



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR REALATIONS COURT

AT MOMBASA

APPEAL NO. 3 OF 2021

RUBI PLASTICS INDUSTRIES LIMITEDAPPELLANT

VERSUS

KHAMIS CHANGAWA KONDE.....RESPONDENT

(Being an Appeal from the judgment delivered by Honourable G. Kiage –SRM

on 13th May 2020 in Mombasa Chief Magistrate Court Civil Suit No. 66 of 2018)

J U D G E M E N T

1. The Appellant, Rubi Plastics Industries Ltd, filed this appeal vide a Memorandum of Appeal dated 27th May 2020 and filed in the High Court Registry at Mombasa on 10th June 2020, whereat it was registered as the said Court's Civil Appeal No. 68 of 2020. The Appellant compiled and filed a Record of Appeal in the said Registry on 2nd December 2020. Subsequently, on 8th March 2021, the High Court made an order transferring the appeal to this Court for hearing and determination.

2. The appellant, who was the defendant in the lower court's case, appeals against a judgment delivered in Mombasa Chief Magistrate's Court on 13/5/2020 (G. Kiage SRM).

3. The Respondent's case in the lower court was outlined in a plaint dated 15th December 2017, wherein he averred, *inter-alia*:-

a) That at all material times to the suit, he (the Respondent) was lawfully employed by the appellant as a Plastic Cutter Machine Operator.

b) That on or about 27/11/2009 at the company's premises at Majengo, Mombasa, while the Respondent was lawfully engaged in his duties as a Plastic Cutter Machine Operator, the machine which was defective suddenly lost control and crashed the Respondent's left index finger thereby causing the Respondent to sustain serious injuries.

c) That leave to file suit out of time was sought and granted in Mombasa SRMCC Misc. Application No. 362 of 2017.

4. The Appellant filed a statement of defence dated 29th January 2018, wherein it denied, *inter-alia*, having employed the Respondent as a plastic cutter or at all and put the Respondent to strict proof of that allegation.

5. The Appellant further denied allegations and particulars of negligence pleaded in the Respondent's plaint and put the Respondent to strict proof thereof. In summary, the Appellant denied all matters pleaded in the plaint and put the Respondent to strict proof thereof.

6. On 2nd February 2018, the Respondent filed a Reply to Defence reiterating the averments made in his plaint.

7. On 7th February 2018, the Appellant filed a notice of intention to raise a Preliminary Objection giving notices as follows:-

“TAKE NOTICE THAT the defendant herein will raise a preliminary objection in limine and seek to have the Plaintiff's entire suit dated 15th December 2017 struck out and/or dismissed for the following reasons:

(1) That the suit is time barred.”

8. The Preliminary Objection is however shown to have been withdrawn on 17th May 2018 with costs to the Respondent herein. On 4th October 2018, the Appellant was granted leave to amend its statement of defence, with corresponding leave being given to the Respondent to amend his reply to defence if need be.

9. Subsequently, the Appellant filed an amended statement of defence dated 9th October 2018 and pleaded as follows in paragraphs 6 and 13 thereof:-

Paragraph 6

“ further and without prejudice to the foregoing, the alleged cause of action arose on 27th November 2009 as per paragraph 5 of the Plaint whereas the suit was filed on 19th January 2018, rendering this suit time barred and therefore bad in law as it offends the provisions of the Limitation of Actions Act, Cap 22 of the Laws of Kenya”.

Paragraph 13

“ the defendant denies the contents of paragraph 11 of the Plaint and specifically denies the Jurisdiction of this Honourable Court.”

10. The lower court's record shows that when the suit came up for directions before the trial court on 26th March 2019, the court gave an order that the file be returned to the registry as the court did not have jurisdiction, the suit having been a WIBA matter. On 16th September 2019, the suit came up for directions once more, and the court fixed the same for hearing on 11th November 2019. No further reference was made to the issue regarding whether or not the court had jurisdiction to hear and determine the claim, either by the trial court or by the parties before it. I will also leave the issue at that point as it has not been taken up on appeal.

11. When the suit came up for hearing on 11th November 2019, the Respondent (being the Plaintiff in the suit) testified and was cross-examined by the Appellant's counsel, upon which he was re-examined. The plaintiff's case was then closed. The Appellant herein (being the defendant in the said suit) also closed its case on the aforesaid date without calling any witness.

12. Under cross-examination, the Respondent testified as follows:-

“I suffered injury on 29/11/09, I filed this suit on 19/1/2018, 8 years after the injury. I confirm that no demand letter dated 27/11/2017. The treatment notes from the doctor (sic) of 17/11/2017 which is 8 years after the date of injury.”

