



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**PMG (Suing Through His Guardian Ruth Muthoni) v Hussein Builders Ltd Nbi & another
(Civil Appeal 139 of 2019) [2024] KEHC 958 (KLR) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 958 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 139 OF 2019
HI ONG'UDI, J
JANUARY 30, 2024**

BETWEEN

**PMG APPELLANT
SUING THROUGH HIS GUARDIAN RUTH MUTHONI**

AND

**HUSSEIN BUILDERS LTD NBI 1ST RESPONDENT
STEPHEN WAMBUA MUTINDA 2ND RESPONDENT**

*(Being an Appeal from the Ruling and/or Order of Honourable R.Yator Principal
Magistrate Molo, delivered on 15th August 2019 in Molo CMCC No. of 2019)*

JUDGMENT

1. This appeal arises from the ruling delivered by the learned trial magistrate in Molo CMCC No. 13 of 2019. The genesis of the dispute between the parties herein is that an accident occurred on 9th January 2016 where the appellant was lawfully walking on the verge of the road along Eldoret-Nakuru at Salгаа area when the 2nd respondent so negligently or carelessly drove, controlled and/or managed motor vehicle registration number KCA 258J FH and caused it to knock the plaintiff as a result of which the plaintiff sustained very serious injuries.
2. The appellant filed a suit against the respondents claiming *inter alia* general damages, special damages of Kshs. 27,890/= plus 16 % VAT court, costs of the suit plus interests. The respondents filed their defence and thereafter a preliminary objection claiming that the suit was statute barred under the *Limitation of Actions Act*. The lower court rendered a ruling on the preliminary objection and found that the appellant's suit was indeed statute barred, and struck it out with costs.
3. Aggrieved by that ruling, the appellant filed this appeal vide the memorandum of appeal dated 14th September, 2020, setting out the following grounds of appeal:



- a. That the learned trial magistrate erred in law and in fact in dismissing the appellant's suit on account that it was time barred.
 - b. That the learned trial magistrate erred in law and in fact in disregarding the appellant's submissions and all the points of facts and law.
 - c. That the learned trial magistrate erred in law and in fact in failing to exclude the Christmas vacation in computing the time within which the suit herein should have filled.
4. The appellant prayed that the appeal be allowed with costs in his favour and the decisions made on 15th July, 2020 be set aside, reviewed and/or revised and/or substituted with the judgment of this court.
 5. The Appeal was heard by way of written submissions.

Appellant's Submissions

6. The appellant filed his submissions through E. M. Juma & Ombui advocates. The same are dated 11th July, 2023. Counsel relied on his lower court submissions and in particular Order 50 Rule 4 of the Civil Procedure Rules on the computation of time in relation to the Courts Christmas recess where judicial time did not run. He further placed reliance on the case of Abdi Abdile Hassan vs Laikipia Nature Conservancy & Another [2016] eKLR, where the court held that the period envisaged under Order 50 rule 4 was relevant in filing of the plaint, and that had the trial magistrate considered the said section he would have found that the suit therein was not time barred.
7. The court's attention was also drawn to the cases of Keziah Stella Pyman & 2 Others v Paul Mwololo Mutevu & Others [2013] eKLR, Kenya Ports Authority v Maur Abdalla Bwanamaka [2018] eKLR and Munir Abubakar Masoud (As a member of Tawbeed Muslim Association) v Ali Abdalla Salim & Another [2018] eKLR. Counsel thus urged the court to allow exemption to cater for Christmas vacation and find that the suit was properly filed within the permitted timeliness. He urged the court to allow the Appeal.

Respondents' Submissions

8. The respondents' submissions filed by Murimi, Nduma, Mbago & Muchela are dated 9/10/2023. Counsel identified 3 issues for determination namely; whether the learned trial magistrate erred in law and in fact in dismissing the appellant's suit on account that it was time barred. On this issue the respondents drew the court's attention to the provisions of section 4 (2) of the Limitation of Actions Act which provides that an action founded on tort may not be brought after the end of 3 years from the date on which the cause of action accrued.
9. Counsel further cited the case of Alfred Mutinda Mutua v C.F.C Stanbic Bank (K) Ltd [2019] eKLR, where the high court agreed with findings by the trial magistrate that the pleadings and evidence in the lower court suit pointed out to an action in tort and not contract. That therefore the same was subject to limitation period of 3 years as was stipulated under section 4(2) of the Limitation of Actions Act.
10. The second issue was on how section 4(2) of the Limitation of Actions Act can be interpreted by the honourable court. Counsel urged the court to be guided by the findings in the case of Council of County Governors v Attorney General & Another [2017] eKLR. The last issue was on the essence of limitation in the judicial system. It was submitted that the said limitation prevented the plaintiff from prosecuting stale claims and protected the defendant after he had lost his evidence for his defence from being disturbed after a long lapse of time. Reliance was placed on the case of Republic v Principal



Magistrate P. Ngare Gesora Principal Magistrate Court & 2 Others Ex-parte Nation Media Group Ltd [2013] eKLR, *Dhanesvar v Mehra v Manilal M shah* [1965] EA 321.

