



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO. 90 OF 2016**

**FRANCIS NJENGA.....APPELLANT**

**VERSUS**

**CONSTABLE JAMES MURAYA.....1<sup>ST</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

This appeal turns on what the law says on the computation of time with regard to the provisions of Section 3(1) of the Public Authorities Limitation Act (PALA) Cap 39 Laws of Kenya which states:

***Limitation of proceedings***

***(1)No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.***

The appellant Francis Njenga filed CMCC no 284 of 2014 via plaint dated 17<sup>th</sup> April 2014 on the 23<sup>rd</sup> April 2014. His claim was set out at paragraph 4 of the plaint:

*That sometimes on the 14<sup>th</sup> April 2013 within Kianjoya township the 1<sup>st</sup> defendant while on duty arrested the plaintiff and forceful(sic) caused the plaintiff to pay him a sum of Ksh 40,000 to induce for the plaintiff's release particulars whereof are well within the 1<sup>st</sup> defendant's knowledge.*

*That the 1<sup>st</sup> Defendant on the 14<sup>th</sup> April 2013 confiscated he plaintiff (sic) mobile phone make Nokia 1600 and has refused to return it to the plaintiff.*

Ultimately he sought judgment against the defendants jointly and severally for a refund of the Ksh 40,000, the return of his mobile phone and costs of the suit.

On 9<sup>th</sup> May 2014 the 2<sup>nd</sup> defendant filed Notice of Preliminary Objection on the point of law that the suit as filed offended the mandatory provisions of section 3(1) of the Public Authorities Limitation Act Cap 39.

By a ruling dated 9<sup>th</sup> August 2016, the learned trial magistrate found that Order 50 of the CPR did not apply to the Public Authorities Limitation Act upheld the P.O. and struck out the suit with costs.

It is against that ruling that this appeal was brought. The grounds for the appeal are that the learned Chief Magistrate erred in law and fact:-

- By holding that the suit was filed outside the limited time under the Public Authorities Limitation Act whereas there was overwhelming evidence to the contrary.
- By upholding a P.O yet there were facts in dispute
- In disregarding the provisions of s. 57 of the Interpretations and General Provisions Act Cap 2 laws of Kenya, Order 50 rule 1 and 4 of the CPR on computation of time which showed that the appellant's suit was well within time

- By failing to appreciate the provisions of s. 6 of the Public Authorities Limitation Act and s 27 of the Limitation of Actions Act which do not offer s. 3(1) of the Public Authorities Limitation Act as a defence for the breach of duty
- In disregarding all materials placed before him and arriving at a decision to dismiss the appellant's suit.
- In striking out the appellant's suit despite the fact that the same had merits worth consideration by the Honorable court.

Parties proceeded by way of written submissions.

Mr. Karanja Mbugua for the appellant reiterated the submissions he made before the learned trial magistrate. Being a matter of interpretation of what time is in civil matters he argued that the 12 months mentioned in the law were not 12 calendar months, but 12 months to be computed excluding certain days. He relied on order 50 rules 2,3 and 4 of the CPR arguing that between April 2013 and April 2014 there were Sundays, Public Holidays and days excluded from the computation of time to demonstrate that the appellant's suit was filed within time.

Mr. Victor Ondieki, Senior Litigation Counsel in the OAG submitted that the suit having been filed on 23<sup>rd</sup> April 2014, it was outside the 12 month limitation of time. He relied on Order 50 rule 18(sic) of CPR for the computation of time. He submitted that the date on which the cause of action arose was excluded, and so were all the public holidays and weekends. That the 14<sup>th</sup> April was a Sunday, and that there were no public holidays between 14<sup>th</sup> April 2013 and 23<sup>rd</sup> April 2013(sic). That the appellant ought to have sought leave of court to file the suit out of time.

On his part counsel for the appellant submitted that between 14<sup>th</sup> April 2013 and 23<sup>rd</sup> April 2014 there were several excluded days. That in 2013 April there were 3 Sundays and 2 Saturdays, a public holiday on 1<sup>st</sup> May, 4 Saturdays and 4 Sundays in May, a Public Holiday on 1<sup>st</sup> June, 4 Saturdays and 4 Sundays in June, 24 weekend days in July August September, 4 Saturdays and 4 Sundays in October plus 2 public holidays, 4 Saturdays and 4 Sundays in November, December the dates from 21<sup>st</sup> December to 13<sup>th</sup> January were excluded.

In 2014, 2 Saturdays and 2 Sundays in January, 4 Saturdays and 4 Sundays in February, 5 Saturdays and 5 Sundays plus Good Friday and Easter Monday, 2 Saturdays and 2 Sundays in April 2014.

That in view of the above computation, the learned trial magistrate was in error in striking out the appellant's suit.

Section 57 of the Interpretation and General Provisions Act Cap 2 states:

***Computation of time***

*In computing time for the purposes of a written law, unless the contrary intention appears—*

*(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;*

*(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;*

*(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;*

*(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.*

For purposes of clarity I find it necessary to reproduce Order 50 CPR here:

***ORDER 50 - TIME***

*1. Month means calendar month [Order 50, rule 1.]*

*Where by these Rules or by any judgment or order given or made, time for doing any act or taking any proceedings is limited by months, and where the word "month" occurs in any document which is part of any legal procedure under these Rules, such time shall be computed by calendar months unless otherwise expressed.*

*2. Exclusion of Sundays and public holidays [Order 50, rule 2.]*

*Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, Sunday, Christmas Day and Good Friday, and any other day appointed as a public holiday shall not be reckoned in the computation of such limited time.*

3. Time expiring on Sunday or day offices closed [Order 50, rule 3.]

Where the **time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed**, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.

