



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

Civil Case 3762 of 1993

STANLEY KIGARA KAGOMBE..... APPLICANT

VERSUS

MICHAEL MAINA & ANOTHER..... RESPONDENT

RULING

This is the defendant's (Judgment debtor) application dated 15.10.96 for the main order that the Ruling made by this court on 13.10.93 admitting the plaintiffs suit out of the limitation period be set aside varied reviewed or otherwise discharged. The application is brought under Order XLIV rule 1 of the Civil Procedure Rules. The brief background to this application is as follows:

Plaintiff filed a suit on 3.8.93 against the two defendants claiming damages for personal injuries he sustained on 10.11.91 as a result of alleged negligence by the defendants. On the same day he filed a chamber summons apparently under S. 27 of the limitation of Actions Act for the extension of the limitation period on the ground that S. 109 of the Kenya Posts and Telecommunications Act (Cap 411). The limitation period was 12 months. The application was made ex parte by Chamber Summons as authorised by order XXXVI rule 3(2) of civil procedure Rules. After hearing the application reach the conclusion that the limitation period in S. 109 of Cap 411 did not prima facie apply to the plaintiffs action as it is the limitation period of 3 years prescribed by S. 4(2) of the limitation of Action which applies. I further concluded that plaintiff has satisfied the provisions of S. 27 of the limitation of Action Act and extended the limitation period in case 1 was wrong on the construction of S. 109 of cap 411.

The defendants filed a defence on 12.11.93 (later amended on 6.1.94 and in paragraph 3 of the defence averred. The defendants state that the suit is time barred by section 109 of the Kenya Posts and Telecommunications corporation

Act Chapter 411 Laws of Kenya and hence should be dismissed with costs".

On the 20.11.94 the defendants filed a preliminary objection to suit on the ground that it was time barred; incompetent bad in law and misconceived I am informed which fact I cannot verify from the record that Ringera J. ruled that the issue of limitation be decided in the main suit.

However the suit was heard by Ringera J. on the merits Mr. Billing has appeared for the defendants all through submitted at the conclusion of the trial that it is the limitation period of 12 months in S. 109 of Cap 411 which applied and not the 3 years general limitation period and in any case the extension of the limitation period by this court was self defeating. He contended that there was nothing material outside the knowledge of the plaintiff to warrant the extension of limitation period. The defendants counsel referred to several authorities to show that the limitation period of 12 months and not the 3 years applied Ringera J. in a full judgment analysed the several decisions referred to the court and concluded

thus:

- (i) On the facts of the case, the plaintiffs suit was not at inception barred by S. 109 of cap 411
- (ii) Had he found that the limitation period in S. 109 of cap 411 protected the defendants then he would have unhesitatingly found that the suit was statute barred and was not saved by any valid order of extension of time.

Upon that findings of the law Ringera J. then proceeded to award damages to the plaintiff for the personal injuries he had sustained as a result of the defendants negligence.

The defendants were not satisfied. They filed Civil Appeal Ho. 109 - of 1996 against the finding of the court that the plaintiff's suit was not barred by S. 109 of cap 411. They asked the court of Appeal to find that S. 109 of Cap 411 applies and therefore the suit was time barred. The plaintiff cross-appealed. Although I have not seen the plaintiff's cross-Appeal, it is clear from the Judgment of the court of Appeal that the cross appeal was on the finding that there was a valid order extending the limitation period and also on the quantum of damages.

The Court of Appeal was of the view that the first question for determination in the appeal was whether an extension of the limitation period was obtained and if so its legal effect. After analyzing the circumstances under which the order extending the limitation period was made the court of Appeal without deciding whether the order was erroneous or not found it to have been regularly made and concluded.

..... the order granting an

extension stands and is binding on the parties. But that means that the order is valid until it has been effectively set aside. And such an order where the objection to it is of the character here set up by the appellants, can only be set aside in an action or proceedings directed to that special end. The applicant's complaint that the respondent's suit was time barred cannot succeed by the provisions of S. 109 of Kenya Posts and Telecommunications, notwithstanding. In these circumstances it is not necessary for us to determine. If S. 109 of the said Act applies to the facts of this case".

