



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 103 OF 2016

TOM ONYANGO OKETCH (Suing on behalf

of the estate of GEORGE ADONIJAH

OKETCH-Deceased).....PLAINTIFF/APPLICANT

VERSUS

KENYATTA NATIONAL HOSPITAL.....DEFENDANT

RULING

1. This ruling is precipitated by the Notice of Motion dated 28th July, 2020 brought by the plaintiff/applicant under the provisions of Sections 1A & B, 3A, 7, 8, 66 and 80 of the Civil Procedure Act and Order 45, Rule 1 of the Civil Procedure Rules. The Motion is supported by the grounds laid out on its face and the facts stated in the affidavits of **Gicobi Saphina** and **Prof. Kiama Wangai**. The applicant sought for the orders hereunder:

i. Spent.

ii. THAT this Honourable Court be pleased to set aside the ruling delivered by Lady Justice Aburili on 30th May, 2016.

iii. THAT costs of the application be provided for.

2. Going by the record, the Motion is unopposed despite there being evidence of service of the same together with a hearing notice on both the defendant and its advocate.

3. I have considered the grounds set out on the face of the Motion and the facts deponed in the respective affidavits supporting it.

4. A brief background of the matter is that George Adonijah Oketch (“the deceased”) died on 28th December, 2008 at the premises of the defendant, following which the applicant sought for and obtained a grant of letters of administration in respect to the estate of the deceased on 11th December, 2009.

5. Subsequently, the applicant filed High Court Civil Case No. 278 of 2013 against the defendant, which he later withdrew by way of the notice of withdrawal dated 28th July, 2015.

6. Later on, the applicant filed the ex parte Originating Summons (“the Summons”) dated 4th April, 2016 in the present suit and sought for the extension of the limitation period to enable him file a suit against the defendant.

7. Upon hearing the applicant on the aforementioned Summons, the court vide its ruling delivered on 30th May, 2016 found that there was a prolonged and unexplained delay in filing the suit, and that the provisions of Section 27 of the Limitation of Actions Act on the extension of the limitation period in case of ignorance of material facts in actions for negligence, among others, had not been fulfilled. For those reasons, the court dismissed the Summons with no order on costs.

8. It is the aforesaid ruling that the applicant now seeks to set aside upon review.

9. The germane principles to guide this court in deciding whether to review the ruling of 30th May, 2016 are found under **Order 45** of the **Civil Procedure Rules, 2010** and reaffirmed under **Section 80** of the **Civil Procedure Act Cap. 21 Laws of Kenya**, and are set out in the following manner:

a. the discovery of new and important matter or evidence, or

b. some mistake or error apparent on the face of the record, or

c. any other sufficient reason.

10. In her supporting affidavit, Gicobi Saphina who is an assistant at the offices of the applicant's advocate states that on 4th April, 2016 she was instructed to file an application before the Chief Magistrate's Court at Milimani Commercial Courts but that she mistakenly filed the same with the High Court at Milimani Law Courts.

11. The deponent further states that on 30th May, 2016 her boss, Prof. Kiama Wangai proceeded to the Chief Magistrate's Court for hearing of the Summons, only to discover that the matter had not been listed on the daily cause list.

12. It is the averment of the deponent that upon inquiry by Prof. Kiama Wangai, she informed him that she had filed the Summons at the High Court and that following his instructions, she filed the same before the appropriate court; being the Chief Magistrate's Court; on 2nd June, 2016.

13. In his supporting affidavit, Prof. Kiama Wangai who is the advocate of the applicant echoed the averments of Gicobi Saphina, save to add that upon attending the hearing of the Summons on 30th April, 2016 he informed the court that his law firm did not file the present suit or any other application seeking to have leave to file the dispute between the parties herein out of time, and hence the Summons was before the wrong court.

14. The advocate also states that he did not attend court for the ruling on the Summons as he genuinely believed that the High Court did not have jurisdiction over the matter.

15. The advocate avers that his office filed an application in Misc. Civil Suit No. 466 of 2016 before the Chief Magistrate's Court and sought for leave to file a suit against the defendant, which leave was granted, resulting in the institution of CMCC NO. 5905 of 2016 before the Chief Magistrate's Court at Milimani Commercial Courts and which suit proceeded to trial and was at the point of final submissions at the time of swearing the supporting affidavit.

16. Upon my perusal of the record, I note that though the Summons was filed before the High Court-Civil Division on 5th April, 2016, it was clearly headed 'Civil Suit No. 103 of 2016' before the Chief Magistrate's Court Milimani Commercial Courts, which supports the averments of the two (2) deponents above, that the Summons was intended to be filed before the subordinate court and that there was an inadvertent error on the part of Gicobi Saphina in filing the Summons before the High Court.

17. From my perusal of the proceedings, it is apparent that save for the impugned ruling, there is no record of the proceedings giving rise to that ruling.

18. That notwithstanding, the applicant has annexed to the Motion a copy of the Originating Summons which was filed before the Chief Magistrate's Court on 2nd June, 2016 in Misc. Civil Suit No. 466 of 2016 involving the parties herein and seeking similar orders as those sought in the Summons. According to the applicant, leave was granted for him to file a suit against the defendant.

19. The applicant has also annexed a copy of the plaint dated 30th August, 2016 and filed on like date in CMCC NO. 5905 of 2016. This, together with subsequent proceedings equally annexed to the Motion, supports the averment on the existence of that suit.

20. Moreover, the applicant has annexed a copy of an application subsequently filed by the defendant on 21st February, 2017 in the aforementioned CMCC NO. 5905 of 2016 seeking the striking out of the applicant's plaint and the consequent dismissal of the suit on grounds, *inter alia*, that the suit is time barred.

21. The applicant annexed copies of the handwritten court proceedings on the aforementioned application, whereby the subordinate court dismissed the same vide the ruling delivered on 24th August, 2017. There is no indication that the said ruling has been challenged and/or set aside.

22. For all the foregoing reasons, I am satisfied that the instant Motion raises sufficient grounds to warrant a granting of the substantive order sought, emanating from the filing of the Summons in the High Court rather than the Chief Magistrate's Court and resulting in the hearing of the Summons by the High Court.

23. Further to the foregoing and without necessarily overlooking the fact that there has been a prolonged delay of four (4) years in approaching this court, I am satisfied that since there is an indication of an existing and pending suit before the Chief Magistrate's Court, and in the absence of any indication of prejudice or contrary arguments on the part of the defendant, the only practical next step for me would be to grant the substantive order sought in the Motion.

24. In the end, the Motion is allowed. Consequently, the ruling delivered on 30.5.2016 by Lady Justice Aburili is set aside.

Each party to bear its own costs

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 8th day of January, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the Defendant