



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
MISC CIVIL APPLICATION NO 81 OF 2015

CHARLES NTIRITU M'IKUNYUA.....APPLICANT

Versus

PROFESSOR JUDITH NJUE.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Extension of time to file suit

[1] The application dated 29th December 2015 is essentially seeking for extension of time to file suit out of time. The application is expressed to be brought under section 3, and 3A of the Civil Procedure Act, section 27 and 28 of the Limitation of Actions Act, Order 45 rule 1 and Order 51 rule 1 of the Civil Procedure Rules. It is supported by the affidavit of Charles Ntiritu M'Ikunyua and other grounds set out in the application and the written submissions by the Applicant. The major reasons for which extension of time is sought are four-fold: (1) That the application dated 15th November 2012 made in **MERU HC SUCCESSION CAUSE NO 43 OF 2012** by the 1st Respondent was heard ex parte; (2) that the ruling dated 14th March 2013 in the said cause was delivered when the Applicant was serving 18 months' jail term at Meru GK Prison; (3) that the said ruling was delivered in the absence of his legal counsel; and (4) that he had issued a notice to sue the AG. He explained in his submissions that he had appointed M/S KIAUTHI ARITHI & CO ADVOCATES to act for him in the said matter on 13th March 2013 but they did not do so. According to him, the delay herein was not, therefore, intentional as it was occasioned by failure of counsel to act in good time to file the appeal. On that basis, he stated that he should be granted an opportunity as a matter of natural justice to be heard. Accordingly, he appealed to what he termed as this court's wide and unfettered discretion to be granted the orders sought in order to do justice in this case.

Respondents opposed the application

[2] The Respondent opposed the application. The 2nd and 3rd Respondents filed a replying affidavit sworn on 3rd February 2016 by KONGO M. JUSTIN, State Counsel in the Office of the Attorney General. The 2nd and 3rd Respondents also filed written submissions. The 1st Respondent did not file any affidavit despite having been allowed sufficient time to do so. She, however, filed submissions which I will consider.

[3] The linchpin argument in opposition to the application by the 2nd and 3rd Respondents is that over 18 months have passed by since the conviction of and sentence upon the Applicant was quashed by the court, yet the Applicant did not file the suit for malicious prosecution. They stated that there has not even been any valid reason or explanation that has been given by the Applicant on this delay. They concluded that this application is therefore an afterthought and an abuse of the process of court. More was submitted by the 2nd and 3rd Respondents: that the Limitation of Actions Act does not apply here but the Public Authorities Act does since the intended proceedings will be a claim against Government and Government Officer. In support of this submission, they relied on section 42(1) of Cap 22 of the Laws of Kenya and the decision by Amburiri J in the case of **VINCENT MANGALO KALIA (DECEASED) vs. AG & 2 OTHERS [2015] eKLR**.

[4] The 1st Respondent submitted the following. The Applicant is seeking leave to file a claim which has not disclosed and therefore, the court should not issue useless orders which will serve no purpose or will only embarrass the court. She argued that the application leaves the court in the dark as to the type of claim the Applicant intends to bring against the Respondents. Again, the application does not follow the prescriptions of section 27 and 28 of Cap 22 which requires him to file an Originating Summons. Secondly, the Applicant does not satisfy the requirements of section 26 of Cap 22. For those reasons, the 1st Respondent seeks the court to dismiss this application.