The Court of Appeal then proceeded to consider the plaintiff's cross - appeal on quantum and damages and allowed the cross - appeal on quantum in respect of on head of damages. In the end, the Court of Appeal dismissed the appeal with costs, increased the award of damages in respect of one item of damages and ordered that the appellants to pay the respondents on half of the costs of the cross - appeal.

The effect of the decision of the Court of Appeal is expressly that the Appeal on limitation was dismissed with costs and the cross appeal on issue of extension of limitation period allowed. But from the substance of the Judgment, the appeal as to the limitation period in S. 109 of cap 411 was not decided on merit. The Appeal was dismissed because there was a regular Order extending the limitation period which made it unnecessary for the Court of Appeal to consider whether or not the limitation period in S. 109 of cap 411 applied to the facts of the case. The result of the decision of the Court of Appeal was to leave the decision of Ringera J that limitation period in S. 109 of cap 411 did not apply and that suit was not time barred at inception intact.

In the above background, the applicant's counsel contends that the words in the Judgment of the Court of Appeal that I have underlined gives the applicant the "leg" to file a review application to challenge the ex parte order extending the limitation period. The respondent opposes the application on the grounds inter alia; that the application is res judicata by virtue of the orders of the court of Appeal and Ringera J. and also on the ground that the court is functus officio. The respondent prays that the application be dismissed and for order for the release of part of the decretal sum invested in a joint account.

For the three grounds of review set out in order XLIV rule 1 (i) the applicant is relying on the ground of "any other sufficient cause". It is contended that there were three relevant decisions which were not brought to the attention of the court when the application for extension of limitation period was made. Those

decisions are: -

Clarke v St Hellens Borough Council - (1916) KB 17
Bradford Corp. v Myers HG (1916) AC 242
Griffiths v Smith - (1941) AC 170
Edwards v Metropolitan Water Board (1921) 1BK 291

Those decision relate to the application of the English Public Authorities Protection Act 1893. They would be relevant on the issue whether or not S. 109 of cap 411 applies to the facts of the case. By the order of 13.10.93, I held that the limitation period in S. 109 of cap 411 did not prima facie apply to the facts of the case. The same issue was taken at the trial before Ringera J. who made the same finding. As I have endeavoured to show the decision of Ringera J remains intact despite the dismissal of the Appeal. It is apparent from the record that Ringera J. considered all the authorities I have been referred to before he came to his conclusion. The authorities I have been referred to would have relate to the order extending the limitation period under S. 27 of the Limitation of the Actions Act. They do not relate to that order and so I find that the applicants have not established that they are any sufficient reason for reviewing the order of 13.10.93

Moreover it is contended that the review application is incompetent and bad in law. By order XLIV Rule 1(i) (a) and (b) the remedy of review arise where there is a right of appeal against the decree or order but not legal appeal have been preferred or where the civil procedure Act or Rules do not give a right of Appeal against the decree or order. It appears that the applicant seeks to have the order extending the limitation period set aside by way of review on the ground that it was erroneous. Ringera J found the order extending the limitation period to be invalid (thus erroneous). The Respondent appealed against that finding. The Court of Appeal found the order extending the limitation period to be regular and binding until it is set aside so, an appeal was preferred by respondent against the order sought to be reviewed and the court of Appeal has pronounced its judgment on the order. The applicant must have defended the order of Ringera J. and must have attempted to convince the court of Appeal that the order extending the limitation period was invalid. Respondent failed to convince the Court of Appeal. The decision of the court of appeal finally determined the suit and all matters in dispute in the suit. So in my view the matter raised in the application is *res judicata*.

The application to re-open the issue of limitation when no suit is pending having been finally determined by the Court of Appeal is incompetent and an abuse of the process of the court.

