IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, MUSINGA, GATEMBU, JJA

CIVIL APPEAL NUMBER 42 OF 2016

BETWEEN

JONES M. MUSAU..1ST APPELLANT

MAGDALENE WAYUA MAVYUVA..................2ND APPELLANT

AND

THE KENYA HOSPITAL

ASSOCIATION..1ST RESPONDENT

DR. PETER MUNGAI NGUGI........................2ND RESPONDENT

(Being an Appeal against the Ruling (Aburili, J) dated 10th December, 2014

in

H.C.C.C. NO. 527 OF 2013

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JUDGMENT OF THE COURT

1. In this appeal, the appellants have challenged a ruling of the High Court (Aburili, J) delivered on 10th December 2014 striking out their suit on the grounds that the same was filed outside the limitation period prescribed under Section 4(2) of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya.

Background

2. On 26th August 2008, Benjamin Mavyuva Mwangangi, deceased, left his residence in Kayole, Nairobi, to seek treatment at Nairobi Hospital for a urination problem he was experiencing. He was admitted to the hospital and was scheduled for surgery to be performed by the second respondent, a medical surgeon, on 27th August 2008. The surgery did not go as well as had been anticipated. According to the appellants, the second respondent punctured the deceased’s rectum in the course of the surgery, leading to a bacterial infection. To correct the “mishap”, the second respondent performed a second surgery at the same hospital on 28th August 2008. Apparently, that too did not go well and unfortunately the deceased died at

the hospital on 29th August 2008. The appellants engaged a pathologist, Dr. Peter Ndegwa, who determined the cause of death to be acute peritonitis due to perforated bowels.

3. On 3rd February 2010, the appellants (the father and wife of the deceased respectively) made a complaint before the Medical Practitioners and Dentists Board (the Medical Board) which, according to the appellants, found the respondents culpable of professional negligence and ordered them to initiate mediation process with a view to compensating the appellants. The decision of the Medical Board was apparently made on 6th August 2013 but the respondents failed to comply with it.

4. On 19th December 2013 the appellants, as the legal representatives of the deceased, filed suit before the High Court at Nairobi seeking general damages against the respondents on the basis that they acted negligently and caused the death of the deceased.

5. In their separate statements of defence, the respondents admitted that the deceased was under their care when he died as pleaded but denied that the death was in any way caused by negligence. They pleaded in their respective defences that the appellants' suit was time-barred under the provisions of Section 4 of the Limitation of Actions Act (the Act) as the cause of action arose on 29th August 2008 and that the appellants' right to institute the claim had lapsed on 28th August 2011. The respondent intimated that they would in due course apply to have the appellants' suit struck out on that basis.

6. True to that threat, the first respondent filed a motion before the High Court on 21st March 2014 seeking an order to have the suit struck out. That motion was based on the ground that the suit was time-barred; that the suit did not disclose a reasonable cause of action; and that the appellants did not have the legal standing to institute the suit in the absence of a grant of letters of administration for the estate of the deceased. On 14th October 2014 the second respondent filed its own motion also seeking to have the suit struck out for the same reasons as those advanced by the first respondent.

7. In replying affidavits sworn by the first appellant in opposition to the applications, it was demonstrated that the appellants had indeed obtained a grant of letters of administration and the issue of their locus standi was accordingly resolved.

8. As regards the contention that the suit was barred under Section 4(2) of the Act, the first appellant deposed that having lodged a complaint with the Medical Board, it would have been an abuse of the process of the court to initiate a suit in a court of law when the Medical Board was already seized of the matter; that had the respondents complied with the decision of the Medical Board to initiate mediation with a view to compensating the appellants, the need to file suit would not have arisen; that the failure to comply with the decision of the Medical Board resulted in "a legitimate claim that is within time"; and that the cause of action arose upon the lapse of 90 days from 6th August 2013, when the Medical Board made its decision, and the suit does not therefore fall within the provisions of Section 4 of the Act.

