



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**APPEAL NO. 33 OF 2018**

*(Before Hon. Justice Mathews N. Nduma)*

**OGEMBO TEA FACTORY COMPANY LIMITED.....APPELLANT**

**VERSUS**

**JOSEPH MAINA OGERI.....RESPONDENT**

**JUDGMENT**

1. The Appellant challenges the judgment of the Learned Magistrate Hon. N. Wairimu SRM delivered on 29<sup>th</sup> June 2016 on the basis that the learned trial magistrate erred in law and fact in failing to hold that the Respondent's suit was time barred and strike out the same at the first instance.
2. Further, the appellant faults the decision of the trial court on liability and quantum.
3. In the judgment the trial court found the Appellant liable for the injuries sustained by the respondent in the course of duty and awarded the respondent general damages in the sum of Kshs. 150,000 and special damages in the sum of Kshs. 3,000.
4. This matter is similar in almost all material respects with Appeal No. 34 of 2018 against the judgment of the same trial magistrate delivered on 29<sup>th</sup> June 2016 as the present one.
5. This court is bound to consider the issue of limitation at the first instance before getting into the merits of the Appeal itself.
6. The plaint dated 19<sup>th</sup> February 2010 and filed on the same date reflects at paragraph 6 that the cause of action arose on 10<sup>th</sup> June 2005 when the respondent sustained serious injury on his right leg in the course of employment.
7. In the statement of defence dated 9<sup>th</sup> March 2010 and filed on the even date, the defendant at paragraph 7 pleaded that the suit was time barred by *dint of limitation of Actions Act Cap 22 laws of Kenya*.
8. The trial court did not consider the issue of limitation but proceeded to hear the case on the merits, found in favour of the respondent and awarded him general and special damages aforesaid.
9. The cause of action is grounded on tort from the facts on record and *Section 4(2) of the Limitation of Actions Act Cap 22 Laws of Kenya* is applicable to the case. The Section 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 occurred”.*
10. The present case was filed more than 5 years from the date the cause of action arose. The respondent did not apply for extension of time before the trial magistrate and therefore no grounds exist from the appeal record that would warrant this court to consider the issue of extension.
11. It is the court's finding following the decision in *Owners of Motor Vessel "Lilian S" eKLR (1989) 14 per Nyarangi – J. and Iga vs Makerere University Court of Appeal at Kampala Civil Appeal 51 of 1971* in which the court held:

(i) "A *plaint barred by limitation is barred by law and must be rejected.*

(ii) *Such a plaint should be rejected even though an interlocutory judgment has been entered.*

(iii) *The judge should not have dismissed the claim but rejected the plaint."*

12. That the trial court should have rejected the plaint at the first instance especially because the issue had been raised in the statement of defence.

13. The trial court therefore erred in law in not striking out the plaint.

14. This court is bound to reconsider the matter and has done so following the guide in the case of **Selles vs Associated Motor Boat Company Limited 1968, EA.**

15. Accordingly, the court finds that the suit was time barred and strikes out the plaint and the proceedings before the trial court. The court sets aside the judgment and the award of general and special damages therein.

16. In conclusion, the Appeal succeeds and the judgment of the trial court is set aside in its entirety.

17. It was not the fault of the respondent that the suit was not struck out in the first instance. The court therefore finds this an appropriate case for each party to bear their own costs of the suit before the trial court and this court.

18. It is so ordered.

**Judgment Dated, Signed and delivered this 14<sup>th</sup> day of October, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

M/S Onyinkwa for the Appellant

M/S Moerwa Omwoyo for the Respondent.

Chrispo – Court Clerk