



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL APPEAL NUMBER 30 OF 2012**

**BETWEEN**

**PAUL NGUNYI KANYI.....APPELLANT**

**AND**

**SUSAN WANGUI MACHARIA.....RESPONDENT**

*(An Appeal from ruling and order of the Senior Principal Magistrate's court at Naivasha,  
(J.Thuita P.M.) dated the 27<sup>th</sup> March 2007 in SPMCC NO. 676 OF 2005*

**JUDGMENT**

1. This appeal is in respect of a ruling dated the 27<sup>th</sup> March 2007 in Naivasha **SPMCC No.677 of 2005, 675 of 2005 and 676 of 2005**(consolidated). The lead file was **SPMCC No.676 of 2005** before the trial court. On the 27<sup>th</sup> March 2007 the trial court struck out leave to file suit out of time granted to the Respondent on the grounds that the said leave was purportedly granted under the provisions of **Section 27 and 28 of the Limitations of Action Act Chapter 22 Laws of Kenya**.

2. Following the grant of leave in **Msc. Appl NO. 10 of 2005** on the 21<sup>st</sup> June 2005 the respondent filed **SMPC No. 676 of 2005**. Upon service, the defendant now Appellant moved the court by a Chamber Summons application dated 22<sup>nd</sup> July 2005 for orders that the suit by Plaintiff dated 23<sup>rd</sup> June 2005 be struck out as it contravened express provisions of **Order 36 Rule 3(c) of the Civil Procedure Rules** and that the orders made under the said provisions are void and ineffective and that the suit was void *ab initio*.

Upon hearing the application, the court make its orders on the 27<sup>th</sup> March 2005 as follows:

1. That the ruling is in respect of similar applications in the present file and case **Numbers SPMCC 675 of 2005 and 625 of 2005**.
2. That the plaint can still stand because the leave on record is of legal value.
3. That the court strikes out the leave but declines to strike out the suit.
4. That the plaintiff be at liberty to list the pending applications dated 23<sup>rd</sup> August 2005 – for hearing

The order above was made in **SPMCC NO. 677 of 2005**. In it the subject of the present appeal.

3. The gist of the appeal is that the trial court failed to understand the purport of the appellants application dated 22<sup>nd</sup> July 2005 by which application the appellant (defendant in the trial court) sought striking out the plaintiff's suit on the ground that the suit having been filed pursuant to leave for extension of time which was itself null and void, and that by allowing the plaintiff(respondent) to set down further applications for extension of time for hearing, which were by way of chamber summons, was again unprocedural as the Civil Procedure Rules mandate that an application for extension of time to file suit out of time when no suit is yet filed be made by way of originating summons. See **Order 37 Rule 6(1) of Civil Procedure Rules**.

4. The appellant has filed written submissions on the appeal but the Respondent though served did not file any submissions nor tendered oral submissions. The application dated 23<sup>rd</sup> August 2005 is not part of the Record of Appeal. I have looked at the proceedings in the trial court. The application filed in **SPMCC No. 677 of 2005** and the proceedings in the said suit are annexed to the Record of Appeal. It is made by Exparte Chamber Summons under **Section 27 and 28 of Limitations of Actions Act and Order 36 Rule 3c(2) of the Civil Procedure Rules and Sections 3A of the Civil Procedure Act**. It seeks an order that the applicant(plaintiff) be granted leave to file suit out of time. As the trial court stated in the offending ruling dated the 27<sup>th</sup> March 2005 the application had not been listed down for hearing.

5. The appellants submissions are that since the order of 27<sup>th</sup> March 2005 struck out the leave upon which the suit was filed, the plaint/suit could not stand. It was submitted that the procedure provided under **Order 37 Rule 6(1)** of the **Civil Procedure Rules** is mandatory and states:

***“An application under Section 27 of the Limitation of Actions Act made before filing a suit shall be made exparte by originating summons supported by affidavit.”***

That under **Section 19 of the Civil Procedure Act**, every suit shall be instituted in such manner as maybe prescribed by rules.

Relying on the case **Mweu -vs- Kubai & Another (1972) EA 242** it was submitted that an application for extension of time to file suit out of time can only succeed if the applicant avails himself and strictly complies with the Provisions of **Section 27, Chapter 22** – that the applicant must prove material facts relating to the cause of action were of a decisive nature which were at all times outside the knowledge (actual or constructive) of the plaintiff.

6. I have considered the plaint filed pursuant to leave granted by the trial court to file the case out of time on the 21<sup>st</sup> June 2005 and brought under the provisions of the **Limitations of Actions Act. Section 27 and 28**, before filing of the suit. The suit was filed on the 24<sup>th</sup> June 2005. Upon the defendant challenging legality of the leave to file the suit out of time, the trial court in her ruling dated 27<sup>th</sup> March 2007 struck out the said leave, but sustained the suit. This court finds that the trial court having struck out the leave upon which the suit was filed, the suit had no legal legs to stand on and it ought to have been struck out as well, together with any other applications that may have been pending hearing.

I find that the Respondent failed to follow the clear provisions under **Order 37 Rule 6(1)** that makes it clear and mandatory that an application under **Section 27 and 28 of the Limitations of Actions Act** must be brought by way or Exparte Originating Summons, if the suit is not yet filed, and by way of Chamber Summons under **Order 37 Rule 6(1) (2) of Civil Procedure Rules** if the suit is filed. It is a further finding that failure to strike out the suit was not supported by any legal provisions or principles. I agree with the appellant that the trial Magistrate failed to understand the purport of her own orders. Striking out the leave alone left the suit as incompetent being on record without leave (after the striking out of the leave) and a candidate for striking out as well, as the application dated 22<sup>nd</sup> July 2005 had sought.

7. Having come to the above findings and conclusions it follows that Naivasha **SPMCC No. 675 of 2005**,

**SPMCC No. 676 of 2005 and SPMCC No. 677 of 2005** are struck out for failure to follow the laid down procedural requirements stated above.

8. While making the above finding I am guided by the provisions of **Article 159(2)(d)** of the Constitution that the court should not pay undue attention to procedural technicalities at the expense of justice. This however does not mean that procedural requirement should not be adhered to nor does it oust the litigants obligations to comply with procedural imperatives as they seek justice that ought to be dispensed to both parties to a case. See **Raila Odinga -vs- IEBC & Others (2013) KLR**.

9. The result is that the appeal is allowed with costs, and the three cases **Naivasha SPMCC No.675 of 2005, SPMCC No. 676 of 2005 and SPMCC No.677 of 2005** are all struck out with costs.

**Dated, signed and delivered in open court this 28<sup>th</sup> day of January 2016.**

**JANET MULWA**

**JUDGE**