9. The two applications were consolidated through an order of the court made on 15th October 2014. Having considered the applications and the arguments presented before her, the learned Judge allowed the applications and struck out the suit in the ruling, now the subject of this appeal, having concluded that the suit was "plainly and obviously" incurable irredeemably. Aggrieved, the appellants filed the present appeal.

The appeal and submissions by counsel

10. In their memorandum of appeal, the appellants complain that in reaching the decision that their claim was barred by limitation, the learned Judge misconstrued and misinterpreted the relevant provisions of the Civil Procedure Act, the Civil Procedure Rules and the Act; that the Judge failed to have regard to the appellants' right to be heard under Article 50(1) of the Constitution; that the Judge ignored relevant precedents while applying irrelevant ones; and that the Judge adjudicated on matters that were not before her.

11. Expounding on those complaints, Ms. Koki Mbulu, learned counsel for the appellants, relied on her written submissions that she highlighted, urging that the court was obliged to hear the appellants' suit and not to strike it out; that considering that the main reason on the basis of which the respondents applied to strike out the suit was that it was barred by Section 4 of the Act, then Order 2 of the Civil Procedure Rules on which the respondents based their applications is not applicable; that striking out of pleadings is draconian and the appellants have been left without a remedy; and that by striking out their suit, the appellants' right to a hearing under Article 50(1) of the Constitution was violated.

12. Counsel submitted this was not a proper case for striking out the claim because triable issues that merit trial are discernible from the pleadings. In that regard, counsel urged that applications for striking out, like applications for summary judgment, involve exercise of discretion that should be exercised only in the clearest of cases and that if a triable issue is raised, a trial must be ordered. In that regard counsel invited us to consider the decisions of this Court in **Charles Mugane Njonjo vs. Gucokaniria Kihato Traders and Farmers Company Limited & another [2016] eKLR**; **Lalji t/a Vakkep Building Contractors vs. Carousel Limited [1989] KLR 386**.

13. Counsel argued that appellants' claim against the respondents was a medical negligence claim; that the learned Judge erred in her interpretation of the provisions of the Act; that the Medical Board had to first determine the cause of death before which the appellants could not institute action; that although the deceased died on 29th August 2009, it was not until 6th August 2013 when the Medical Board made its determination regarding the cause of death; that time begun to run, for purposes of limitation, on 6th August 2013 after the Medical Board made that determination and faulted the Judge for proceeding as though the claim was one arising from a road traffic accident.

14. Counsel urged that the learned Judge ought to have approached this matter as she subsequently did in the case of **P. M. N vs. Kenyatta National Hospital & 6 others [2015] eKLR** where the Judge declined to strike out a suit on the basis that courts of justice should strive to sustain suits rather than dismiss them.

15. Counsel concluded by urging us to allow the appeal and reinstate the appellants' suit for hearing and determination on merits.

16. Opposing the appeal, Mr. Queenton Ochieng, learned counsel for the 1st respondent, relied on his written submissions which he highlighted. He submitted that the applications before the lower court were based on the correct legal provisions; that to the extent that the claim was barred by limitation it did not disclose a reasonable cause of action. In that regard counsel referred to a High Court decision in the case of **Time Magazine International Ltd and another vs. Michael F Rotich and another [2000] eKLR** where Onyango Otieno J (as he then was) adopted a definition of reasonable cause of action as meaning a cause of action with some chance of success. Insofar as the present action was time-barred, counsel argued, it did not have any chance of success and therefore the proper provisions of the Civil Procedure Rules were correctly invoked.

17. Counsel stated that it was clear from paragraph 7 of the amended plaint that the deceased died on 29th August 2008; that having regard to Section 4(2) of the Act, suit should have been filed within three years of the death; that the court has no power to hear a claim that is time-barred and the contention that the right to a hearing under Article 50(1) of the Constitution was violated has no basis. Citing a High Court case of **Kenyan Builders and Concrete Company Limited vs. National Government Constituency Development Fund Committee [2017] eKLR**, counsel submitted that the Constitution does not operate in a vacuum and neither does it automatically oust other statutory provisions.

