



**Faulu Microfinance Bank Ltd v Onchonga & another (Miscellaneous Application E006 of 2022) [2022] KEHC 15136 (KLR) (22 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 15136 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
MISCELLANEOUS APPLICATION E006 OF 2022  
SN MUTUKU, J  
JUNE 22, 2022**

**BETWEEN**

**FAULU MICROFINANCE BANK LTD ..... APPLICANT**

**AND**

**ROBERT NYAMWEYA ONCHONGA ..... 1<sup>ST</sup> RESPONDENT**

**PAUL WAMBUA VALUERS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By an Ex parte Originating Summons (the application) dated 2<sup>nd</sup> February 2022, Faulu Microfinance Bank Ltd (the Applicant) has come to this court seeking leave to file a suit out of time against Paul Wambua Valuers Limited (the 2<sup>nd</sup> respondent) and costs of the application. The grounds in support of the Application are found on the face of it and in the supporting affidavit sworn by Maurine W. Kahiro, the Legal Officer of the Applicant.
2. The grounds she has advanced are that the applicant instructed the 2<sup>nd</sup> respondent to conduct valuation over title number Ngong/Ngong/5892 and Kekonyokia/Ikkisunumet/299 as a prerequisite to granting of banking facilities; that upon completion of the valuation the value was used as the basis for advancing a loan facility of Kshs 22,000,000 to the 1<sup>st</sup> Respondent; that the 1<sup>st</sup> Respondent defaulted on repayments of the loan facility, thereby necessitating the Applicant to proceed with the recovery of the loan; that the applicant commissioned another valuation report on the same property with the result that the properties had been grossly overvalued and misrepresented by the 2<sup>nd</sup> respondent prior to the granting of the loan facilities.
3. It is further stated that the applicant lodged a complaint with the Valuers Registration Board and the Institute of Surveyors of Kenya who commenced investigations; that these investigations have been prolonged and have not concluded to date thereby causing delay in giving feedback to the Applicant



and as a result the three (3) year statutory period for filing civil suits lapsed. The applicant states that it has a strong case against the respondents founded on tort of negligence and breach of duty.

4. In the supporting affidavit the applicant has particularized the breach of duty as what it referred to as the gross professional misconduct on the part of the respondents in undervaluing the properties in question and professional negligence. It is deposed that the undervaluation of the properties means that the applicant will not be able to recover its money if it were to sell the overvalued property leading to prejudice and loss.
5. I have considered this application. I have satisfied myself that the provisions of the law under section 4, 27 and 28 of Limitation of Actions Act (Cap. 21) and Order 37 of the Civil Procedure Rules have been complied with. For emphasis I will replicate those provisions here.
6. Section 4 (2) of the Limitation of Actions Act (Cap 22) Laws of Kenya provides that:

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- (2) An action founded on tort may not be brought after the end three years from the date on which the cause of action occurred.  
Provided that an action for libel or slander may not be brought after the end of timeline months from such date.”

7. Section 27 (1) (b)-(d) and (2) of the Limitation of Actions Act provides:

“(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

(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?”

10. Further section 28 (1) (2) (a) and (b) of the Limitation of Actions Act provides that:

“(1) An application for the leave of the court for the purposes of section 27 of this Act shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.



- (2) Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient—
- (a) To establish that cause of action, apart from any defence under section 4(2) of this Act; and
- (b) To fulfil the requirements of section 27(2) of this Act in relation to that cause of action."

8. In addition to the above provisions, order 37 rule 6 (1) of the *Civil Procedure Rules* provides that:

An application under section 27 of the *Limitation of Actions Act* made before filing a suit shall be made ex parte by originating summons supported by affidavit.

9. I considered this matter and the grounds advanced in support of the Application. It is my view that this court is clothed with the discretion to grant this application. It is clear to me that the Applicant is still waiting for the investigations to conclude and therefore as a result of waiting for this to happen, time within which to file this suit lapsed.
10. This application is merited and I hereby allow the same. Leave is hereby granted to the ex parte applicant to file suit out of time with costs in the cause. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 22<sup>ND</sup> JUNE 2022.**

**S. N. MUTUKU**

**JUDGE**

