



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC CIVIL APPLICATION NO. 73 OF 2020

TRAPEZE ASSOCIATES LIMITED.....APPLICANT

VERSUS

LUKAS ODHIAMBO ODODA.....1ST RESPONDENT

CAVLAG LIMITED.....2ND RESPONDENT

NORMAN CHUGUGAA MWAURA.....3RD RESPONDENT

PETERSON MWANGI.....4TH RESPONDENT.

RULING.

1. In its **Notice of Motion** dated **22nd June 2020**, the applicant prays for the following orders;

a) That this application be heard and there be stay of proceedings and any consequential orders in Molo cmcc no. 226 of 2013 be granted pending interpartes hearing of the application.

b) That this court grants leave to the applicant to file an appeal out of time against the ruling delivered in Molo cmcc no. 226 of 2015 on 30th April 2020.

2. The application is supported by the affidavit of **Muchela. A. Ongenge**, the advocate for the applicant sworn on the same date as well the grounds on the face of the motion.

3. The issues herein are not difficult to understand. The 1st respondent did file what is commonly known as a *running down* case number **Molo cmcc 226 of 2015** seeking damages as a result of a road traffic accident that occurred on 28th December 2013 involving motor cycle registration number MKCU 965Z and motor vehicle registration number KAZ 451V along Molo- Mau summit road. This was against 2, 3 and 4th respondents.

4. The 1st respondent through an interlocutory application managed to get a favourable judgement. In the process of executing against the respondents it became necessary to sue the insurance company which it did vide case no Molo cmcc 168 of 2017.

5. There was another case no Molo 225 of 2015 which involved same parties. The 1st respondent made an application to reopen the case on 18th June 2018 and the same was allowed on 28th August 2018. The applicant was then made a party in the case no 226 of 2015 and it filed its defence as well as raised a preliminary objection after being served with the amended plaint.

6. The said preliminary objection centered on the fact that its inclusion in the suit ran contrary to the **Provisions of Sections 4, 27 and 28 of the Limitations of Action Act**. The same was argued and the court delivered its verdict online because of the challenges of Covid 19.

7. The applicant was unable to receive the said ruling within the stipulated time as agreed and all efforts were fruitless and it only managed to get the ruling after expiry of the 30 days' period for lodging and appeal if any. It is for this reason that it is seeking to have the court extend the period.

8. One **Peter Otieno Ododa** has sworn a replying affidavit dated 21st January 2021 and a further affidavit dated 30th April 2021. Both

affidavits have given chronology of the cases as demonstrated by the applicant as well. The only parting shot is that the applicant has all along been involved in the matter and has attempted to block its progress. That the applicant since it was granted the chance by the trial court to defend the matter has failed to file its witness statements and have the matter proceed to its logical conclusion. That this was another attempt by the applicant to stall the progress of the case at the trial court.

9. He went on to state that the ruling by the court was served to the parties through the emails they had provided and it was incumbent upon the applicant to respond within time. That the application is not merited for the simple reason that it took a long time for the applicant to file this application. The court in his words should not aid the indolent.

10. The court then ordered the parties to file their written submission which they have done and the court has perused the same as well as the attendant attached authorities.

11. The first issue to determine is whether the application has been filed within a reasonable time. The applicant has given several reasons why it was unable to access the ruling of the trial court. To the applicant the trial court was to blame as it did not email the same to the email it had provided.

12. In the absence of any evidence of email, the court is inclined to believe the applicant. It is true that they had provided their email addresses and if for any reason they did not then it should be accorded a benefit of doubt.

13. This position is buttressed by the fact that the application was made within a reasonable time in the circumstances which was about three weeks after the ruling was delivered. The court also takes judicial notice of the fact that most of our courts scaled down operations because of the Covid 19 pandemic.

14. In any case to allow this prayer or not is really at the discretion of the court as it has been enunciated in many authorities for example that of **NICHOLAS KIPTOO KORIR ARAP SALAT VERSES IEBC & 7 OTHERS (2014) eKLR** by our Supreme Court.

15. Having found so, what is the merit of the application.? The court was not provided with the ruling of the court by either of the parties despite a reference to the same. The applicant was dissatisfied with the finding that the matter was not time barred as provided under the **Provisions of Section 4, 27 and 28 of the Limitation of Actions Act.**

16. It went on to state that they should be allowed to appeal against that decision as failure to do so shall make them liable to carry the burden of compensation should the court rule against it.

17. In my humble view, this may not prejudice the applicant's chances for the following reasons. First of all, the applicant still has a chance to appeal even after the final findings by the trial court. Should this court stop the matter proceeding because of the said interlocutory ruling both parties shall suffer prejudice considering the time it has taken to have this matter at the corridors of justice which is over 6years.

18. The other reason is that as much as possible the courts ought to grant parties to proceed to the full haul unless the matter is hopeless on the face of it. In any case they will always have another chance to appeal after the final verdict. The applicant shall have the opportunity to ventilate its claim by way of cross examination or adduction of evidence in support of its claim that the matter was indeed time barred.

19. For now, I find no basis to allow the application. Should the final decision be unfavourable to the applicant, the legal ground, namely, of limitation of time shall obviously be one of the grounds of appeal. Let every party have their full day in court. The matters in any even should always be encouraged to go to finality as it saves time compared to whenp9 interlocutory applications are encouraged or entertained.

20. This court does not find any prejudice the applicant shall suffer should the matter proceed to its logical conclusion. **The application is dismissed with no order as to costs.**

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 29TH DAY OF JULY 2021.

H K CHEMITEI.

JUDGE