18. As to the argument that the appellants had to wait for the decision of the Medical Board before filing suit, counsel argued that the Medical Board has no mandate to determine claims of negligence and it was therefore not necessary to wait for it to make a determination before filing suit. Counsel urged that there was indeed a post-mortem report that made known the cause of death and the appellants cannot claim to have been ignorant of material facts. In that regard, counsel drew our attention to a decision of this Court in **Gathoni vs. Kenya Co-operative Creameries Ltd [1982] 104**; the English case of **Dobbie vs. Medway Health Authority (1994) 4 All E R** and the case of **Mbithi vs. Municipal Council of**

Mombasa and another [1990-1994] EA 359. Counsel concluded by saying that the appellants did not demonstrate why they did not file an application for extension of time. With that, counsel urged us to dismiss the appeal with costs.

19. Mr. Gordon Ogado, learned counsel for the 2nd respondent, also relied on written submissions that he highlighted. He associated himself with the 1st respondent's submissions and reiterated that based on the post mortem report, the cause of death of the deceased was known to the appellants from the onset; that the appellants need not have waited for a determination by the Medical Board before lodging a claim in court; that the appellants had not shown that the delay in filing the claim was due to a mistake and there cannot be any basis for extending time under Sections 26 and 27 of the Act; that the appellants did not in their pleading allude to ignorance or mistake as to the cause of death and to that extent are bound by their pleading. In that regard, counsel cited this Court's decision in the case of **IEBC and another vs. Stephen Mutinda Mule & 3 others [2014] eKLR.**

20. According to Mr. Ogado, the appellants indicated, upon enquiry by the High Court, that they did not need time or an opportunity to seek an extension of time for the filing of the suit. He also urged us to dismiss the appeal with costs.

Analysis and determination

21. We have considered the appeal and the submissions by learned counsel. An application to strike out pleadings as disclosing no reasonable cause of action, such as the High Court was addressing in this case, involves the exercise of judicial discretion on the part of the court. In **Crescent Construction Co.Ltd vs Delphis Bank Ltd [2007] eKLR** this Court stated that:

> ***"…one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant, however weak his case may be, from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter."***

22. As Newbold, P. stated in a decision of the predecessor to this Court in **Mbogo and another vs. Shah [1968] E. A 93**, the circumstances in which we, as an appellate court, can interfere with the exercise of judicial discretion are limited. For us to do so, we must be satisfied that the lower court misdirected itself in some matter and as a result arrived at a wrong decision or that it is manifest from the case as a whole that the lower court was clearly wrong in the exercise of its discretion and that as a result there has been misjustice.

23. Alive to those considerations, the proposition advanced by the appellants in this appeal is that notwithstanding the fact that the deceased died on 29th August 2008, the three year time limit for filing suit fixed by Section 4(2) of the Act did not begin to run until after a complaint the appellants had lodged against the respondents with the Medical Board had been determined; that since a determination by the Medical Board was made on 6th August 2013, that is the date on which time began to run.

24. The question therefore is whether the period between the date of death of the deceased and the date of the determination by the Medical Board is to be excluded in the computation of time for purposes of Section 4(2) of the Act. In other words, whether the appellants' claim filed in court on 19th December 2013 was within time and whether the learned Judge was therefore wrong in striking out the appellants' suit.