DETERMINATION

[5] Hitherto, it is not clear the type of proceedings the Applicant intends to bring against the Respondents. Invariably, an application for extension of time must set out in very clear terms the nature of the intended claim and also concisely give legally valid reasons which prevented the filing of the suit on time. These are important consideration in applications such as this. I note the main prayer for extension of time has been cast in broad terms; except the reasons set out in the application, the affidavit in support as well as the submissions is not succinct at all. From his pleadings, the Applicant is carried away into making unclear and misleading statements; at one point he seems to be complaining about ex parte orders having been given in Meru High Court Succession Cause Number 43 of 2010, and at other times, he is talking about the incarceration and eventual quashing of his conviction and sentence in the criminal appeal number 93 of 2012. These statements do not call up any clarity or certainty on exactly why the Applicant wants extension of time. The statements relating to the succession cause do not make any sense at all in the context of extension of time to file a claim against the 2nd and 3rd Respondents for they have nothing to do with the succession cause. Again, if the ruling delivered on 14th March 2014 aggrieved him, I suppose he would be applying for extension of time to file appeal out of time. But, this is not the case here. Similarly, on ex parte orders, in my understanding of the law he ought to apply to the court which made the ex parte orders to set it aside. Accordingly, I agree with counsel for the 1st Respondent that the court has been left to grope in the dark in this application. Nonetheless, being moved by the demand of the Constitution to serve substantive justice, I wish to ask whether there is anything which may enable the court to decipher what the Applicant wants in his application. By citing the 2nd and 3rd Defendants as potential defendants in the proposed suit, one may think the extension of time is in respect of the prosecution he suffered in the criminal case. But, he does not state categorically that he intends to file a case for malicious prosecution; in fact these terms were used by the 2nd and 3rd Respondent. Assuming this is an application for leave to file suit for malicious prosecution, the Applicant must contend with the provisions of Public Authorities Limitation Act. He must show that: (1) he was prevented from bringing the suit for tort within the time prescribed in section 3 of cap 39 for he was under a disability; and (2) when he ceased being under disability. He will also have to show material facts relating to the cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the Applicant until a date which was beyond the prescribed time. The Applicant's conviction and sentence was quashed on 8th May 2014- at the time, the Applicant had already served his jail term. Since that date, he next woke up from slumber on 30th December 2015 when he filed this application. Considerable amount of time; over 18 months passed by without any action being taken. The Applicant tried to explain this delay by stating that it was caused by his legal counsel's failure to effect his instructions. This is not plausible explanation as I note that the advocates issued a notice of intention

to sue the AG dated 14th December 2014 but there is nothing to show the follow-up action taken by the Applicant in the matter yet he was already out of prison. In any case, these kinds of arguments are best utilized in a case of negligence against the legal counsel rather than in an application for extension of time which requires specific matters to be proved by the applicant. Such omission is not in itself or solely to be regarded as a material fact for which extension of time to file suit shall be granted. Therefore, the Applicant has not satisfied either section 3 of the Public Authorities Act or sections 27 or 28 of the law of Limitation of Actions Act. This statement brings me to the point where I should say something about the submission by Mr Kiongo that by dint of section 42(1) (e) of Cap 22, Limitation of Actions Act does not apply in proceedings governed by cap 39. I wish to only refer to section 6 of Cap 39 which provides as follows:

Application of Cap. 22

Notwithstanding the provisions of section 31 of the Limitation of Actions Act, section 22 of that Act shall not apply in respect of the provisions of this Act; and in section 27 of the Limitation of Actions Act the reference to section 4(2) of that Act shall be read and construed as a reference to section 3(1) of this Act, but subject thereto and notwithstanding section 42 of the Limitation of Actions Act, Part III of that Act shall apply to this Act. [Underlining mine]

I am aware that our law of limitation of actions are not in any satisfactory state and require dire and deliberate legislative action to bring harmony amongst all statutes of limitation of actions and up-to-date positions on limitation of actions based on new frontiers ushered in by the Constitution of Kenya, 2010. But this is for the AG to take up and invite appropriate legislative action. For now, such arguments as have been put forth by Mr Kiongo will keep on coming up in litigation.

[6] I now turn to the main issues. Despite the best efforts to make the best out of this application, the upshot of my analysis is that the application dated 29th December 2015 lacks merit and is dismissed with costs to the Respondents. It is so ordered.

Dated, signed and delivered in open court at Meru this 16th day of August 2016

F. GIKONYO

JUDGE