



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC APPLICATION NO 635 OF 2018 (O.S)

EXPRESS KENYA LIMITED.....APPELLANT

VERSUS

EAST AFRICAN BREWERIES LIMITED.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Applicant's *Ex-parte* Originating Summons dated 27th November 2018 and filed on 28th November 2018 was brought pursuant to the provisions of Section 27 and 30 of the Limitations of Actions Act Cap 22, Order 37 Rule 6(1) of the Civil Procedure Rules (2010), Section 3A of the Civil Procedure Act Cap 21, Article 50 and 159 of the Constitution of Kenya 2010 and all enabling provisions of the Law.

It sought the following prayers **THAT:-**

- 1. The Honourable Court be pleased to grant unto the Applicant herein, leave to file suit out of time against the Respondents herein for recovery of a debt of Kshs 40 Million owed to the applicant.**
- 2. Consequent to prayer (1) hereinabove granted, the Applicant be at liberty to file and/or lodge the intended proceedings within 30 days from the date of the order.**
- 3. Costs of this application be in the cause.**
- 4. Such further and/or other orders be made as the court may deem fit and expedient.**

2. On 6th December 2018, this court directed the Applicant to file Written Submissions and fixed the matter for mention on 16th January 2019 to confirm compliance. However, on the said date, the Respondent sent an advocate to appear in court on its behalf, M/S Kaplan & Stratton Advocates having filed a Notice of Appointment of Advocates dated 20th December 2018 on even date. The said advocates also indicated that they had filed Grounds of Opposition dated 15th January 2019 on even date. Directions were therefore given to the Respondent to file and serve its Written Submissions.

3. The Applicant's Written Submissions were dated and filed on 8th February 2019 while those of the Respondent's were dated 31st January 2019 and filed on 4th February 2018.

4. Parties asked this court to deliver its decision based on Written Submissions that they fully replied upon. The said Judgment is based on the said Written Submissions.

THE APPLICANT'S CASE

5. The Applicant's Senior Manager, Jane Nungari Ng'ang'a, swore the Affidavit in Support of the *Ex-parte* Originating Summons.

6. Its case was in 2009 that it had entered into a three (3)year contract with the Respondent herein. The same was to end in 2012. However, before the contract could come to an end, the Respondent terminated the said contract vide a letter dated 10th January 2011. The Applicant therefore demanded from the Respondent the sum of Kshs 10,000,000/= being the outstanding balance of monies owed to it for the transport services it had offered the Respondent.

7. It averred that the Respondent wrote to it asking it not to file any suit as it was seeking further clarification on the matter and that it would revert. It said that it believed the Respondent and did not lodge the intended proceedings on time. It stated that the Respondent misled it into believing that it would settle its claim and unfortunately, the statutory period for filing suit lapsed.

8. It instructed auctioneers to recover the monies but the recovery did not materialise. It stated that it remitted filing fees to its previous advocates but they did not file suit. It blamed its previous counsel for not having filed the suit within the statutory period.

9. It was its contention that it ought to be given an opportunity to be heard because failure to do so would amount to a deprivation of a right to be heard and an infringement of its constitutional right.

10. It also pointed out that it would suffer irreparable and/or substantial loss if it was denied an opportunity to file suit out of time and that it should not be punished for the mistakes of its advocate. It thus asked this court to allow its application as prayed.

THE RESPONDENT'S CASE

11. The Respondent relied on six (6) grounds of opposition to the Applicant's *Ex-parte* summons. They could be summarised as follows:-

1. **THAT actions based on contract cannot be brought at the end of six (6) years after the cause of action accrued.**
2. **THAT even with the consent of the parties, a court cannot extend the time for filing a suit based on contract as parties cannot confer jurisdiction on the court by their consent.**
3. **THAT the application lacked merit, was an abuse of the court process and should be dismissed with costs to it.**

LEGAL ANALYSIS

12. The Applicant submitted that whereas contractual matters had to be instituted within six (6) years, there were exceptional circumstances under Section 27 of the Limitation of Actions Act where extension of filing suit could be given. These were:-

- (a) **Ignorance of material fact of decisive character.**
- (b) **appropriate advise**
- (c) **acknowledgement of the claim**
- (d) **negligence of the advocates**

13. It submitted that it had all intentions of recovering the monies and that it wrote a demand letter to the Respondent which went unanswered. It urged this court to scrutinise the circumstances that led to the failure to file the suit out of time and if they were excusable, then its application ought to be allowed.

14. It referred this court to the case of **HCMA No 213 of 1989 Lucia Wambui Ngugi vs Kenya Railways & Another** (unreported) where it was held that an application to extend time must be scrutinised and further that where a respondent had led a plaintiff to believe that a claim would be settled and in reliance of such belief the Plaintiff refrained from filing suit after the time for limitation has run its course, extension of time to file suit could be granted notwithstanding the provisions of Section 27 of the Limitations of Actions Act.

15. It also placed reliance on the case of **Gathoni vs Kenya Co-operative Creameries Ltd [1982] eKLR** where it was held that for an application to be allowed under Section 27 of the Limitation of Actions Act, the court must be satisfied that the failure to file suit within time was due to lack of knowledge of certain material facts. Further, the applicant must show that s(he) had taken all reasonable steps to seek appropriate advise in respect of the facts.

16. It contended that the Respondent had in its letter of 26th May, 2013 (**sic**) advised its advocates not to file suit as they were working out some logistics and would get back to them. It averred that since this was an acknowledgement of the debt, the filing of the suit was set to lapse on 26th May 2019.

17. It also referred this court to the cases of **Laemthong Rice Co Ltd vs Principal Secretary Ministry of Finance [2002] I EA 119** and **Shire vs Thabuti Finance Co Ltd [2002] I EA 279** where the common thread was that an acknowledgement of debt made after expiry of a limitation period gave rise to a fresh period of limitation.

18. It also relied on the case of **CFC Stanbic Ltd VS John Maina Githaiga & Another [2013] eKLR** amongst others where the common thread was that a party ought not to be punished for the mistakes of his advocate by not having his case heard on merit.

19. In further response to the Respondent's submissions, the Applicant submitted that the two (2) issues that had been placed before this court were:-

1. **Whether this Honourable Court had jurisdiction to hear this matter;**

2. Whether there was acknowledgement and what would be its effect.

20. It conceded that actions founded on contract could not be brought after expiration of six (6) years from the date on which the cause of action accrued but reiterated that Section 27 of the Limitations of Actions Act gave the circumstances under which the court had jurisdiction to extend the time for filing suit where the action was founded on tort of negligence, nuisance or breach of duty.

21. It pointed out that the question that arose was whether the Applicant's claim amounted to a tort and argued that the cause of action disclosed both a breach of contract and a breach of statutory duty. It was its submission that the Applicant's claim was both a tort and a contract and the Respondent's arguments that time to file suit could not be extended was baseless.

22. In this regard, it relied on the cases of Civil Appeal No 57 of 2002 Robin Cahill & 9 others vs T.S. Nandhra & 3 others (unreported) where it was held that where a claim was pleaded both as a tort or a contract, the plaintiff could rely on either of the limitation periods set out for tort and contract.

23. It also placed reliance in the case of Kiamokoma Tea Factory Ltd vs Joshua Nyakoni [2015] eKLR where it was held that a breach of statutory duty was a tort.

24. On the question as to whether there was acknowledgement and the effect thereof, it submitted that the Respondent's argument that Section 23(3) of the Limitation of Actions Act did not apply herein was misleading, farfetched and an incorrect interpretation of the law.

25. It was emphatic that contrary to what the Respondent had contended, the letter of 20th May, 2013 formed part of its evidence as it was annexed to the Supporting Affidavit of Jane Nungari Ng'ang'a.

26. It denied the Respondent's averment that the letter dated 20th May, 2013 only acted as a holding letter and not as an acknowledgement and instead stated that the same qualified as an acknowledgement for all purposes of Section 23(3) of the Limitations of Actions Act.

27. It referred this court to the case of Telkom Kenya Ltd vs Kenya Railways Corporation [2018] eKLR where Onguto J (as he then was) held that an acknowledgement which must be in writing and unequivocal revives an action denovo.

28. On its part, the Respondent argued that this court had no jurisdiction to extend time to the Applicant to file suit because its claim did not fall within the exceptions of Section 27 of the Limitations of Actions Act which period of Limitation ran out on 10th January 2017.

29. It relied on the cases of Jones M Musau & another vs Kenya Hospital Association & another [2018] eKLR, Mary Osundwa vs Nzoia Sugar Co [2002] eKLR and several other cases to buttress its argument.

30. It also placed reliance on the cases of Samuel Kamau Macharia & another VS Kenya Commercial Bank Ltd & 2 others [2012] eKLR where it was held that a court could not arrogate to itself jurisdiction through the art of interpretation and in the case of Adero & another vs Ulinzi Sacco Society Ltd [2002] eKLR 577 where the Court of Appeal held that jurisdiction could not be conferred by the consent of the parties.

31. It was emphatic that the cases the Applicant had relied upon for the extension of time to file suit out of time were distinguishable from the facts of this case as leave could only be granted when the cause of action was based on tort, nuisance or breach of duty.

32. It denied ever having admitted that it was indebted to the Applicant and contended that the relief against an advocate who had failed to act diligently was for professional negligence.

33. Section 4(1)(a) of the Limitations of Actions Act states that:-

“The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

34. Section 27 of the Limitations of Actions Act further stipulates that:-

(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)

(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

(c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section

(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

(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.

35. In simple terms, what this court understands Section 27 of the Limitations of Actions Act to mean is that where there is a case of ignorance of material facts in actions for negligence, nuisance or breach of duty founded on tort, a defendant cannot contend that the time of filing of suit cannot be extended. He can, however, object to such extension of time in the circumstances set out in Section 4(1)(a) – (e) of the Limitations of Actions Act.

36. It is important to point out that extension of time is not only limited to Section 27 of the Limitations of Actions Act. Extension of limitation period can be granted in a case of disability under Section 22 of the Limitation of Actions Act. The limitation period can also be extended under Section 23 of the Limitations of Action Act where there is fresh accrual of right of action on acknowledgment or part payment of a debt. Extension of the limitation period can further be granted in case of fraud or mistake as provided for in Section 26 of the Limitation of Actions Act.

37. The Applicant's application was based on Section 23 of the Limitation of Actions Act. The same provides as follows:-

(1) Where—

(a) a right of action (including a foreclosure action) to recover land; or

(b) a right of mortgagee of movable property to bring a foreclosure action in respect of the property, has accrued, and—

(i) the person in possession of the land or movable property acknowledges the title of the person to whom the right of the action has accrued; or

(ii) in the case of a foreclosure of other action by a mortgagee, the person in possession of the land or movable property or the person liable for the mortgage debt makes any payment in respect thereof, whether of principal interest, the right accrues on and not before the acknowledgement or payment.

(2) Where a mortgagee is, by virtue of the mortgage, in possession of any mortgaged land and either receives any sum in respect of the principal or interest of the mortgage debt or acknowledges the titles of the mortgagor, or his equity of redemption, an action to redeem the land in his possession may be brought at any time before the end of twelve years from the date of the payment or acknowledgement.

(3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment:

Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt.

38. It was emphatic that the Respondent's letter was an acknowledgment of the debt it owed it and denied the Respondent's assertions that the letter was not an acknowledgment but a holding letter.

39. This court carefully perused the Respondent's letter dated 20th May 2013 that was addressed to Morara Apiemi & Nyangito Advocates and noted that the contents were as follows:-

Dear Sirs,

We acknowledge receipt of your letter dated 3rd May, 2013.

We are attending to this matter and shall revert shortly.

Kindly withhold any precipitate action in the meantime.

Yours faithfully,

FOR; Kenya Breweries Limited

Alison Kariuki-Mbuthia”

Legal Counsel

40. This court agreed with the Respondent that there was no acknowledgment of the debt of Kshs 40,000,000/=. It was merely asking the Applicant to withhold any precipitate action. There was also no indication that the Respondent would not plead limitation once the period of limitation lapsed.

41. Indeed, Section 24 of the Limitations of Actions Act provides that:-

(1) Every acknowledgement of the kind mentioned in [section 23](#) of this Act must be in writing and signed by the person making it.

(2) The acknowledgement or payment mentioned in [section 23](#) of this Act is one made to the person, or to an agent of the person, whose title or claim is being acknowledged, or in respect of whose claim the payment is being made, as the case may be, and it may be made by the agent of the person by whom it is required by that section to be made.

42. The Respondent’s letter was equivocal. It was not unequivocal in that it did not expressly state that it owed the Applicant any monies. Infact there was nothing remotely close to indicating that the Respondent owed the Applicant any monies.

43. It appeared to this court that the Applicant was pursuing a claim for payment of monies. It was, however, not clear from when the monies were due but it was evident from its Demand letter dated 26th January 2012 annexed to its Originating summons that it called for monies in 2012. Being an action under contract, the Applicant could not bring a claim after six(6) years.

44. The Applicant could not therefore contend that the Respondent misled it not to file suit. It was seeking to lay blame on the wrong party. In its Supporting Affidavit it was contended that it forwarded filing fees to its then advocates but they failed to file suit. It ought to have filed suit before the statutory period of limitation lapsed when it realised that the Respondent was not reverting as it had promised to do in its letter of 20th May, 2013.

45. Accordingly, having considered the Affidavit evidence, the Written Submissions and the case law that each party relied upon, this court came to the firm conclusion that the Applicant could not benefit from the provisions of Section 23 and Section 27(2) of the Limitations of Actions Act. The cases it relied upon were distinguishable from the facts of this case. This claim based on contract was statute barred and could not be brought back to life. It is only matters of tort that could be extended.

46. The applicant was seeking to lay blame on the wrong part. In its Supporting Affidavit it was contended that it forwarded filing fees to its then advocates but they failed to file suit. There was negligence on the part of the Applicant’s advocates. However, this was one instance where it could not seek refuge to be excused for mistakes of an advocate. It must look elsewhere for remedy.

DISPOSITION

47. For the foregoing reasons, the upshot of this court’s decision was that the Originating Summons that was dated 27th November 2018 and filed on 28th November 2018 was not merited and the same is hereby dismissed with costs to the Respondent.

48. It is so ordered.

DATED and DELIVERD at NAIROBI this 20th day of June 2019

J. KAMAU

JUDGE