



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: AZANGALALA , OTIENO-ODEK & KANTAI JJ.A)
CIVIL APPEAL NO. 37 OF 2013

BETWEEN

WILLIS ONDITI ODHIAMBO..... APPELLANT

AND

GATEWAY INSURANCE CO. LTD..... RESPONDENT

(Appeal from a Ruling of the High Court of Kenya at Kisumu (Chemitei, J.) dated 14th November, 2012

in

H.C. MISCELLANEOUS CIVIL APPEAL NO. 245 OF 2011

JUDGMENT OF THE COURT

The appellant, **Willis Onditi Odhiambo**, sued **Mr** and **Mrs Aoko** in, Kisumu Chief magistrate's Court Civil Suit No. 55 of 1994 claiming general and special damages following a road traffic accident which occurred on 22nd December, 1992 along Nakuru-Kericho road near Kedowa. He succeeded and was awarded a total of Ksh.271,600/ in general and special damages plus costs and interest.

The decree which issued remained unexecuted for a prolonged period of time. The appellant then, filed Kisumu Chief Magistrate's Court Civil Suit No. 12 of 2009 against the respondent. In that suit, the appellant sought declaratory orders compelling the defendant to satisfy the decree pursuant to the said judgment in Kisumu Chief Magistrate's Court Civil Case No. 55 of 1994. Kisumu CMCC No. 12 of 2009 was eventually struck out for being statute barred under the Limitation of Actions Act.

The appellant was not done yet; he lodged an Originating Summons in Kisumu High Court Misc. Civil Application No. 245 of 2011 in which he sought leave of the court to file suit out of time against the respondent to enforce the same decree in Kisumu CMCC No. 55 of 1994. The record of the Misc. Application shows that the appellant did not disclose that his claim in Kisumu CMCC No. 12 of 2000 had been struck out for being time barred.

The Originating Summons came up for hearing before H.K. Chemitei, J. who granted the extension

of time to file the suit. Pursuant to that leave, the appellant filed Winam Principal Magistrate's Court Civil Case No. 53 of 2012 seeking exactly the same reliefs he had sought in Kisumu CMCC No. 12 of 2009 namely declaratory orders compelling the respondent to satisfy the decree pursuant to the judgment in Kisumu CMCC No. 55 of 1994.

In the written statement of defence, the respondent denied the appellant's claim and also pleaded that the same was statutorily time barred under the Limitation of Actions Act – Cap 22 Laws of Kenya. The respondent further averred that the suit was an abuse of the process of the court as the earlier suit, being Kisumu CMCC No. 12 of 2009, had been dismissed for being statute barred. In paragraph 17 – the respondent specifically pleaded as follows:

“17 The Defendant will contend that the extension of time to the plaintiff in Kisumu High Court Miscellaneous Civil Application No. 245 of 2011 is of no legal effect and was made without jurisdiction and obtained by means of fraudulent concealment of facts and the Defendant will crave that the said extension of time is invalid and of no consequence and subject to be set aside and/or vacated by the said court ex-debito justitiae.”

As cautioned in paragraph 17 of the defence, the respondent, by its Notice of Motion dated 14th August, 2012, moved the High Court in Kisumu Miscellaneous Civil Application No. 245 of 2011 for two substantive orders namely that the order extending time to file suit made in favour of the appellant on 17th October 2011, be set aside, discharged or otherwise reviewed and a further order that Winam SRMCC No. 53 of 2012 was time barred.

The review application was heard by H.K. Chemitei, J. who allowed the same and made the following main orders:-

“(a) This Court's orders issued on 17th October, 2011 are hereby set aside together with any attendant consequences.

(b) Suit No. Winam SRM CC 53 of 2012 is time barred for all intent and purposes.”

Those are the orders which triggered the appeal before us by the appellant premised upon seven (7) grounds of appeal. Those grounds however, raise the following issues:-

- 1) ***That the order reviewing the extension of time to file suit amounted to an error in law.***
- 2) ***That the order allowing review was made without considering the reasons for the delay in filing suit.***
- 3) ***That the learned Judge of the High court relied on technicalities rather than substantive law in allowing the review application.***

The appellant appeared in person and acknowledged, in his oral submissions, that he was late in filing the declaratory suit which delay, in his view, was cured when he obtained leave to file the suit out of time. The appellant further submitted that he did not know that he should have filed his suit in the court which granted him leave to file the suit out of time rather than at Winam Principal Magistrate's Court.

Mr. Peter Karanja, learned counsel for the respondent, in opposing the appeal reiterated the arguments he made at the High Court when he prosecuted the review application. He emphasized that the requirements of **Section 27** of the Limitation of Actions Act were not demonstrated when leave was initially obtained by the appellant. In learned counsel's view, there was no jurisdiction to extend time to file suit and the High Court was right to review its own order granting extension of time. Counsel placed reliance upon several decisions of this Court and those of the High court to substantiate his submissions. Because of considerations of relevance we shall refer to only one of those cases in this judgment even though we have read all of them.

We have now considered the record, the grounds of appeal and submissions made to us. The dispute between the appellant and the respondent, in our view, is straight forward. It is this: should the order granting leave to the appellant to file suit out of time have been reviewed as did H.K. Chemitei, J? To determine the issue, we must examine the basis of the decision to allow the review. The learned Judge found the basis for review in the provisions of **Section 4 (2)** and **Section 27** of the Limitation of Actions Act.

Section 4 (2) provides:-

“4 (2) 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.”

And Section 27 (1) is in the following terms:-

“Section 4 (2) does not afford a defence to an action founded on tort where:

- (a) the action is for damages for negligence, nuisance or breach of duty whether the duty exists by virtue of a contract or of written law independently of contract or written law; and**
- (b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consists of or include damages in respect of personal injuries or any person; and**
- (c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this Section; and**
- (d) the requirements of Subsection (2) are fulfilled in relation to the cause of action.”**

After considering the above provisions, the learned Judge concluded that the court had no jurisdiction to extend the time of filing suit as had been sought by the appellant. There are three other reasons why the learned Judge reviewed his own order extending time to file suit. He found that the appellant was guilty of inordinate delay in filing the application to extend time. He also found that the appellant had lodged his suit in an inappropriate court and not in the court in which the leave had been given. Finally, the learned Judge found that the appellant had been guilty of material non-disclosure.

Given the record of this matter which record we summarized at the beginning of this judgment, we do not see how the learned Judge's decision can be faulted. For the avoidance of doubt, we state that the appellant was not seeking to file suit out of time for damages in negligence. The suit which the appellant filed against Mr. and Mrs Aoko, ie Kisumu CMCC No. 55 of 1994, did not contravene the provisions of the Limitation of Actions Act. The appellant therefore required no leave to extend time to file the same. The leave he sought was to file the declaratory suit out of time to compel the respondent to satisfy the decree he had obtained on 26th August, 1996 in Kisumu CMCC No. 55 of 1994. In other words, the appellant wanted to execute the said decree against the respondent out of time. Execution of judgments and/or decrees is governed by **Section 4 (4)** of the Limitation of Actions Act which is in the following terms:-

“4 (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered.”

The judgment which the appellant sought to execute was passed on 26th August, 1996. The judgment should therefore have been executed on or before 27th August, 2008. The suit which was first filed by the appellant ie Kisumu CMCC No. 12 of 2009 and the second one, being Winam Principal Magistrate's Court Civil Case No. 53 of 2012, were both plainly filed out of time.

The appellant moved the High Court by his Originating Summons filed on 19th September, 2011 for leave to file suit out of time under the provisions of **Sections 27 and 29** of the Limitation of Actions Act. **Section 29** is of no relevance in this appeal. Under **Section 27**, as can be gleaned from the provisions cited above, time to file suit can only be extended where the action is found on **tort** and must relate to the torts of **negligence, nuisance or breach of duty and the damages** claimed should be in respect of personal injuries to the plaintiff as a result of the **tort**. The section clearly does not give jurisdiction to the court to extend time for filing suit in cases involving execution of decrees. In the matter before us, it matters not that the original suit was founded on the tort of negligence and damages claimed were in respect of personal injuries as a result of the tort of negligence. Here, the extension was sought to enforce a judgment and/or decree. Time within which to lodge such action cannot be extended under the provisions of **Section 27** of the Limitation of Actions Act. Accordingly, H.K. Chemitei, J. had no jurisdiction to extend time as he purportedly did on 17th October, 2011. We are therefore not at all surprised that the learned Judge reviewed that order by setting it aside on 14th

November, 2011. Without the leave extending time to file the suit, Winam Principal Magistrate's Court Civil Case No. 53 of 2012, could not survive as it was obviously filed out of time. Even if the suit were to proceed, it was bound to be struck out or dismissed as the respondent had specifically pleaded the issue of limitation in its written statement of defence which it delivered in the suit.

In **Mary Osundwa - V - Nzoia Sugar Company Limited [2002] eKLR**, Osiemo, J., had, with the consent of the parties, granted extension of time to file suit retrospectively. Notwithstanding that the parties had consented, on appeal this Court said of **Section 27 (1)** of the Limitation of Actions Act:

“This Section clearly lays down the circumstances in which the court would have jurisdiction to extend time. That action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The Section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort. Accordingly Osiemo, J. had no jurisdiction to extend time as he purported to do on 28th May, 1991. That the order was by consent can be neither here nor there; the parties could not confer jurisdiction on the judge by their consent.”

(Emphasis ours)

That decision correctly interpreted the provisions of **Section 27(1)** of the Limitation of Actions Act and there is no basis to depart from the same.

In the result and for reasons we have endeavoured to give above this appeal is absolutely without merit and we order that it be and is hereby dismissed.

Each Party shall bear his/its own costs in the appeal.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF DECEMBER ,2014.

F. AZANGALALA

.....

JUDGE OF APPEAL

OTIENO-ODEK

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL