



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

CORAM: OMOLO, SHAH & KEIWUA, JJ.A.

CIVIL APPEAL NO. 244 OF 2000

BETWEEN

MARY OSUNDWA APPELLANT

AND

NZOIA SUGAR COMPANY LIMITED RESPONDENT

(An appeal from the judgment of the High Court of Kenya

at Kakamega (Tanui J) dated 26th April, 1999

in

H.C.C.C. NO. 85 OF 1990)

JUDGMENT OF THE COURT

The appellant brought a claim against the respondent and in both the original plaint and the amended plaint, the appellant's claim was for an alleged breach of contract which was entered into in 1983. The claim was brought to the High Court at Kakamega in 1990, some seven years from the date of the alleged breach. Faced with the defence of limitation, the appellant on the 11th February, 1991 long after the suit had been filed brought before the Court an application by way of notice of motion under **Section 27 of the Limitation of Actions Act, Cap 22 Laws of Kenya**, and under **Order 50 rule 1 of the Civil Procedure Rules**, and in that motion the appellant had prayed for an order that:

"... this suit be deemed to have been filed in time with the result that time be extended retrospectively."

That motion was consented to on 28th May, 1991 and Osiemo, J. made an order that the motion, as it was consented to, was granted. **Section 27 (1) of the Limitation of Actions Act**, provides and we quote:

"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 a contract or written law); and

(b) 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

(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."

This section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The 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. Though Tanui, J. dismissed the suit on a different basis, we think the suit was bound to be dismissed in any event on the issue of limitation which was specifically pleaded in the defence. This appeal accordingly fails and we order that it be and is hereby dismissed but we make no order as to costs.

Dated and delivered at Kisumu this 20th day of June, 2002.

R. S. C. OMOLO

JUDGE OF APPEAL

A. B. SHAH

JUDGE OF APPEAL

M. Ole KEIWUA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR