



**Ondieki v ABSA Bank Kenya PLC (Miscellaneous Civil Application
E002 of 2021) [2022] KEHC 15390 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15390 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION E002 OF 2021
HK CHEMITEI, J
NOVEMBER 17, 2022**

BETWEEN

HEBISIBAH MORAA ONDIEKI PLAINTIFF

AND

ABSA BANK KENYA PLC DEFENDANT

RULING

1. This Ruling is in respect to the defendant's Preliminary Objection dated November 29, 2021 and the Notice of Motion dated June 14, 2022, filed by the plaintiff.
2. The Notice of preliminary objection seeks striking out of the Originating Summons on the ground that it was fatally defective, that the claim by the plaintiff was statute barred under the *Limitation of Actions Act*, the subject matter the said originating summons was outside the ambit of Order 37 of the *Civil Procedure Rules* and that the plaintiff's claim was res judicata as per Section 7 of the *Civil Procedure Act*.
3. The plaintiff in her submission mentioned that she had opposed the preliminary objection vide a replying affidavit dated December 15, 2021 which apparently was not in the court records.
4. The Notice of Motion dated March 4, 2020 seeks the following orders:
 - a. That this honourable Court be pleased to arrest the ruling on the Preliminary Objection dated November 29, 2021 coming up for ruling on the July 21, 2022, pending the hearing and determination of this application.
 - b. That this honourable Court be pleased to arrive at a finding that the leave granted by the Chief Magistrate court to file suit out of time is applicable in the instant cause being OS No E2/21, Hebby Moraa versus Absa Bank Kenya PLC.



- c. That in the alternative and upon the finding that the leave granted at the lower Court is deemed inapplicable in the circumstances, this honourable Court be pleased to grant leave to the Exparte applicant to proceed with the already filed suit being OS No E2/21, Hebbly Moraa versus Absa Bank Kenya PLC, pursuant to section 28(3) of the [Limitation of Actions Act](#).
 - d. That the ruling of both the Preliminary Objection and this application be jointly delivered.
 - e. That the costs of this application be provided for.
 - f. That this honourable Court be pleased to issue any orders that it may deem fit, just and expedient in the interest of justice.
5. The application is based on the grounds thereof and the affidavit of the plaintiff sworn on the same date. She deposed that she had a bank-customer relationship for several years until the year 1999 when there was a robbery at the defendant premises that occasioned her a loss of Kshs 800,000/=. She filed a suit in the High court of Kenya at Nakuru, being Civil Suit No 432 of 1999 against the defendant which was later appealed and a determination was made in her favour.
 6. The plaintiff deposed further that the prayer for loss of user and or the future value of the money arising from the loss was erroneously left out. She therefore filed an application in the Chief Magistrate's Court being Misc. App No 98 of 2021 (OS) seeking leave to file suit out of time and the same was granted thus the present suit. She went on to depose that her advocate on record had advised her that the said leave was valid. However, that in the unlikely event that the leave granted by the Chief Magistrate's Court was deemed to be invalid and inapplicable, it was her prayer that this Court does grant leave and the matter does proceed to be heard on its merits.
 7. In response to the application the defendant alleged in its submission that it filed a replying affidavit and grounds of opposition both dated July 19, 2022 and filed on July 22, 2022. As stated above the said affidavit or grounds of opposition are not in the court records save the replying affidavit dated November 29, 2021 and filed on February 7, 2022 in response to the Originating Summons.
 8. The plaintiff filed a further affidavit in response to the alleged replying affidavit dated July 22, 2022 filed by the defendant. She deposed that the application dated June 14, 2022 was made ex-parte as per section 28 (1) of the [Limitation of Actions Act](#) and thus the respondent herein abused the court process in filing the said replying affidavit.
 9. The plaintiff deposed further that the defendant's replying affidavit was full of falsehoods and half-truths aimed at misleading the course of justice. That her suit was not res judicata as the main issue of loss of user had not been previously heard and finally determined by a court of competent jurisdiction. Further, that her application fully complied with the provisions of section 27 (2) and 28(3) of the [Limitations of Actions Act](#) being the relevant applicable statute.
 10. The plaintiff went on to depose that the delay was occasioned by the long litigation of the Nakuru HCCC 432 of 2019 in which the claim of loss of user had been erroneously left out. That the applications filed in Nakuru HCCC 432 of 2019 Hebbly Ondieki v Barclays Bank of Kenya Limited do not relate to the current matter in issue being loss of user. Further, that the Ruling dated February 10, 2022 in Nakuru HCCC 432 of 1992 (Hebbly Ondieki v Barclays Bank Limited) did not include the issue of loss of user as the same was not litigated in that suit. According to the plaintiff the application dated June 14, 2022 was brought in good faith and in the interest of justice therefore it was only fair, just and prudent that the same be allowed.
 11. When the matter came up for hearing the court directed that both applications be canvassed together through written submissions which all parties have complied.