25. In **D. T. Dobie & Company (Kenya) Limited vs. Joseph Mbaria Muchina and another [1980] eKLR**, this Court, when discussing the principles upon which the court acts when dealing with an application to strike out pleadings on grounds of non disclosure of reasonable cause of action or defence held that a "court ought to act very cautiously and carefully and consider all the facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or

being otherwise an abuse of the process of the court." The Court cautioned that:

> **"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."**

26. Can it then be said that the appellants' case is one that plainly and obviously discloses no reasonable cause of action? There is no dispute that the appellants' cause of action in this case was founded on the tort of negligence. That much is clear from the plaint dated 19th December 2014 as amended on 2nd April 2014. The deceased died on 29th August 2008. In paragraph 8, the appellants averred that Dr. Peter Ndegwa, a pathologist, determined the cause of death as acute peritonitis due to perforated bowels. In paragraph 9 of the amended plaint, the appellants averred that the respondents "acted negligently and caused the death" of the deceased on 29th August 2008. The particulars of negligence attributed to the respondents were then set out in detail under paragraph 9 of the amended plaint.

27. Section 4(2) of the Act provides that:

> **"An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued."**

28. In general, the period of limitation begins to run when the cause of action accrues.[1] Under Section 27 of the Act, Section 4(2) does not afford a defence to an action founded on tort where the action is for damages for negligence, nuisance or breach of duty, and the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person, and the court has, whether before or after the commencement of the action, granted leave for purposes of that provision. To qualify for leave, it should be 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 either was after the 3 year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period, and in either case, was a date not earlier than one year before the date on which the action was brought.

29. While we appreciate that the learned Judge was not dealing with an application for extension of time under those provisions, the question arises, as already stated, as to whether the appellants' cause of action accrued on 29th August 2008 when the deceased died by reason of the alleged negligence on the part of the respondents or whether it accrued on 6th August 2013 when the Medical Board is said to have made a determination of professional misconduct. In other words, did the appellants have to wait for the outcome of the inquiry by the Board before instituting the claim in court?

30. The deceased's father, the first appellant, stated in his witness statement filed with the plaint on 19th December 2013 that on learning of the death of the deceased, he sought the services of a private pathologist, Dr. Peter M. Ndegwa, to ascertain the cause of death of his son; that from the examination, the cause of death was established as "acute peritonitis due to perforated bowels" and that on 3rd February 2010, he lodged a complaint with the Medical Board. In effect, the appellants were as early as 3rd February 2010 seized of the material facts relating to the cause of action on the basis of which they should have instituted the claim in court. It was not necessary to await the outcome of a determination by the Medical Board in order to institute the claim in court.

31. There are parallels to be drawn between the circumstances in this case and those in **Mbithi vs. Municipal Council of Mombasa** **and another** (above). That case involved an appeal to this Court from a decision of the High Court declining to grant extension of time to file suit outside the limitation period. The applicant in that case had thought it was necessary to await the outcome of an inquest before making a claim in court for the death of his son caused by negligence. In upholding the decision of the High Court refusing to grant an extension of time in that case, Kwach, JA had this to say:

> ***"In the present case, there can be no doubt that the appellant knew right from the start that the death of his son had been caused by negligence and/or breach of duty attributable to the respondents. He did not have to wait for the conclusion of the inquest to make that determination. The fact that he thought this was necessary did not and could not make it a material fact. The application was therefore rightly rejected by the judge."***

32. Although, as we have already indicated, the High Court was, in the present appeal, dealing with an application to strike out the plaint as opposed to an application for extension of time as was the case in **Mbithi vs. Municipal Council of Mombasa and another** (above) we think the principle for which it stands is applicable here in the sense that the appellants knew from the onset, based on the post mortem report, that the death of the deceased may have been attributable to the negligence of the respondents. Consequently, we agree with the High Court that the appellants need not have waited for a decision of the Board before filing suit.

33. In conclusion therefore, we hold that the learned Judge was correct in striking out the suit filed in court on 19th December 2013 as the same was filed outside the prescribed limitation period without leave having been obtained. The result is that this appeal has no merit and is accordingly hereby dismissed. We think, as the High Court did, that each party should bear its own costs of the appeal.

Orders accordingly.

Dated and delivered at Nairobi this 24th day of November, 2017.

R. N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR