



APA Insurance Limited v RLA (Minor Suing Through her Next Friend RA) (Civil Appeal 440 of 2019) [2024] KEHC 2943 (KLR) (Civ) (19 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2943 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 440 OF 2019

CW MEOLI, J

MARCH 19, 2024

BETWEEN

APA INSURANCE LIMITED APPELLANT

AND

RLA (MINOR SUING THROUGH HER NEXT FRIEND RA) RESPONDENT

*(Being an appeal against the ruling and order of Honourable B.J. Ofisi,
RM delivered on 12th July, 2019 in Milimani CMCC No. 10282 of 2018)*

JUDGMENT

1. This appeal emanates from the ruling delivered on 12th July, 2019 in Milimani CMCC No. 10282 of 2018 (hereafter the declaratory suit). The facts leading up to the said ruling are that RLA (Minor suing through her next friend RA) (hereafter the Respondent) filed the declaratory suit in the lower court against APA Insurance Limited (hereafter the Appellant) by way of the plaint dated 14th August 2018. Seeking payment of the sum of Kshs 105,340/- arising from the decree issued in Milimani CMCC No. 5030 of 2004 (RLA (Minor suing through her next friend RA) v James Muriithi & Kenya Bus Service) (hereafter the primary suit).
2. The Respondent averred in the declaratory suit that the Appellant had taken over the business of Pan Africa Insurance Company Limited (the Company) which had at all material times insured the motor vehicle registration number KAN xxxH (the subject motor vehicle) under Policy Number 010xxxx4 (hereafter the policy) and that on 15th March, 2005 judgment was entered in the primary suit, in favour of the Respondent as against the Appellant's insured, in the sum of Kshs. 53,200/- with costs and interest.
3. The Appellant upon entering appearance, filed a statement of defence dated 4th January, 2019 denying the key averments in the plaint and liability. Simultaneously, the Appellant lodged the notice of



preliminary objection, challenging the competency of the declaratory suit on the grounds that it offended both the provisions of Section 4(4) of the [Limitation of Actions Act](#), and Section 8 of the [Transfer of Business Act](#).

4. Upon hearing the parties on the preliminary objection, the trial court dismissed the preliminary objection with costs, provoking the instant appeal, based on the following grounds:
 - “1. The learned trial magistrate grossly misdirected herself in treating the Defendant’s/Appellant’s preliminary objection and submissions superficially and consequently arrived at a wrong conclusion.
 2. The learned trial magistrate erred in law and in fact by ruling that the Defendant’s/Appellant’s preliminary objection was unmerited and thus proceeded to dismiss the same with costs.
 3. The learned trial magistrate erred in law and in fact by exercising her discretion injudiciously thus proceeding to dismiss the Defendant’s/Appellant’s preliminary objection with costs.
 4. The learned trial magistrate erred in law and in fact by considering the Plaintiff’s/Appellant’s documents that were filed without leave of court thus taking into account extraneous factors before arriving at her decision.” (sic)
5. Directions were given for the appeal to be canvassed by way of written submissions. On its part, the Appellant’s counsel anchored his submissions on the decision in [M’Kiara M’Rinkanya & Another v Gilbert Kabeere M’Mbijiwe](#) [2007] eKLR to argue that all actions brought after the lapse of 12 years from the date of delivery of a judgment are statute barred, by dint of Section 4(4) of the [Limitation of Actions Act](#). That in view of this, the learned trial magistrate erred by failing to strike out the Respondent’s suit.
6. Counsel further argued that leave to file a claim out of time can only be sought and granted in the specific instances prescribed under Section 27 of the [Limitation of Actions Act](#). That consequently, the copy of order tendered by the Respondent and dated 4th October, 2018 purporting to grant leave to enable her file the declaratory suit out of time and in respect of the decree issued in the primary suit, had no legal foundation. Counsel cited the decision in [Willis Onditi Odhiambo v Gateway Insurance Co Ltd](#) [2014] eKLR to argue that the discretionary power of a court to extend the timelines for lodging claims prescribed under Section 27 of the [Limitation of Actions Act](#) does not extend to the enforcement of decrees, and hence the lower court lacked jurisdiction to extend the statutory timelines within which the Respondent could bring the declaratory suit.
7. On those grounds, counsel for the Appellant urged the court to allow the appeal and upon doing so, to set aside the impugned ruling.
8. The Respondent on her part defended the decision by the trial court. Her counsel anchored his submissions on the decision in [M W N \(a Minor suing through his Father and Next Friend D W N v Attorney General\)](#) [2018] eKLR and the proviso of Section 23(3) of the [Limitation of Actions Act](#) to argue that there exists an exception to Section 4(4) (*supra*) such that, where a debt/liability has been acknowledged by the person liable, then a judgment creditor’s right to lay claim on such debt accrues from the date of such acknowledgment and consequently, an application seeking to enforce a judgment can be made even after lapse of the statutory 12-year period. That in the present instance, the Appellant acknowledged the debt arising from the decree issued in the primary suit vide the letters dated 23rd May, 2016 and 30th May, 2016 and hence the Respondent’s right to pursue her claim against the Appellant



would accrue afresh, from the aforesaid dates. On those grounds, the court was urged to dismiss the appeal and to uphold the decision by the trial court.

9. The court has perused the original record, the record of appeal and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See *Kenya Ports Authority v Kustbon (Kenya) Limited* (2000) 2EA 212, *Peters v Sunday Post Ltd* (1958) EA 424; *Selle and Anor. v Associated Motor Boat Co. Ltd and Others* (1968) EA 123; *William Diamonds Ltd v Brown* [1970] EA 11 and *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278.
10. The Court of Appeal stated in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR that:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.
11. To be determined in the present appeal is the key question whether the trial court’s findings and consequent dismissal of the preliminary objection can stand. The court proposes to address the four (4) grounds of appeal contemporaneously.
12. Although ideally a challenge to an order extending time for filing of a suit out of time would normally be raised at the hearing of the suit, in this case the challenge was properly raised at the interlocutory stage by way of a preliminary objection, jurisdiction being primordial in a suit. In the renowned case of *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696 the court analyzed the definition of a preliminary objection in the following manner:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”
13. The above definition was further advanced by the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR when it rendered itself thus:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”
14. As earlier stated, the Appellant premised the preliminary objection on grounds inter alia that the declaratory suit was time barred by virtue of Section 4(4) of the *Limitation of Actions Act* and therefore incompetent. First, it is pertinent to observe that a preliminary objection based on limitation is not a technicality but a matter that goes to the root of the Court’s jurisdiction; no court has jurisdiction to hear a matter that is time barred. The settled legal principle is that jurisdiction is everything and without it, a court cannot perform any further action in a matter.



15. The Court of Appeal in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR when it held thus:

“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. In another locus classicus in this subject, this Court pronounced; *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd.* (1989):

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

These words were echoed by this Court in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR in the following words:-

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of the *Constitution* to remedy the same.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.” (Emphasis ours)

Decided cases on this issue are legion and we cannot cite all of them. The case of *Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another* (2013) eKLR is however on all fours and addresses the issue raised by Ms. Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages



allowable within its pecuniary jurisdiction. The Court succinctly settled this point in the following words:-

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being *Kagenyi v. Musirambo* (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction.

We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.”

16. Section 4(4) of the *Limitation of Actions Act* expresses thus:

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

17. The court’s understanding of the above provisions is that the law sets out specific timelines for the enforcement of judgments and decrees. In the present instance, it is not in dispute that the judgment in the primary suit was delivered on 15th March, 2005 which would mean that any subsequent claims by the Respondent in enforcing the said judgment ought to have been brought within 12 years, which period was to lapse on 15th March, 2017. It is not in dispute that the Respondent sought to enforce the decree in the primary suit by instituting the declaratory suit against the Appellant on 21st November, 2018. Clearly therefore, the latter suit was brought outside the statutory timelines laid out hereinabove.