Plaintiff's Submission in respect to the Preliminary Objection

12. The plaintiff only raised one issue for determination and that is whether the preliminary objection dated November 29, 2021 was merited. The plaintiff submitted that the said preliminary objection fell short of the essence of a preliminary objection as was set out in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors* 1969 EA 696 at 700, where the court held that a preliminary objection should be raised on a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. Also, that a preliminary objection cannot be raised if any facts are to be ascertained or what is sought is the exercise of judicial discretion.
13. While placing reliance on the case of *Pan African Builders & Contractors Ltd & Another v Jogolish Singh*, Civil Appeal Number 52 of 1995, the plaintiff submitted that when preliminary points are raised they should be capable of disposing the matter preliminarily without the court having to resort to ascertain the facts from elsewhere apart from looking at the pleadings alone.
14. The plaintiff submitted further that the present preliminary objection was unmerited to the extent that it required the adducing of evidence to corroborate the assertion made that the court admitted that it did not have jurisdiction a fact which was utterly false and misrepresenting. She urged the court to be guided by Article 159 (2) (d) of the [Constitution](#) of Kenya and look into the substance of the case and not the form. That no exclusion clause had been sought to be given by the defendants to lead to a conclusion that the matter in issue falls outside the ambit of Article 37 or the [Constitution](#).
15. It was the plaintiff's submission while placing reliance on Section 7 of the [Civil Procedure Act](#), 2010 that this matter was not res judicata as the law on the same only barred subsequent action involving the same claim, demand or cause of action where final judgment had been rendered by a court of competent jurisdiction on merit. That in her case no award of loss of user or that of consequential loss of business.
16. In conclusion, the plaintiff urged the court not to allow the preliminary objection as the same was not merited. The court's attention was drawn to the case of [George Waweru Njuguna v Pauline Chesang Gitau Kamunyu \[2017\] eKLR](#).

Plaintiff's Submissions to the Notice of Motion dated 14th June 2022

17. The plaintiff in her submissions identified three issues for determination namely; whether this honourable court has jurisdiction to hear the plaintiff's application dated June 14, 2022; whether the leave granted by the Magistrate court is valid and applicable in the instant suit and whether the leave sought to proceed with a suit out of time ought to be allowed.
18. On the first issue, the plaintiff submitted that this court had jurisdiction to hear and determine this application by dint of Order 37 rule 6 of the [Civil Procedure Rules 2010](#) which provides for extension of limitation period for an application brought under section 27 of the [Limitation of Actions Act](#). She submitted further that her application was made pursuant to section 28 of the [Limitation of Actions Act](#) on application for leave of court under section 27. Also that the said application brought forth issues not previously brought forth that is seeking leave within a suit to proceed out of time.
19. On the second issue, the plaintiff submitted that section 27 (1) of the [Limitation of Actions Act](#) laid down the circumstances in which the court would have jurisdiction to extent time. According to the said Act the action must be founded on tort and must relate to tort of negligence or breach of duty and damages claimed are in respect of personal injuries to the plaintiff as a result of tort. That her application was founded on negligence and breach of duty of the respondent to ensure the safety of its customers as was determined in the Civil Case No 432 of 1999 and the subsequent appeal.



20. On the last issue, the plaintiff urged this court to grant her leave to proceed out of time in the event it found that the leave granted by the trial magistrate was invalid. She urged the court to allow her application and the cost of the same be in the cause.

Defendant's Submissions in support of the Preliminary objection dated November 29, 2021

