

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. E190 OF 2021

YH WHOLSALERS LIMITED.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

1. By an Originating Summons dated 19th February 2021 expressed under the provisions of Sections 1, IA, 3, 3A of the Civil Procedure Act, [1] Section 26, 27, 28, 30 and 39 of the Limitation of Actions Act, [2] Section 6 of the Public Authorities Limitation Act, [3] Order 37 Rule 6, and Order 50 Rule 6 of the Civil Procedure Rules, the applicant prays for leave to file suit against the respondent out of time. It also prays that the respondent deposits the sum of **Kshs. 293,000,000/=** in court within 7 days as security for satisfaction of the Plaintiff's claim and costs. Also, the applicant prays that its Plaint dated 27th January 2021 be deemed as duly filed. Lastly, it prays for costs of the application.

2. The Originating Summons is grounded on the annexed affidavit of Jafari Ibrahim Khalif. The substance of the affidavit is that on or about 16th June, 2011 the applicant was transporting 520 bags of Pakistani rice; that, its vehicle was impounded by Customs Officials who issued a seizure notice alleging lack of customs documents and confined the consignment in a customs bonded warehouse at the Jomo Kenyatta International Airport.

3. The applicant claims that it produced all the required documents showing that the duty was paid, but upon being allowed to access the truck the applicant found only 80 bags only out of the 520. Further, that the applicant states that it wrote a demand letter to the Plaintiff dated 28th May 2012 and after several reminders, the respondent commissioned an enquiry and wrote to the applicant urging it not to file suit as it would consider amicably settling the matter. It states that unless the orders sought are granted, the plaintiff shall suffer irreparable loss owing to the defendant's negligent action. Lastly, it states that the respondents shall not suffer any loss should the orders sought be granted.

The Respondent's grounds of opposition

4. The Respondent filed grounds of opposition stating:- that the application is an abuse of the court process; that section 27 of the Limitations of Actions Act does not contemplate nor provide for the orders sought in the application; that the prayers sought are incapable of being granted; that the applicant has not satisfied the principles to merit the orders sought; that the applicant has not given sufficient reasons for the inordinate delay of 10 years; and, equity aids the vigilant and not the indolent.

The applicant's further affidavit

5. The substance of the applicant's further affidavit sworn by Jafari Ibrahim Khalif is that the applicant has been in constant discussion with the Respondent through their advocates regarding the dispute which is the sole reason why the applicant did not institute proceedings.

The Plaintiffs advocates submissions

6. The Plaintiffs' counsel urged the court to exercise its discretion under Article 159 of the Constitution and allow the application. He cited *Rosemary Wanjiru Kungu v Elijah Macharia Githinji & another*^[4] which held *inter alia* that: - (a) the object of a limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he has lost evidence for his defense from being disturbed after along lapse of time; (b) unless an applicant shows grounds upon which he could claim exemption, a court shall reject his claim. Counsel submitted that a cause of action that is barred may in certain cases be revived if the conditions set out in section 27 of the Limitation of Actions Act are satisfied.

7. He also cited *Lucia Wambui Ngugi v Kenya Railways Another*^[5] which held that in an application for leave, the court should scrutinize the case to see whether it is a proper one for leave. Additionally, he cited *Gatune v The Headmaster, Nairobi Technical High School Another*^[6] in which the court held that protracted negotiations led the applicant to believe that the matter would be settled. He argued that the Respondent's discussions with the applicant led it to believe that its claim was one capable of being settled, hence, he halted filing court proceedings to allow the negotiations. Lastly, counsel confirmed that the applicant had abandoned the prayer for security.

The Respondent's advocates submission

8. The Respondent's counsel cited Section 3 (1) of the Public Authorities Limitations Act and section 27 of the Limitation of Actions Act, both of which are reproduced later in this ruling and argued that section 27 (2) of the Limitations Act provides that the section is fulfilled when the applicant "proves" that material facts relating to the cause of action were outside his knowledge." She submitted that the power to extend time is discretionary and cited *Commissioner of Domestic Taxes v Maair Insurance Com an Limited*[7] which held that the court may extend time where there is reasonable cause for the delay and that the applicant ought to advance sufficient and reasonable grounds for any delay on its part. She argued that the reason offered is that the Respondent indicated that it would consider amicably settling the matter and argued that discussions are not among the grounds provided by the law.

9. Counsel submitted that Section 27 of the Limitations of Actions Act is entitled "extension of limitation period in case of ignorance of material facts in actions for negligence, etc" and argued that the applicant was aware of the material facts, so, the prayer for extension of time cannot be granted. Also, counsel argued that under section 27(2) of the Limitations of Actions Act, a party must demonstrate that material facts relating to the cause of action or facts of a decisive character were at all times outside their knowledge (actual or constructive). She submitted that this threshold has not been met as there is no such averment in the applicant's affidavit(s). She argued that the supporting affidavit lacks the key requirements/ingredients as contemplated by section 27 of the Limitation of Actions Act and therefore of no value at all to the application. He cited *Willis Onditi Odhiambo v Gateway Insurance Co Limited*[8] in which the Court of Appeal held that time to file suit can only be extended where the action is found on tort and must relate to the torts or negligence, nuisance or breach of duty and the damages claimed should be in respect of personal injuries to the plaintiff as a result of the tort.

10. Additionally, counsel cited *Geoffrey Mbugua Muhoro v Attorney General*[9] in which the court dismissed an application for extension of time to file suit adopting *Mary Ofundwa v Nzoia Sugar Company Limited*[10] which held that section 27 of the Limitation of Actions Act clearly lays down the circumstances under which the court would have jurisdiction to extend time, that the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The court also held that 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.

Determination

11. The Respondent, (the Kenya Revenue Authority) is established under section 3 (1) of the Kenya Revenue Authority Act.[11] Pursuant to section 3(2) of the said Act, it is a body corporate with perpetual succession and a common seal and shall, subject to the Act, capable in its corporate name of (a) suing and being sued. The proviso to the said sub-section provides that any legal proceedings against the Authority arising from the performance of the functions or the exercise of any of the powers of the Authority under section 5 shall be deemed to be legal proceedings against the Government within the meaning of the Government Proceedings Act.[12]

12. Section 3(1) of the Public Authorities Limitation Act[13] provides that 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. Also relevant is section 5 of Public Authorities Limitation Act which provides:-

5. Extension of limitation period in case of disability

Notwithstanding the provisions of section 4 of this Act, if, on the date when a right of action accrues for which a period of limitation is prescribed by this Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of twelve months from the date when that person ceases to be under a disability: Provided that—

- i. this section does not apply in respect of proceedings where the right of action first accrues to a person who is not under a disability and through whom the person under a disability claims;
- ii. this section does not apply to an action to recover a penalty or forfeiture or a sum by way of penalty or forfeiture recoverable by virtue of a written law.

13. The applicant was not under disability at the time the alleged cause of action accrued, therefore, it cannot benefit from the above provision.

14. A reading of the applicant's draft Complaint shows that he has premised its claim on the tort of negligence, trespass and conversion. The Plaintiff pleaded particulars of alleged negligence to support the alleged breaches. The Plaintiff is also claiming general damages. Simply put, to the extent that the Plaintiffs claim is anchored on the various torts it alleges were committed by the Respondent's agents, then the same is time barred by dint of section 3(1) of the Public Authorities Limitation Act. Further, the applicant was not under a disability at the time the cause of action arose, hence he cannot benefit from the extension provided under section 5 of the Public Authorities Limitation Act.

15. It is also important to establish the link between the Public Authorities Limitation Act and the Limitation of Actions Act. In this regard, section 6 of the Public Authorities Limitation Act provides for application of the Limitation of Actions Act in matters governed by the Act. It provides as follows: -

6. Application of Cap. 22

Notwithstanding the provisions of section 31 of the Limitation of Actions Act, section 22 of that Act shall not apply in respect of the provisions of this Act; and in section 27 of the Limitation of Actions Act the reference to section 4(2) of that Act shall be read and construed as a reference to section 3(1) of this Act, but subject thereto and notwithstanding section 42 of the Limitation of Actions Act, Part III of that Act shall apply to this Act.

16. Section 27 of the Limitation of Actions Act provides for extension of limitation period in case of ignorance of material facts in actions for negligence, etc. It reads: -

(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.

17. Section 27 provides that section 4(2) does not afford a defence to an action founded on tort as provided in the said section. 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. In accordance with section 6 of the Public Authorities Limitation Act cited above, reference to section 4(2) of the Limitation of Actions Act means reference to section 3(1) of the Public Authorities Limitation Act which provides that actions founded on tort must be brought within 12 months. The import of this provision is that the Plaintiffs claim was statute barred by slightly over 10 years.

18. The applicant attributes the delay to alleged discussions with the Respondent. It claims that owing to the negotiations, it withheld court action. In support of this view, reliance was placed on *Gatune v The Headmaster, Nairobi Technical High School Another* in which the court allowed extension of time on grounds that the parties were negotiating. I have in several decisions stated that cases are context sensitive. It is settled law that a case is only an authority for what it decides. This is correctly captured in the following passage: -^[14]

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ...a case is only an authority for what it actually decides...." (Emphasis added)

19. It is a correct proposition of the law to state that the ratio of any decision must be understood in the background of the facts of the particular case.^[15] A case is only an authority for what it actually decides, and not what logically follows from it.^[16] A little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.^[17]

20. Simply put, each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.^[18] In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.^[19] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.^[20]

21. I have carefully read *Gatune v The Headmaster, Nairobi Technical High School Another* relied upon by the applicant. The said decision has no relevancy to the facts of this case. Three distinguishable features are discernible in the said case as is evident from the following excerpt from the judgment.

"Claimants who appear in person in the negotiating table would regard the proceedings even more seriously. So much so that the mere fact of continuing negotiation would reasonably be taken to mean an appreciation by the Attorney-General of the correctness and substance of the claim. Only a foolhardy and vexatious claimant would want to prejudice the negotiations and thereby earn the displeasure of the Attorney-General by filing an action on the very same cause of action which had given rise to the negotiation. The

reasonable lay claimant would continue with the negotiations and would feel that the Attorney-General would advise him on what action to take if and when negotiations failed. Ordinarily, the more educated the claimant, the more reliance he would place on the Attorney-General and the greater the hope would be that there would be a fair end to the negotiations. A claimant in that position would reasonably feel that by negotiating with him, the Attorney-General had invited him to delay court proceedings and that he would not be prejudiced by the delay.

The appellant negotiated with the Attorney General from 1977 to October 1981. He had faith in the negotiations. The respondents would now be barred from setting up the provisions of the Act; Halsbury's Laws of England, 14th edition, Volume 28, para. 608.

Certainly the appellant pursued his claim which he believes is a good one with reasonable diligence – he has not been idle since he received the medical report: See also Board of Trade v Gayzer, Iruine Feo. [1927] A.C 610. I do not therefore regard it as accurate to say that the appellant waited from August 1979 to 1981. On the evidence as I understand it, the appellant should have brought his action by 2nd January 1980. The delay of 10 months appears to have been due to negotiations. In my view, the Attorney-General should have informed the appellant well before 2nd January 1980 that it was in his interests to file an action within three years from the 6th August 1967 and that by doing so he would not be prejudicing the negotiations out of court. Having not done so and therefore having caused the appellant to continue the negotiations, it is only fair that the appellant should not be penalized for attempting to settle the dispute out to court. I fear that a contrary view will operate harshly on the appellant who has been guilty of no laches and has negotiated in good faith.

So it comes to this although the appellant was aware of the injury to his eyes from the 21st May 1973, that knowledge alone did not in the circumstances to his case constitute material facts relating to the cause of action. The appellant underwent considerable medical treatment here and in the U.S.S.R before the medical report that he had lost eye-sight in both eyes was issued. The medical report which came to the knowledge of the appellant early in 1977 included a fact of decisive character – i.e total loss of eye-sight which was outside the appellant's knowledge prior to 2nd January 1977. In my judgment the trial Judge erred in finding that the material facts which facts the trial Judge considered far too narrowly, were not outside the knowledge of the appellant. The appellant acted reasonably in seeking medical treatment than in obtaining legal advice with a view to filing an action. The trial Judge refers to the negotiations between the appellant and the Attorney-General. However, the relevance or otherwise of the negotiations to this appeal is nowhere he stated, a factor which is prejudicial to the appellant. For that was one of the two real points of the application which needed consideration.

On the evidence, the appellant was under a disability up to the time he knew of the contents of the medical report. He could reasonably be said to have been under equal disability while he negotiated with the Attorney- General. I would allow the appeal, set aside the order of the High Court, give leave to the appellant to file his case against the respondents at any time before the end of six years from the 16th October 1981 (section 22 of the Act)."

22. From the above excerpt, four distinguishable features are evident. (a) the appellant in the said case was under a disability. (b) the appellant was acting in person and he had engaged in negotiations with the Attorney General. (c) the appellant received a Medical Report much later which disclosed the nature and extent of the injuries he had sustained which constituted material facts which were not within his knowledge. (d) the Respondent in the said case did not file a Replying affidavit, hence, the factual averments before the court were uncontroverted. The above features are not present in this case. Any attempt to compare the said decision with the present case is a contradiction. On this ground, the applicants case collapses.

23. As to whether the applicant provided any reasons to trigger this courts discretion, the Plaintiff contends that they were discussing the matter with the Respondent and that he believed that defendant had agreed to settle. However, a reading of the letters relied upon by the applicant, namely, the Respondent's letters dated 13th May 2012, the internal memo dated 30th June 2011, the applicant's advocates letters dated 14th May 2015 7, 28th May 2012 and 25th November 2020 leave no doubt that there were no settlement negotiations at all. Even if we were to treat the said letters as settlement negotiations (which we cannot do), there is nothing to show that the applicant was precluded from filing the suit. Differently put, the letters do not disclose the permissible tests under section 27 to trigger the exercise of this courts jurisdiction to grant the orders sought.

24. Time bar 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 applicant 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, what is more, the explanation given must be reasonable. The **10-year** delay has not been explained at all. Extension of time is not a right of a party. It is an equitable remedy that 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 applicant 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, the applicants Originating Summons falls for dismissal.

25. The other important issue is the argument raised by the Respondent's counsel that section 27 of the Limitation of Actions Act clearly lays down the circumstances under which the court would have jurisdiction to extend time, that the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The defendant's counsel relied on several decisions in support of this proposition including *Willis Onditi Odhiambo v Gateway Insurance Co Limited*[21] in which the Court of Appeal held that time to file suit can only be extended where the action is found on tort and must relate to the torts or negligence, nuisance or breach of duty and the damages claimed should be in respect of personal injuries to the plaintiff as a result of the tort.

26. The above argument has consistently been upheld in many decisions of our superior courts. In *Mary Osundwa v Nzoia Sugar Co. Ltd*[22] 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 28/5/1991 that the order was by consent can be neither here nor there, the parties could not confer jurisdiction on the judge by consent.”

27. In *Oadi Odhiambo v Gateway Insurance Co. Ltd* [23] the Court of Appeal faced with the same set of circumstances as in this case observed:

“Under Section 27 (1) of the Limitations Act, time to file a suit can only be extended where the action is founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages accorded should be in respect of personal injury to the plaintiff as a result of the tort.”

28. The applicants supporting affidavit tried to depict how the Respondent is to blame. What is required at this stage is not a merit evaluation of the case, but the applicant must bring himself within the grounds in section 27 and to also, an explanation for the delay. Lord Green MR said it all in *Hilton v Sultan S. Team Laundry*[24]

“But the statute of limitation is not concerned with merits, once the axe falls, it falls and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled to insist on his strict rights.”

29. Flowing from the above grounds addressed above, I find and hold that the applicant’s Originating Summons is manifestly un merited. There is no basis at all upon which this court can grant the leave sought. Accordingly, the Originating Summons dated 19th February 2021 is hereby dismissed with costs to the Respondent.

Orders accordingly

SIGNED, DATED AND DELIVERED VIA E-MAIL AT NAIROBI THIS 11TH DAY OF AUGUST, 2021

JOHN M. MATIVO

JUDGE

[1] Cap 21, Laws of Kenya.

[2] Cap 22, Laws of Kenya.

[3] Cap 39, Laws of Kenya.

[4] {2014} e KLR.

[5] Nairobi HCMA No. 213.

[6] {1988} KLR 561.

[7] {2017} e KLR.

[8] {2014} e KLR.

[9] {2017} e KLR.

[10] Kisumu CA No. 244 of 2000.

[11] Act No. 2 o 1995.

[12] Cap 40, Laws of Kenya.

[13] Cap 39, Laws of Kenya.

[14] As observed in *State of Orissa v Sudhansu Sekhar Misra* MANU/SC/0047/1967.

[15] *Ambica Quarry Works v State of Gujarat and Ors.* MANU/SC/0049/1986.

[16] Ibid

[17] Bhavnagar University v. Palitana Sugar Mills Pvt Ltd (2003) 2 SC 111 (vide para 59)

[18] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, Prashant Vats Versus University of Delhi & Anr. (Citing Lord Denning).

[19] Ibid

[20] Ibid

[21] {2014} e KLR.

[22] {2002} e KLR

[23] *Civil Appeal No. 37 of 2013 eKLR*

[24] {1946} 1KB 61, 81.