13. The court then fixed the matter for mention on 5/12/2014 for submissions.

14. Parties to the suit do not appear to have framed and filed a statement of agreed issues for determination before commencement of trial. The Appellant however came up with separate issues for determination, after hearing of the case, and listed them in its written submissions dated 3rd December 2019 and filed in court on 4th December 2019. Issues listed for determination by the Appellant were as follows:-

a) Whether or not a party can challenge *ex-parte* leave to file suit out of time.

b) Whether the Plaintiff was validly granted leave to file the suit out of time in the circumstances.

c) Whether or not the plaintiff could be granted the prayers sought.

15. On the first issue the Appellant submitted that where *ex-parte* leave has been obtained to file suit out of time, it cannot be challenged by way of Preliminary Objection before trial, but can only be challenged during trial. The Appellant referred the trial court to Court of Appeal decision in Mary Wambui Kabugu (legal Representative of Kabugu Mutua) vs- Kenya Bus Service Limited (Appeal No. 195 of 1995 Nairobi (Akiwumi J.A.) where the Court stated:-

“it must be remembered that even when the Judge grants leave, there is nothing final about it, it is merely provisional. The defendant will have every opportunity of challenging the facts and the law afterwards at the trial. The judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar. He is not in the least bound by the provisional view expressed by the judge in chambers who gave leave...the question of whether or not the Plaintiff was entitled to the extension can only be challenged in the proceedings. This is one of the exceptions to the general rule that a party against whom an *ex-parte* order has been made can only apply to the court which made the order to set it aside.”

16. The Appellant further submitted before the trial court that for an extension of a limitation period to be deemed to be properly granted, the Plaintiff must fulfil the conditions set out in **Section 27(2) of the Limitation of Actions Act** which provides:-

“ 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 the period; and

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

17. It was the Appellant’s further submission before the trial court that having admitted under cross examination that the suit had been brought eight (8) years out of time, despite having all the material facts of a decisive character within his knowledge, actual or constructive, no reasonable excuse could be made for the leave granted to file the suit out of time. That the suit must fail.

18. Although the Appellant also submitted on the other two issues for determination listed in paragraph 14 of this judgment, I will not set out those submissions in this judgment.

19. On his part, the Respondent, filed written submissions dated 3rd December 2019 and filed in court on the same date, wherein he submitted on the issue of limitation of time as follows:-

“leave to file this suit out of time was sought and granted in Msa Srnc Misc. Appl No. 362 of 2017 and the order was produced in evidence. The defendant had filed a preliminary objection to the same which was withdrawn later. The defendant did not adduce any evidence to challenge the same at all and the same cannot be raised at submissions state at all.”

20. In his brief judgement dated 5/5/2020 and delivered on 13/5/2020, the Honourable trial magistrate rendered himself on the issue of limitation as follows:-

“it is crucial that the question of limitation be resolved before the rest of the issues can be canvassed. The defendant filed a notice of preliminary objection dated 7/2/2018 on the question of limitation which they subsequently withdrew on 23/5/2018 for reasons known to themselves.

On 12/10/2018 the defendant filed an amended statement of defence wherein once again the issue of limitation was introduced. Although the same was in the amended defence, the defendant did not, during the pendency of the suit, seek to have it argued inter-partes and determined, but instead chose to raise it in their submissions. The defendant failed to raise the issue of limitation at the appropriate time, it is therefore not open for them to raise it at the submissions stage. In the end therefore this issue can safely be ignored.”

21. The Appellant appears to have been aggrieved by the foregoing part of the trial court’s judgment only because the grounds of appeal set out in the Memorandum of Appeal dated 27th May 2020 are as follows:-

a) The Learned Magistrate erred in law by ignoring and failing to determine the issue of limitation of time.

b) The Learned Magistrate erred in law and in fact by overlooking the fact that the Respondent filed the suit out of time pursuant to ex-parte leave, which can only be challenged during trial and not by preliminary objection.

c) The Learned Magistrate erred in law by failing to adhere to the doctrine of stare decisis established on the issue of limitation of time, where ex-parte leave has been granted to file suit out of time.

d) The Learned Magistrate erred in law by failing to consider and adhere to Section 27(1) & (2) of the Limitation of Actions Act.

e) The Learned Magistrate erred in law and in fact by failing to take into account the Appellant’s cross examination of the Respondent.

f) The Learned Magistrate erred in law and in fact by failing to consider the Appellant’s Witten submissions and bundle of authorities.

22. The first five grounds of appeal more or less address one issue and may be collapsed into one ground, time limitation, which I proceed to address.

23. In my view, a court of law cannot ignore a point of law, and particularly when that point of law has been specifically pleaded in the pleadings before it. A court of law may, even on its own motion, take cognizance of such point. At paragraph 6 of its amended statement of defence dated 9th October 2018, the Appellant pleaded specifically that the Respondent’s suit filed on 19th January 2018 was time barred and therefore bad in law as it offended provisions of the Limitation of Actions Act Cap 22 Laws of Kenya.