11. Counsel while placing reliance on the case of *Maersk Kenya v Murabu Chaka & Suma* [2017] eKLR, submitted that Order 50 rule 4 of the *Civil Procedure Rules* was not applicable to the time limits fixed in the *Limitation of Actions Act*. He further cited the case of *Samwel Mukora & Another v Samuel Kipng'etich Soi* [2020] eKLR, where the court held that the trial magistrate fell into error by applying order 50 rule 4 to the provisions of the *Limitation of Actions Act* to extend time for filing of the respondent's claim.
12. He urged the court to dismiss the appellant's appeal with costs.

Analysis and Determination

13. This being a first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act* to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion considering the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) 123 where Sir Clement De Lestang (V.P) stated that:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.

14. Having carefully perused the proceedings, the ruling and the record of appeal as a whole including both parties' submissions, I find that the issue arising for determination by this court is whether the trial magistrate erred in law and in fact in declaring that the appellant's case was statute barred.
15. In addressing this issue, I note that the appellant in his submissions argued that his suit was not time barred for reasons that under Order 50 Rule 4 of the *Civil Procedure Rules* as the computation of time in relation to the Courts Christmas recess, judicial time did not run during the period between 21st December and 13th January. The said Order 50 rule 4 stipulates as follows;

“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these *Rules* or any order of the court) for the amending, delivering or filing of any pleadings or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction.”

16. The respondents on their part argued that the appellant's suit was time barred by virtue of section 4 (2) of the *Limitation of Actions Act* which stipulates that an action founded on tort may not be brought after the end of 3 years from the date on which the cause of action accrued.



17. In the case of *Gathoni vs. Kenya Co-Operative Creameries Ltd* [1982] KLR 104, Potter, JA at page 107 expressed himself thus:

“The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

18. Further, in *Iga vs. Makerere University* [1972] EA it was held:

“A claim which is barred by limitation is a claim barred by law. A reading of the provisions of Section 3 and 4 of the Limitations Act Cap 70 together with Order 7 Rule 6 of the *Civil Procedure Rule of Uganda* which has same provisions with *Limitations Act of Kenya* seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief.”

19. In case of *Maersk Kenya Limited v Murabu Chaka Tsuma* (*supra*) as relied on by the respondents, the Court of Appeal while dealing with a similar issue held as follows;

“The question at this juncture is whether the learned judge rightly applied order 50 rule 4 of the *Civil Procedure Rules* to hold that the six-year period stipulated by the *Limitation of Actions Act* could be extended in each year from 2006 to 2012 by exclusion of the period between 21st December and 13th January. In other words, did time stop running in each year from 2006 to 2012 during the period between 21st December and 13th January thereby extending the time specified by the *Limitation of Actions Act* for filing of the respondent’s claim? In determining the issue, a consideration of section 33 of the *Interpretation and General Provisions Act* will be of necessity. It provides;

“An act shall be deemed to be done under an Act by virtue of the powers conferred by an Act or in pursuance or execution of the powers of or under the authority of an Act, it is done under or by virtue of or in pursuance of subsidiary legislation made under a power contained in that Act.”

20. The said court went ahead to cite the case of *Republic vs. Public Procurement Administrative Review Board & another exparte Teachers Service Commission* [2015] eKLR the High court cited the case of *Mokombo Ole Simel & Others vs. County Council of Narok & Others* Nairobi HCMA No. 361 of 1994 which concerned similar circumstances. There, the High Court considered whether order 49 rule 5 of the repealed *Civil Procedure Rules* was capable of enlarging time specified by section 9(2) and (3) of the *Law Reform Act*, and succinctly expressed itself thus;

“If the limited time is prescribed under the *Civil Procedure Rules* or by an order of the court or by summary notice, the court could enlarge the period. But here the absolute period of six months has been laid down by a different statute namely the *Law Reform Act*. Order 49 rule 5 of the *Civil Procedure Rules* cannot be invoked to supersede the express provisions of the Act...Order 49 rule 3A is similarly a piece of delegated legislation and cannot have the effect of amending the express provisions of section 9(2) and (3) of the *Act*. The said provisions can only be altered or amended by an Act of the Parliament...”



21. In view of the above observation by the Court of Appeal, it is clear that Order 50 Rule 4 applies specifically to computing time under the Civil Procedure Rules, or in accordance with an order of the court. Nothing in the Rule shows that it was intended to be applied to the time limits fixed by the Limitation of Actions Act, which is a different Act from the Civil Procedure Act and the Rules.
22. Moreover the issue of Christmas recess does not apply to the Magistrates Courts where the suit was filed and dismissed. I am guided by the holding by the Court of Appeal in the case of Maersk Kenya Limited v Murabu Tsuma (*supra*), which I adopt herein. The period of Limitation of Actions Act cannot be overrun by the Civil Procedure Rules.
23. The cause of action arose on 9th January, 2016, and ought to have been filed within 3 years which lapsed on 8th January, 2019. The suit in issue was filed on 23rd January, 2019, which was clearly time barred. The Appellant never sought leave to file the suit out of time before filing the same.
24. The upshot is that the learned trial Magistrate did not err in law and in fact in arriving at the decision she made declaring the Appellant's suit as being statute barred. The Appeal is therefore found to lack merit and is dismissed with costs. The judgment of the trial court is upheld.
25. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF JANUARY, 2024 IN OPEN COURT AT NAKURU

H. I. ONG'UDI

.....

JUDGE