4. When time does not run [Order 50, rule 4.]

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 pleading or the doing of any other act:**

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

5. Time for giving security for costs, when not to be reckoned [Order 50, rule 5.]

The day on which an order for security for costs is served, and the time thenceforward until and including the day on which such security is given shall not be reckoned in the computation of time allowed to plead, or take any other proceeding in the cause or matter.

6. Power to enlarge time [Order 50, rule 6.]

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

7. Enlargement of time by consent [Order 50, rule 7.]

The time for delivering, amending, or filing any pleading, answer or other document of any kind whatsoever may be enlarged by consent in writing of the parties or their advocates without application to the court.

I have carefully considered the submissions by counsel. I note that no authority was cited.

From the grounds of appeal the issues that emerge for determination are:

1. whether in light of order 50 rules 2 3 and 4 the appellant's suit was filed out of time
2. whether there were any facts in issue with respect to the P.O raised before the learned CM
3. whether the provisions of s. 57 Cap 2, Order 50 rules 1 and 2 of CPR bring the appellant's claim within time provided by statute
4. whether the appellant's suit was about breach of duty
5. Whether the appellant's suit was up for striking out.

Counsel for the appellant argued the grounds on computation of time only. There were no arguments on the application of s. 6 of the PALA and s. 27 of Cap 22 to the appellant's claim.

On the issues regarding computation of time that is 1 and 3

According to his counsel all the provisions cited apply without exception to the limitation of time provided by s. 3(1) of the PALA. From a simple arithmetic that would add 117 days or about 4 months to the 12 months limitation period, making it 16 months.

A literal reading of the provisions however says otherwise. These provisions apply to specific situations and not to all limitations of time. Here is what I read them to say;

1. From the above provisions what is clear is that the 'months' here means calendar month.
2. The date the event took place was the 14<sup>th</sup> April 2013. The twelve months began to run from that date. However the law says that the date of the occurrence is excluded hence time began to run on 15<sup>th</sup> April 2013 and ended on 15<sup>th</sup> April 2014.

3. The 15<sup>th</sup> April 2013 was a Monday. 15<sup>th</sup> April 2014 was a Tuesday. Neither of these days are among the excluded days.

4. The exclusion in the computation of time of Saturdays Sundays and all other excluded days only applies **where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days.**

5. The omission from the computation of time of the period between the twenty-first day of December 2013 and the thirteenth day of January 2014 both days included, would only be applicable if the time for **filing of the plaint was within this period.** In this case it was not. It was in April.

Were there any facts in issue with regard to the P.O before the learned CM?

From the proceedings it was clearly a pure point of law, computation of time. There is no dispute that the appellant was wronged on the 14<sup>th</sup> of April 2013 and filed his suit on 23<sup>rd</sup> April 2014. These were the only facts the court needed to consider and they are not in dispute.

Regarding issue no. 4 I have carefully perused the Plaint. There nowhere in that plaint that the appellant's alleges breach of duty by either of the defendants or both of them. His claim is that the 1<sup>st</sup> defendant took forced him to pay money to buy his release from arrest. That as a result he suffered loss and damage. That the matter was heard by area elders who determined that the money and phone be returned to him, and the 1<sup>st</sup> defendant having failed to do so, brought the suit. There is no prayer for damages for breach of duty, no particulars of the alleged breach. He is bound by his pleadings and cannot amend his plaint through a ground of appeal.

On the last issue, the question is whether this suit was brought against a Public Authority.

Cap 39 describes itself thus: **An Act of Parliament to provide for the limitation of proceedings against the Government and a local authority, and for purposes incidental to and connected with the foregoing.**

It further states at section 2:

For the purposes of this Act—

(a) proceedings against the Government includes proceedings against the Attorney-General or any Government department or any public officer as such;

(b) proceedings against a local authority includes proceedings against any person employed by a local authority and sued or intended to be sued as such;

(c) a person is under a disability while he is a minor or of unsound mind or is detained in pursuance of any written law which authorizes the detention of persons suffering from mental disorder or unsoundness of mind.

A public officer is defined by Cap 2 as

**“public officer”** means a person in the service of, or holding office under, the Government of Kenya, whether that service or office is permanent or temporary, or paid or unpaid;

The appellant sued the 1<sup>st</sup> defendant in his capacity as Constable James Muraya, and the 2<sup>nd</sup> defendant as the legal advisor of Government.

Clearly therefore by virtue of s. 2 of Cap 39 and s. 2 of Cap 39 the respondents were sued in their capacities as described by Cap 39.

The learned trial magistrate having found that the suit was filed in violation of s. 3(1) of the PALA he was within his jurisdiction to strike out the suit.

Despite the appellant's counsel's ingenious arguments on computation of time, I find no reason to interfere with that discretion.

The appeal fails with costs to the respondents.

**Dated this 10<sup>th</sup> January 2021.**

**Mumbua T Matheka**

**Judge**

**13<sup>th</sup> January 2021: Virtually**

**In the presence of:**

**Court Assistant: Edna**

**Court: Counsel were notified but did not appear virtually. Judgment delivered via email this 13<sup>th</sup> Day of January 2021.**

**Karanja Mbugua & Co advocates for appellant**

**OAG for the Respondents**

**Mumbua T Matheka**

**Judge**