

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL MISCELLANEOUS APPLICATION NO. 215 OF 2012 (O.S.)

MULEI MWENDWA.....APPLICANT

VERSUS

TACKAN ARUSI MWANDINDA

NATIONAL INTELLIGENCE SECURITY SERVICES

THE HON. ATTORNEY GENERAL.....RESPONDENTS

RULING OF THE COURT

1. By an Application dated 12/1/2016 and amended on 22/4/2016 the Applicant herein seeks for an order that the ruling entered on 16/11/2015 be reviewed and or set aside and the Applicant be granted leave to file suit out of time. The Application is premised on grounds that the Applicant's earlier Application to be granted leave to file suit out of time had been declined by this court due to the Applicant's failure to avail proof that a previous suit **CMCC 212 of 2008** had already been withdrawn by his previous Advocates; that at the time the Applicant after exercise of due diligence could not produce the notice of withdrawal aforesaid; that the Applicant has since obtained the notice to withdraw which had been filed on 10/09/2010; that it is in the interest of Justice and fairness that the ruling herein be reviewed; that the Respondent will not suffer any prejudice if the Application is allowed.

2. The Application is also supported by an affidavit of the Applicant sworn on 22/04/2016 where he stated that he had been let down by his former Advocates who withdrew the initial suit which had been filed within time and further that his said former Advocates disorganized him and as a result could not file suit within the limitation period and finally that he had not fully recovered from the injuries sustained in the accident which has greatly curtailed his mobility.

3. I have considered the Applicant's Application aforesaid. It is noted that the Applicant's previous Application dated 27/09/2012 was dismissed by Hon. Lady Justice L. M. Mutende vide her ruling dated 16/11/2015. The said learned Judge has since proceeded on transfer to another station. I have perused the said ruling sought to be reviewed herein and note that the Honourable Judge held that the Applicant herein had not availed the withdrawal notice as regards **CMCC. 212 of 2008** in the form of Affidavit evidence. The Applicant has now annexed the said withdrawal notice and seeks this court to review the ruling dated 16/11/2015 so as to enable him lodge suit outside the limitation period.

4. It is also noted from the Applicant's previous Application that his present Advocates M/s E. K. Mutua & Co. Advocates had also filed another suit namely **SRMCC No. 7 of 2010 at Mwingi -MULEI MWENDWA =VS= TACKAN ARUSI MWANDINDA, N.I.S.S** and the **ATTORNEY GENERAL**. If indeed the Applicant's other suit **CMCC 212 of 2008** at Mwingi had been withdrawn by his erstwhile Advocates M/s Janet Mulwa & Co. Advocates on the 10/09/2010 then it would appear that the Applicant's other **Suit Number 7 of 2010** filed by his present Advocates is still in existence. The question is "why wouldn't the Applicant have proceeded with that other case?" The Applicant in his earlier Application which was dismissed had tried to explain that his present Advocates had not been aware of the filing of **Civil Suit 212 of 2008** by the firm of Janet Mulwa & Co. Advocates. It would follow then that upon the withdrawal of **Civil Suit 212 of 2008** on 10/09/2010 the Applicant was to be at liberty to proceed with the remaining Civil Suit Number 7 of 2010 with his current Advocates but not to seek to be granted leave to file another suit out of time. The Applicant's silence to explain the purpose and the position of **Civil Suit Number 7 of 2010** filed at Mwingi law courts on 1/2/2010 leads me to believe that he is economical with the truth as regards his cases before the courts. He is not candid to the court. The parties in **Civil Suit No. 212 of 2008** are exactly the same in the **Civil Suit No. 7 of 2010** both of which had been lodged at Mwingi Law courts and therefore if **Civil Suit No. 212 of 2008** has been withdrawn then it is obvious that there still exists **Civil Suit No. 7 of 2010** filed on behalf of the Applicant by his present Advocates. Hence I find the Applicant cannot purport to seek to file another suit out of time while there exists another one before court of competent jurisdiction. The Applicant's Application amounts to an abuse of the court process and ought not to be allowed.

5. As the remedy sought by the Applicant is a discretionary one, I find the Applicant was expected to adhere to the dictates of equity by ensuring that he comes to a court of equity must come with clean hands. I find the Applicant has approached the court with unclean hands. The letter dated 30/07/2010 from C. M. Mutinda a Senior Litigation Counsel at the Attorney General's Chambers and which was addressed to the Applicant's present Advocates clearly pointed out the duplication in the case numbers **7 of 2010** and **212 of 2008** involving the Applicant herein and hence the Applicant appears not to have heeded the advice and appears out to file fresh case despite the existence of **Civil Suit No. 7 of 2010** whose current status has not been disclosed by the Applicant.

6. In the result it is the finding of this court that the Applicant's Application dated 22/04/2016 lacks merit. The same is dismissed with no order as to costs.

Orders accordingly.

Dated and delivered at Machakos this 12th day of April, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Nthiwa for E. K. Mutua - for the Applicant

No appearance - for the Respondent

Kituva - Court Assistant