling of the lower court. Consequently, the appeal fails and the same is hereby dismissed with an order that each party bears their own costs of the appeal.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of April, 2018.

W. OUKO

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR