

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CIVIL APPLICATION NO. 204 OF 2014

SILVANO KAMBI MURANJERI.....APPLICANT

VERSUS

THAMBANA FARMERS CO-OP. SOCIETY.....RESPONDENT

RULING

1. This is ruling on the application dated 1/11/2014 seeking for leave to file a suit out of time and for costs of the application.
2. The application is supported by affidavit of Silvano Kiambi Muruanjeri. He depones that the cause of action arose between 1994 and 1995 as a result of illegal deductions of KShs.89,198.75 made by the respondent from his coffee proceeds account. It is further stated that the applicant was hospitalized for a long period which caused the delay in filing the suit. The claim is now time barred and it is a mandatory pre-requisite that leave be granted.
3. The application was opposed by the respondent who deposed that he sued the applicant in the year 1985 for a sum of Kshs.89,198.15 in Embu PMCC No. 316 of 1995. Judgment was entered in the favour of the applicant and the decretal amount was recovered from the respondent drawn from his coffee proceeds account. For that reason, there is no cause of action that lies on part of the applicant against the respondent. The said deductions were done in pursuance of a court order and were therefore lawful.
4. Mr. Kathungu for the respondent argued that the application ought to have been brought under Section 27 and 28 of the Limitation of Actions Act. To the contrary, the applicant has cited the wrong provisions of the law. He argued further it is not true that the applicant was hospitalized for a long time as alleged. The applicant has failed to explain the delay. It is also stated that the intended suit has no chances of success.
5. It is true that the application has been brought under Section 37 Rule 6 of the Civil Procedure Rules which provision does not exist. The orders sought are for leave to file a suit out of time. The correct provisions are Section 27 and 28 of the Limitation of Actions Act. Surprisingly the application was drafted by an advocate who was later withdrawn from acting for the applicant.
6. During the hearing of the application, the applicant indicated that he was never hospitalized and that it was his advocate who included that ground in the application.
7. The provisions of Section 28 of the Act require that delay in filing the intended suit be explained. The main reason in this application was that the applicant was hospitalized for a long time. Having withdrawn that reason which was not supported by any evidence, his application has no tangible ground. The applicant has therefore failed to explain delay.
8. The respondent annexed a copy of the decree in PMCC No. 316 of 1995 in which the applicant was ordered to pay the respondent KShs.89,198.15 together with interest at bank rates and costs of the suit. This supports the respondent's case that the amount was recovered in satisfaction of the decree.
9. The applicant has not annexed any document to controvert the evidence adduced by the respondent that the recovery was unlawful as he alleges. Consequently, the intended suit has no chances of success and it would be futile to grant the leave sought in this application.

10. This application therefore lacks merit and it is hereby dismissed with costs.

DATED, DELIVERED AND SIGNED AT EMBU THIS 14TH DECEMBER, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Applicant present

Ms. Kavandi for Kathungu for respondent