Nor, do I think that an order extending the limitation period can be challenged by a review application under Order XLIV Rule 1 of the Civil Procedure Rules. The court of Appeal decided that such an order can be set aside in an action or proceedings directed to that special end. There is an earlier decision of the Kenya Court of Appeal - Yunes K. Oruta and Another versus Samuel Moses Nyamata - Civil Appeal No 96 of 1984 (Unreported). That was an appeal from the High Court Order dismissing an application by way of preliminary objection to strike a suit on the ground that *ex parte* leave to file the suit outside the limitation period was erroneously given by the High Court. The court of Appeal persuaded by the decision of English court of Appeal in Cozens versus North Devon Hospital Management committee and another (1966) 2 ALL ER 799 dismissed the appeal holding that the *ex parte* order granting leave can only be challenged in the trial itself and not by a preliminary objection.

However in Goodchild v Great timber Co. Ltd (1968) Q B 372, the English Court of Appeal allowed a defendant to have issue whether the plaintiff's medical condition he claimed he was not aware of was a decisive character to be tried as a preliminary issue without evidence after the pleadings in the action had closed in Re Pickles v National Coal Board (intended action) 1968 1 WLR 997 Lord Deaning M.R was to say at page 1001 D-

"The grant of leave *ex parte* is only provisional. The defendants will have an opportunity later to argue these points if they so please, either on preliminary issue or on a full trial"

The applicant in this case challenged the grant of *ex parte* leave as a preliminary point before trial but issue was dealt with at the trial. That was in accordance with the decision in Yunes K. Oruta case and the English practice. The Court of Appeal as I have indicated before held that the order granting *ex parte* leave

was binding unless it is set aside by an action or proceedings directed to that special end. To that extent the decision of the court of Appeal in Michael Maina and Kenya Posts and Telecommunication Corporation versus Stanley KAGOMBE C.A No. 109 of 1996 is not only inconsistent with its decision in Yunes K. Oruta but also revolutionary. So, if have to follow the decision in Yunes K. Oruta and the English Practice, the applicant cannot challenge the grant of leave by a review application He can only do that in trial or by a preliminary objection before trial. To that extent the application is incompetent.

The Court of Appeal decision in Michael Maina and Kenya Posts and Telecommunication Corporation versus Stanley Kagombe may not be necessarily wrong. The Court of Appeal would not logically understand how a regular order granting leave would be rendered invalid in a judgment after the trial unless it had been set aside through competent proceedings before the trial. More incompetent question as to what is the purpose of the leave granted ex parte. The English limitation

Act 1963 (found in Halsbury statutes of England 2nd Edition page 614) which amends the 1939 limitation Act does not provide either in S. 1 or S. 2 that the leave granted is provisional or that leave so granted can be challenged in the defence or at trial of the action or in preliminary proceedings in the suit. The English law on the effect of leave is in fact Judge-made law based on how the courts have interpreted the limitation Act 1963.

Salmon L.J in the dissenting judgment in Cozens versus North Devon Hospital management committee case (supra) said at page 805 B

The leave in my judgment is leave to set up facts in the action which if established will by virtue of the Act of 1963 knock defence under S. 2(1) of the Act of 1939 (which would otherwise be available from under the defendants feet".

And the Thompson J. Sitting in the High Court in Conzens v North Devon Hospital Management Committee case (1966) 2 ALL ER 278 said at page 280 A:-

"The leave for the purposes of Act of 1963 is, in my judgment leave to the plaintiff to advance in the action the contention that he should not be limited by the Act of 1939 and that his complaint should not be restricted to matters falling within the three years prior to the issue of the court".

The English limitation Act 1963 condenses what is S. 27, 28, 29, 30 of the Kenya Act, into section 1 and 2 but the two acts are similar except that S. 2(4) of the English Act gives a right to an applicant whose application for leave has been dismissed. It is clear from S. 28(2) and 28(3) of the Kenya Act and S. 2(2) and 2(3) of English Act 1963 that before court grants leave it has to be satisfied that there is evidence to satisfy all the conditions in S. 27 of the Kenya Act or in section 1 of English Act of 1963 so that all the conditions are considered later in the action. According to the wording of the sections court "shall grant leave only if the evidence adduced satisfies the conditions. The court has no discretion. If the conditions are satisfied leave is granted. If they are not satisfied leave is refused.

