



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT MISC. APPLICATION NO. 25 OF 2015

SIMON WANYIRI1ST APPLICANT

ALOYSIUS WAWERU.....2ND APPLICANT

JULIUS MAINA.....3RD APPLICANT

JULIUS NJORA.....4TH APPLICANT

JAMES GITHINJI.....5TH APPLICANT

BERNARD GITAHU.....6TH APPLICANT

- V E R S U S -

CATHOLIC DIOCESE OF NYERI.....1ST RESPONDENT

BISHOP PETER KAIRU.....2ND RESPONDENT

FR. PETER KIHARA.....3RD RESPONDENT

INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

RULING

1. The only issue for my determination in this matter is whether the applicants should be granted leave and /or extension of time to file a claim for malicious prosecution.

2. They have brought a Notice of Motion dated 28th May 2015 headed

(Application for extension of time in filing a damage claim after the police prosecution failed to prove their case against the Applicants in the C.M. Criminal Case No. 1629 of 2004 Nyeri in the Ruling/judgment dated 18th November, 2004) and also time to give Attorney General Notice of intention to sue.) and seeking orders;

i. That this Honourable Court may be pleased to give extension of time or leave to give Notice of intention to sue to the Attorney General and thereafter to file a claim in High Court against the Respondents.

ii. *The court to certify the plaint attached herein as genuine and correct*

iii. *The cost of this application be the costs in this case.*

3. The Notice of Motion is supported by the affidavit sworn by the 1st applicant Simony Wanyiri on his behalf and on behalf of the other applicants

4. The application does not indicate the provisions of the law under which it is premised. By virtue of the orders sought, I proceeded on the presumption that it is section 27 of the Limitation of Actions Act Cap 22 and section 6 of the Public Authorities Limitation Act Cap 39, which acknowledges the application of part III of Cap 22 to Cap 39. By virtue of section 28 of Cap 22 applications under section 27 are ex parte by nature.

28. Application for leave of court under section 27

(1) An application for the leave of the court for the purposes of section 27 of this Act shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.

5. The application was filed under certificate of urgency, and on its first appearance the judge ordered that it be served on the other parties, on the presumption that the applicant had already commenced the 'relevant action'.

6. As a result of the foregoing, the application is opposed.

a. The 1st, 2nd and 3rd respondents filed a preliminary objection dated 22/6/15 through their lawyers Sichangi & Co. Advocates

b. he 4th and 5th respondents filed grounds of opposition dated 15/6/2015 through the Attorney General, the 5th respondent.

c. The applicants filed answers to the grounds of application by the 4th and 5th respondents on 6/7/15, and answer to the preliminary objection by 1st, 2nd and 3rd respondents on the same date.

d. A Rev.Fr. Mutahi David swore and filed a replying affidavit to the Notice of Motion on behalf of the 1st, 2nd and 3rd respondents on 27th and filed on the 28th Oct, 2015 and the applicants filed a replying affidavit to his affidavit on 6/11/15 sworn by the 1st applicant on the same date.

7. After that all the parties filed their written submissions.

8. According to Mr. Wanyiri's affidavit, the applicants were, on 20/4/2004 arrested by police officers from Nyeri Police Station, taken to Nyeri Police station, transferred to and detained at Kiganjo Police Station, and on 24/5/2004, arraigned before the Chief Magistrate, Nyeri in Cr.C. 1629/2004 for the offence of cutting down 726 coffee stems at Hill Farm belonging to the Catholic Diocese of Nyeri.

9. They were remanded in custody at Kingogo G.K. Prison till 9/6/04 when they were released on bond.

10. They were acquitted of the charges on 18/11/2004 under section 210 of the Criminal Procedure Code.

11. They felt they had been maliciously prosecution and instructed counsel, a Mr. Nganga, in 2004, to file a civil case for damages as they had suffered both loss and damage as a result of the said arrest, detention and prosecution –

12. That it is only in 2013 that they learnt that their advocate was long dead and he had not filed the case nor the requisite notice to the Attorney General except with respect to four of them.

13. That they instructed another advocate one J. Macharia in 2013 who also did not file the case.

14. The preliminary objection is that the applicants are statute barred under s.4(1)(e) and (4) of the Limitations of Actions Act, Cap 22, that they have not complied with procedure filing a plaint instead of Originating Summons that they have no *locus standi* to bring any claim against the 1st, 2nd, and 3rd respondents, that they disclosed no disability as provided for by the Cap 22, there is no reasonable cause of action against the 1st, 2nd and 3rd respondents, the application is misconceived, bad in law, and should be struck out *in limine* with costs to the applicants.

15. In response to the preliminary objection the applicant's answer was mainly that the 1st, 2nd and 3rd respondents had not denied giving false information to the police and hence causing their arrest and malicious prosecution. They also pointed out that the preliminary objection was headed 'High Court of Kenya at Nairobi' instead of Nyeri.

16. The 4th and 5th respondents grounds of opposition were that the application is incompetent, lacks merit, and an abuse of the process of the law, does not comply with the provisions of s.5 of the Public Authorities Limitation Act Cap 39 Laws of Kenya, that the facts and grounds on the face of the application were not in tandem with the prayers sought, that the applicants were guilty of inordinate and unjustifiable delay of over 10 years, and that the 4th and 5th respondents would be highly prejudiced by the orders sought and their constitutional rights violated.

17. In answer to the grounds of opposition the applicants stated that they were lay persons acting on their own, that the delay had been caused by the advocates that the 4th and 5th respondents had not responded to the application that they had not given any reasoning why the applicants' application should not be allowed. They denied 'abusing' the court.

18. The applicants objected to Rev. Fr. Mutahi David's affidavit in response to the application for the reason that he was not a party to the suit, and could not just jump in and swear an affidavit opposing their application.

19. In their submissions the applicants gave out a summary of the case and of which their application arose. They argued that they had been let down by their advocates who never filed suit despite being instructed soon after the judgment in 2004, that this court was empowered by Article 165(3)(a) and (b) to hear and determine this matter. They also submitted that underlying the criminal charges against them was land dispute between them and the 1st, 2nd and 3rd respondents over their ancestral land which the former had taken after the departure of the colonialists and the dismantling of emergency villages, further that the respondents had no defence to their claim.

20. The 1st, 2nd and 3rd respondents put out the issue for determination to be whether the applicants should be granted leave to file a claim for malicious prosecution relying on sections 4 and 27 of the Limitation of Advocates Act Cap 22. They argued that the applicants were time barred, and had not shown that there existed any facts that were beyond their knowledge at all material times

21. That equity aids the vigilant and not the indolent and that he who seeks equity must do equity.

22. Relying on the case of **Peter Kamau Josphat vs. Attorney General & Anor. [2008]eKLR** they argued that there was no explanation for the inexcusable delay; and in the case of **Kagane vs. The Attorney General [1969] E.A.643**, that the 1st, 2nd and 3rd respondents had reasonable cause to set the law in motion as they did. That the decision to arrest and charge the applicants was made by the police and the Attorney General, and the 1st, 2nd and 3rd respondents were merely witnesses.

23. The 4th and 5th respondent's cited the Public Authorities Limitation Act which provides at s.3 that a tortious action must be brought within 12 months the only exemption being demonstration by the applicant that he/she was under disability at the due date and that That the applicants had also not

complied with s.4 of Cap 22

24. That though the court has discretion in this matter, the same must be exercised judiciously. See **Court of Appeal No. 124/2004 Habo Agencies Ltd. Vs. William Odhiambo Musingo.** The same case discusses what constitutes delay.

25. Regarding the applicant's blame on their advocates for the delay in filing the case the 4th and 5th respondents argued that the explanation was not justifiable. For this they relied on the court of appeal case of **Rajesh Rughani vs. Fifty Investment Ltd & Anor [2005]eKLR**

26. The Law

S.4(2) of the Limitation so Advocates Act Cap 22 provides:-

“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.”

According to the affidavit of the 1st applicant, they were acquitted of the wrongful charges on the 18th November 2004 and that is when the cause of action accrued. Their three years began to run on that date. The last day for filing the case was 19th November 2007. Section 27(2) of the same Act provides for the exemptions to S.4(2) in the following terms:

1. Section 4(2) does not afford a defence to an action founded on part 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.

These four conditions are not mutually exclusive but are to be established.

The conditions provided for in (d) are set out under Section 27(2) in the following terms;

(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— (emphasis mine)

(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.

Likewise, section 3 of the Public Authorities Limitations Act Cap 39 provides that

(1) no proceedings founded on fact shall be brought against the government and Local authority after 12 months from the date on which the cause of action occurred.

Section 5 provides for exemption

... if, on the date when a right of action accrues, for which the 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 12 months from the date when that person ceases to be under a disability.

27. In **Mary Ofundwa vs. Nzoia Sugar Company Ltd Kisumu C.A. No. 244/2000** the Court of Appeal addressing s.27(2) of Cap 22 did set out the circumstances under which the court can extend time

“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”

(see **Geoffrey Mbugua Muhoro vs. Attorney General (2017) eKLR In Samson Nderitu vs the AG [2008] eKLR** the judge held that damages in respect of personal injury include damages for unlawful arrest, malicious prosecution and unlawful imprisonment.

28. Section 28(2) enjoin the court to grant leave but not without condition;

Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient—

(a) to establish that cause of action, apart from any defence under section 4(2) of this Act; and

(b) to fulfil the requirements of section 27(2) of this Act in relation to that cause of action.

The position of tenor of this section was pronounced by the High court in **Zachariah B. Shimechero –vs- Attorney General & Another [2006] eKLR**, in the following words;

“The provisions of section 28(2) of the Limitation of Actions Act enjoin the Court to grant leave only if evidence exists to satisfy the court that if the intended action was brought forthwith and such evidence was adduced in that action, it would in the absence of any evidence to the contrary be sufficient to establish that cause of action (apart from the defence under s. 4(2) of Cap 22) and to meet the requirements of section 27(2) of the Act.”

29. The applicants must therefore establish that either there were material facts that were outside their knowledge at the time their cause of action accrued, and any disability if at all. For this court to exercise its discretion the applicants are also obligated to give a reasonable explanation for the undue delay in filing the matter.

30. Section 2(2) of Cap 22 defines

(b) a person is under a disability while he is a minor or of unsound mind; and, without prejudice to the generality of the foregoing, a person is conclusively presumed to be of unsound mind while he is detained in pursuance of some written law authorizing the detention of persons of unsound mind or criminal lunatics;

31. Court of Appeal in the case of **Gathoni –vs- Kenya Co-operative Creameries Ltd (1982) KLR 104** held thus: -

1. *“Disability” within the meaning of section 22(v) of the Limitation of Actions Act (Cap 22) does not include physical disability. The definition of disability is clearly provided in section 2 (2) of the Act which refers to persons who are minors or are of unsound mind.*

2. For an application to be allowed under section 27 of the Limitation of Actions Act, it must be shown, to the satisfaction of the court, that failure to apply within time was due to lack of knowledge of certain material facts. The Applicants must show to the satisfaction of the court she had taken all reasonable steps and sought appropriate advice in respect of the facts. Here the applicant failed to satisfy the court.

3. An applicant for leave under section 27 must bring the action within one year of the cessation of the period during which the decisive material facts were outside his knowledge.

The applicants reason that they did not know that their lawyer had not filed the case cannot amount to a disability.

32. In Samson Oyango Omondi & Another vs Akamba Public Service Ltd & 3 others [2012] eKLR the High court was of the view that six years was inordinate delay. That no reasonable /sufficient explanation had been given, and allowing the application would be prejudicial to the defendants who would not be able to amount reasonable defence. In dismissing the notice of motion the judge stated;

18. In any event, suing a party more than 11 years after a cause of action occurred would no doubt cause injustice and prejudice as there would be obvious constraints to mounting a proper defence due to the passage of time.

19. I am also not satisfied that the very strict requirements of sections 27 (2) and 28 of Cap 22 have been met by the Plaintiffs, given the fact that they were aware of the judgment in the test suit from the time it was delivered in the year 2004. They have applied six (6) year later without any or sufficient explanation for the delay.

33. In the case of **Rajesh Rughani v Fifty Investments Limited & another [2016] eKLR**, the appellant went to the Court of Appeal after the High Court dismissed his suit for want of prosecution in which he lay the blame squarely on his advocate. In dismissing the suit, the judge expressed himself thus;

“...The above line of thinking no longer holds water and in my view it is the duty and right of any litigant to put pressure on his counsel to have the suit prosecuted earliest possible. If counsel can't rise to the task, the plaintiff has the power and the right to dismiss such an advocate and get the services of another...It must always be remembered it is the plaintiff's suit, not the advocate's, which risks dismissal for want of prosecution. Put differently, it is not acceptable for a plaintiff to hide behind his counsel's inaction, for such a defence is tantamount to an admission or collusion with his advocate, not to prosecute the suit as required by law.... In the present case, the delay is unquestionably unexplained other than that counsel on record took no action. I have expressed myself on that lame excuse.... I dismiss the suit herein for want of prosecution in terms of the provisions of Order 16 rule 5 of the Civil Procedure Rules.”

I could not agree more. The fact that the applicants instructed counsel did not remove their responsibility for their own case.

The court of appeal upon hearing the appeal against the holding above held;

Our re-evaluation of the record leads us to conclude that no credible, satisfactory and sufficient explanation for delay has been given. It is insufficient to blame previous counsel on record without an explanation as to the action taken by the litigant to show he did not condone or collude in the delay. It is our considered view that the judge did not err in finding that the delay was not only inordinate but unexplained...we come to the conclusion that this appeal has no merit and is hereby dismissed with costs.

It is inconceivable that the appellants would for nine years, without checking with their lawyer to find out what was happening to their case, and especially because they paid some fees for the work. That alone cannot form the basis for extension of time.

34. Hence even though the applicants have demonstrated that they would have a case against the respondents or intended defendants as required by section 28 (2) of Cap 22, they have not met the requirements of section 27(2) as read with section 30 of Cap 22 and section 5 of Cap 39. The court will only act under section 28(2) upon the fulfilment of the other requirements.

35. Before I conclude, I must point out that I did not find it necessary to specifically determine the issues raised in the PO and the grounds of opposition for the reasons stated above.

36. This is a sad case. The applicants are a group of elderly men who believe that they were maliciously prosecuted in 2004. However, they slept on their rights. They cited for me Article 165 (3) of the Constitution seeking refuge in the unlimited jurisdiction of the High Court in both criminal and civil matters. However, even Article 159(2) ‘the healer of all ‘heartaches’’ caused by acts and omissions in the exercise of judicial authority, could not come to their assistance, as at (d) it requires that ‘justice shall not be delayed’ and that means, for both sides. In conclusion I find that the applicants have not satisfied the strict requirements of the Limitation of Actions Act Cap 22 with regard to extension of time, there is no satisfactory explanation for the long and inordinate delay of 11 years. This application must fail.

37. It is dismissed with no orders as to costs.

Dated, delivered and signed this 31st Day of January 2018 at Nyeri

Teresia M Matheka

Judge