21. The defendant in its submission in respect to the first ground of the preliminary objection placed reliance on the case of *Jane Dzidza Kutandaza v Kenya Power & Lighting Company Limited & Another [2015] eKLR* and submitted that any application for leave to file out of time under section 27 and 28 of the *Limitation of Actions Act* must be made in the court where the suit was filed or would be filed. The defendant submitted further that the plaintiff claims of breach of contract had a limitation period of 6 years and the same lapsed 16 years ago.
22. The defendant draws the court's attention to the case of *YH Wholesale Limited v Kenya Revenue Authority [2021] eKLR* where the court held in part that section 27 of the *Limitation of Action Act* 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. That therefore the purported order of the Magistrate Court was null and void having been granted by a court with no jurisdiction. The defendant submitted that the present suit having filed without leave thereof was fatally defective and should be stuck out.
23. On grounds 2 and 3 of the preliminary objection, that the subject matter of the originating summons was outside the ambit of order 37 of the *Civil Procedure Rules* and that the said summons offended the provisions of order 37 as the plaintiff did not fall within the category of persons who may institute suit vide an Originating Summons, the defendant reiterated its earlier submissions that order 37 does not provide for claims for breach of contract.
24. The defendant relied on the case of *Cyril J Haroo & Another v Uchumi Services Limited & 3 other [2014] eKLR*, where it was held in part that when it became obvious that the issues raised complex and contentious questions of facts and law, judge should dismiss the summons and leave the parties to pursue their claim by ordinary suit.
25. The defendant while placing reliance on the case of *Siasa Pashua & 2 others v Mbaruk Khamis Mobamed & Another [2012] eKLR*, submitted that where a party does not comply with the express provisions of the law in terms of how he should move the court and where the court does not have discretion to rule otherwise the provisions of Article 159(2) (d) cannot come to the aid of such party.
26. On the fourth ground that the suit is res judicata, they placed reliance in the locus classicus case on the aspect of res judicata *Henderson v Henerson [1843] HARE 100, 115* where the court held in part that the plea of res judicata applied except in special cases not only to points upon which the court was actually required by parties to form an opinion and pronounce judgment but to every point which belonged to the subject litigation and which the parties exercising reasonable diligence, might have brought forward at that time. Prior to this the same court had stated that the court required parties to a litigation to bring forward their whole case and will not except under special circumstances, permit the same parties to open same subject matter which might have been brought forward only because they had from negligence inadvertence, or even accident omitted part of their case.
27. In conclusion, the defendant submitted that the plaintiff's suit was statute barred under section 7 of the *Civil Procedure Act*. The same, they submitted was a perfect example of abuse of the court process and should therefore be dismissed with costs.
28. The Defendant's Submission in opposition to the plaintiff Application dated June 14, 2022 reiterated its submissions in support of the preliminary objection



Analysis and Determination

29. I have carefully considered the preliminary objection, the application, the affidavits filed, the submissions and the authorities cited by the parties. I will deal with the preliminary objection as it seeks striking out the suit on the ground that the suit is barred under sections 27 and 28 of the [Limitation of Actions Act](#), Cap 22, Laws of Kenya.
30. Of significance is section 27 which provides 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.
31. In view of the above, it is clear that Section 27 provides that section 4(2) does not afford a defence to an action founded on tort as provided in the said section. On the hand Section 4(2) provides that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.



32. In the instant case, the import of this provision is that the Plaintiffs claim was statute barred by over 20 years. The plaintiff filed a series of cases from the lower court through the High Court, Court of Appeal to the Supreme Court since the cause of action arose in 1999. The plaintiff has failed to explain why he decided to file a Miscellaneous Application in lower court seeking leave to file his suit out of time, only to file the said suit in the High court vide Originating Summons. Also, the filing of suits in the Court of Appeal and Supreme court erroneously clearly demonstrates that she is the one who caused the inordinate delay in seeking redress for her claim for loss of user over the years.
33. It is trite law that time bar as per the *Limitation of Actions Act*, limits the right to seek judicial redress. It serves an important purpose in that it prevents inordinate delays which may be detrimental to the interests of justice. An application for leave to file suit out of time must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay and moreover the explanation given must be reasonable. In the instant case the over 20 years' delay has not been reasonably explained at all.
34. Additionally, an extension of time is not a right of a party for it is an equitable remedy which is only available to a deserving party at the discretion of the court. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court. The plaintiff herein has manifestly failed to account for the delay and to lay a basis for this court to grant the leave sought. On this ground alone, her Originating Summons falls for dismissal.
35. In addition, leave granted by the magistrate cannot be relied upon by the plaintiff as there was no basis at all why this court had to grant leave yet it was in the mind of the applicant that this court had dealt with the earlier concluded matters. In any case if she was confident of the leave by the lower court then she should have proceeded to file the suit in the same court. The orders of this court and the said lower court are legally speaking poles apart.
36. In *Mary Osundwa v Nzoia Sugar Co Ltd* (supra) as relied on by the defendant in its submissions, the court in regard to section 27 of the *Limitation of Actions Act* held thus: -
- “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 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 May 28, 1991 that the order was by consent can be neither here nor there, the parties could not confer jurisdiction on the judge by consent.”
37. In the premises, and for the reasons given above this court finds the preliminary objection dated November 29, 2022 meritorious and it is therefore allowed as prayed.
33. The Originating Summons herein is hereby dismissed with costs to the respondent.

DATED SIGNED AND DELIVERED AT NAKURU THIS 17TH DAY OF NOVEMBER 2022.

H K CHEMITEL.

JUDGE