The Kenya Act has a Marginal note to section 27(1) which reads:-

Extension of limitation period in cases of ignorance of material facts in action for negligence etc"

And By S. 27(1)

Section 4(2) does not afford a defence to an action founded on tort where..."

S. 1 of the English 1963 Act has the preamble "Extension of time-limit for certain actions and S. 1(1) uses stronger words "Shall not afford any defence"

Both Acts extend the limitation periods - in the Kenya case the limitation period of 3 years in S. 4(2) of the Act and in the English case in S. 2(1) of limitation Act 1939 in the Kenya case, it is the limitation Act period in S. 4(2) which enacted the limitation period of 3 years for actions founded on tort otherwise the

defence of limitation would not be available to a defendant. It is the same statute which says in S. 27(1) that the 3 years limitation period is not a defence if certain conditions are fulfilled. The same statute makes provision in S. 28(1) for an application for leave of Court for purposes of S. 27 to be made to court and the same statute mandatorily requires the court to give leave if the specified conditions are in the judgment of the court, fulfilled by evidence. The leave given for purposes of S. 27 is by the marginal note for extension of the limitation period from the 3 years in S. 4(2) to the period of 3 years should not apply and is in fact ousted. The limitation Act is not a procedural Act but a substantive Law Act. There is nothing irregular or illogical in the legislature setting limitation period of 3 years for actions founded on tort and singling out one tort where plaintiff intends to claim damages for personal injuries and giving power to the court to extend the limitation period through an application on certain strict onerous conditions. It appears to me that legislature gave the court the statutory duty of extending the limitation period if an application is made by the would be plaintiff and if the court is satisfied that all conditions in section 27 inclusive of prove that the facts constituting the cause of action were outside his knowledge and were decisive character (See S. 28(3) and S.30(2) A plaintiff does not require leave to file an action even if it is stale. IN any case there are other cases like the case of disability (S.22) and fraud (S.26) where the legislature itself extended the limitation period without first requiring that leave first be granted by the court. In particular By S. 22 (v)(b) of the Act, in action for court where plaintiff is under disability the section has effect as if the words "six years". By S. 26, of the Act, in case of fraud, the period of limitation does not begin to run until the plaintiff has discovered the fraud. In either of the two cases the plaintiff is not required to apply for leave of the court. All he needs to do is to plead and prove the facts entitling him to the extension of the limitation period. It should be noted that it is only in the case where plaintiff claims damages for personal injuries for negligence etc that Act provides for application for leave of the court If the purpose of the leave was merely to allow the plaintiff to set up facts which would defeat the limitation period, the legislature would have done that by enacting section 27 in similar terms as S. 22 and 26 of the Act thereby avoiding the unnecessary costs of making an application for leave before the Court saving the costs of having to raise and prove the same matters in the suit.

In my respectful view the ex parte leave granted by the court upon an application statutorily and finally extends the limitation period and ousts the limitation period of 3 years in S 4(2) of the Act—

For those reasons, I would respectfully agree with the decision of the Court of Appeal in Michael Maina and Kenya Posts and Telecommunications Corporation versus Stanley Kagombe C.A No. 109 of 1996 that the ex parte order extending the limitation period is binding on the parties and the court trying the action unless it has first been set aside. That finding is another reason why the application is incompetent.

There is no doubt that when the opportunity arises again the court of Appeal will decide which of its two inconsistent decisions correctly interprets the law correctly.

Lastly the purpose of the application is not explained. The applicant will not achieve anything by having the ex parte order extending the limitation period set aside as the Judgment of Ringera J that the action was not at the inception barred by S.109 of cap 441 still stands. The judgment in favour of the plaintiff is still valid in spite of the ex parte order extending the limitation periods The court would be acting in futility if it sets aside the ex parte order.

For those reasons, I dismiss the application with

Costs and order that the decretal sum deposited in the bank pursuant to the order of Ringera_J dated 27.4.95 be released to J M/S V. E. Muguku Muriu and Company advocates by the bank forthwith-

E. M. Githinji

Judge

14.11.96

Mr. Billing and Mr. Muguku - present