18. On the lower court record is a copy of a court order issued on 22nd February, 2019 in respect of a ruling delivered by the lower court on 4th October, 2018 granting leave to the Respondent to institute the declaratory suit out of time; but which the Appellant termed as being of no legal consequence in view of the provisions of Section 27 of the *Limitation of Actions Act*. This raises the question whether the trial court had jurisdiction to extend the statutory timelines for the Respondent to file the declaratory suit. Section 27 reads as follows:

- (1) 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 a written law or 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.



- (2) 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 that period; and
 - (b) in either case, was a date not earlier than one year before the date on which the action was brought.
- (3) This section does not exclude or otherwise affect—
 - (a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or
 - (b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

19. The Section above provides for instances when the limitation period can be extended, such as in the case of ignorance of material facts, actions for negligence, nuisance, or breach of duty. However, there is nothing in the said provision to extend its application to the enforcement of judgments/decrees. The Court of Appeal in *Willis Onditi Odhiambo v Gateway Insurance Co Ltd* [2014] eKLR:

“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.

...

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.”

20. Flowing from the foregoing, the court is of the view that the lower court had no legal basis or jurisdiction to extend the statutory timelines or to grant leave to the Respondent to file the declaratory suit out of time. The court handling the preliminary objection failed to apply itself to that question, which it was entitled to do as the trial court, but was content to base its decision on the mere fact of the grant of leave.
21. The copies of letters from the advocates of the Appellant’s predecessor dated 23rd May, 2016 and 30th May, 2016 touted by the Respondent before the lower court and this court, as acknowledging the debt hence giving rise to fresh accrual of the Respondent’s claim pursuant to Section 23(3) of the *Limitation of Actions Act*, did not give succor to the Respondent’s claim. The said correspondence was exhibited as part of annexures marked KM 2(a) to (d) found in the copy of the Originating Summons for leave that was filed on the lower court record and dated 18.05.2018. Ex facie, these letters relate to the declaratory suit CMCC No. 588 of 2011 brought in the name of one Imelda Atieno and not to the present claim. The fact that the present claim arose from the same cause of action, namely, a road traffic accident, is of no moment here.
22. An acknowledgement of debt as envisaged in sections 23 and 24 and pursuant to the provisions of 25(5) & (6) is the equivalent of an admission of debt. According to *Black’s Law Dictionary*, Tenth Edition an acknowledgement of debt is:

“Recognition by a debtor of the existence of a debt. An acknowledgement of debt interrupts the running of prescription”.
23. That said, the nature of the claim herein did not fall within the categories of claims for which time could properly or validly be extended under section 27 of the *Limitation of Actions Act*, for filing suit out of time. Evidently, the lower court lacked jurisdiction to extend the time required for the Respondent to institute the declaratory suit and therefore the trial learned magistrate erred when she dismissed the preliminary objection.
24. The Appellant’s preliminary objection had equally challenged the competency of the suit by dint of Section 8 of the Transfer of Business Act. This aspect of the preliminary objection was not actively pursued on this appeal, and in any event was on all accounts not a pure point of law.
25. The finding that time for filing could not be extended in respect of the Respondent’s claim under section 27 of the *Limitation of Actions Act* is sufficient to dispose of the appeal. The suit brought pursuant to leave granted without jurisdiction was incompetent and the trial court did not have jurisdiction to entertain a suit that was time barred. In *Thuranira Karauri v Agnes Ncheche* [1997] eKLR held that:

“We do not understand how the Judge could proceed with the trial without finally determining such an important point of jurisdiction and it is pointed out that as a general rule, a point or issue of limitation of time goes to the root of jurisdiction which this Court



should determine at the first instance. Subsequently, that where a suit is time barred, the same is incompetent and consequently a court has no jurisdiction to entertain such suit”.

26. The appeal has succeeded. Consequently, the ruling delivered by the trial court on 12th July, 2019 is hereby set aside and is substituted with an order to the effect that ground 1 of the preliminary objection dated 4th January, 2019 is upheld and the Respondent’s suit is accordingly struck out with costs to the Appellant. The Appellant shall also have the costs of the appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 19TH DAY OF MARCH 2024.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Ms. Mutheu h/b for Mr. Kibiku

For the Respondent: N/A

C/A: Carol