24. Although Section 27(2) of the Limitation of Actions Act obligates the plaintiff to demonstrate fulfilment of conditions set out therein, the Respondent herein did not even attempt to discharge the aforesaid obligation by explaining to the court why the suit had been filed eight (8) years after the cause of action arose. The Respondent simply produced a copy of the order granting him leave as an exhibit.

25. Cross examined by counsel for the Appellant, the Respondent admitted having filed the suit eight year after the date of injury. He however did not offer any explanation for the late filing.

26. The Appellant thereupon took up the issue of limitation of time in their final written submissions referred to in paragraph 14 of this judgment, exhaustively submitting on the same and citing various authorities/decided cases in support of their arguments.

27. The Learned trial Magistrate fell into error by ignoring submissions made by the Appellant on the aforesaid issue. Matters of law are

better argued by counsel where parties before the court are represented by counsel. Such arguments may be in the form of submissions, either written or orally presented, depending on directions given by the court handling the matter.

28. In my view, matters of law may be raised and argued at any stage of proceedings before a court, and especially when such matters are pleaded. Proceedings include final and/or closing submissions by parties and/or their advocates.

29. It was upon the Respondent to demonstrate fulfilment of the conditions set out in Section 27(2) of the Limitation of Actions Act as set out in the said Section. The trial magistrate erred by blaming the Appellant for **“not raising the issue at the appropriate time.”** There was no better time for the Appellant to raise the issue of limitation than in their cross-examination of the Respondent and in their submissions thereafter.

30. The Appellant had, vide its amended statement of defence, invited the court to make a determination on the issue of the suit before it being time barred, and consequently the validity or otherwise of the *ex-parte* leave granted to the Respondent to file the suit out of time. Issues for determination flow from pleadings filed but not from arguments presented by parties to the suit at whatever stage of the proceedings. By choosing to ignore the issue of time limitation and therefore failing to render a determination thereon, the trial court fell into error.

31. It was held in the case of Galaxy Paints Co. Ltd –vs- Falcon Guards ltd [2000]eKLR that:-

“...it is trite law, that issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended..., the trial court..., may only pronounce judgment on the issues arising from the pleadings or such issue as the parties may have framed for the court’s determination.”

32. It was held in the Gandy –vs- Caspair [1956] EACA 139 that:-

“unless pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record.”

33. The importance of pleadings in framing issues for determination was also stated in Fernandes –vs- People Newspapers Lrd [1972] EA 63 where Law Ag v.p. said:-

“A Civil Case is decided on issues arising out of the pleadings. No allegation of negligence against the appellant has ever been made and it was not open to the court to find negligence on his part.”

34. Being a first appellate court, this court is obligated to look at the pleadings filed in the trial court and to reappraise the entire evidence on record and to make its own findings on the issues raised on appeal. It was held in Damiano Migwi –vs- Timothy Maina Waitegi [2009] eKLR that:-

“a first appellate court has a duty to reappraise the entire evidence on record and make its own findings of fact on the issues, while allowing for the fact that it had not seen the witnesses testify, before it could decide whether a trial court’s decision could be supported.”

35. As held in Mwangi –vs- Wambugu [1984] KLR 453

“ A court of appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finding, and an appellate court is not bound to accept the trial Judge’s finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence...”

36. The trial court ought to have considered and determined not only the issue of time limitation pleaded in the appellant’s amended statement of defence, but also whether, based on the evidence presented, the Respondent had satisfied the statutory conditions set out in Section 27(2) of the Limitation of Actions Act. Failure and/or refusal to do so amounted to an error.

37. As stated by the Court of Appeal in the Mary Wambui Kabugu Case (supra):-

“...the defendant only becomes aware of the order extending time when he is served with the summons, plaint and order extending time...the only time when such defendant can challenge the order granting extension of time is at the time of the trial, either on facts brought out at the trial, or by way of arguments at trial...”

38. Arguments at the trial include submissions, written or oral, presented by parties or their advocates before closure of the trial, that is, before the trial court retires to write its judgment.

39. There having been no reasons given by the Respondent pursuant to Section 27(2) of the Limitation of Actions Act explaining the delay in filing his suit, and having considered the rival submissions filed by counsel for both parties, I find and hold that the suit in the lower court, being Mombasa SRMCC No. 66 of 2018, was statute barred.

40. Consequently, I set aside the Judgment of G. Kiage -SRM dated 5/5/2020 and delivered on 13/5/2020 and substitute it with an order dismissing the said suit with costs to the Appellant. The Appellant will also have costs of this appeal.

41. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14TH DAY OF OCTOBER 2021

AGNES M.K. NZEI

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

AGNES M.K. NZEI

JUDGE

APPEARANCE:

MR. NDEGE FOR THE APPELLANT

MR. MUTISYA FOR THE RESPONDENT