



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NUMBER 325 OF 2015 (OS)

IN THE MATTER OF THE ESTATE OF ELISHA OTIENO ODERA

DANIEL OCHIENG ODERA. EX PARTE APPLICANT

R U L I N G

The application before the court for determination is the ex parte originating summons dated the 21st day of July, 2015 brought under Order 37 Rule 6 of the Civil Procedure Rules and Section 27 of the Limitations of Actions Act. The ex parte Applicant has sought leave to file suit outside time.

The Application is supported by the affidavit of Fredrick Orego sworn on the 21st July, 2015. It is deponed that Elisha Otieno Odera died on the 23rd March, 2008 following which the ex parte applicant took out letters of administration *ad litem* for proposes of filing a suit. The Limited grant *ad litem* was issued on the 20th May, 2015 outside the prescribed time limit.

He avers that the delay was not the fault of the ex parte applicant or his advocate and that if the orders ought are not granted, the estate of the deceased shall suffer prejudice.

The ex-parte applicant has also relied on a further affidavit sworn by himself on 18th November, 2015 which he depones that the delay in applying for the grant of letters of administration was occasioned by the honest belief that the first advocate he instructed was acting on the matter but to the contrary this was not the case, following which he instructed the firm of Orego & Odhiambo Advocates on the 7th February, 2014

He further depones that the delay in applying for the grant of letters of administration was also caused the difficulties he encountered in obtaining the relevant documents, in particular the death certificate which was issued on the 4th March, 2015. He urges the court to allow the Application.

The court has carefully considered the application and the submissions filed by the learned counsel in support of the application. The effect of the statute of limitation is that certain causes of action may not be brought after the expiry of a particular period of time. In other words, the Act bars the bringing of particular actions after the specified periods of limitation but does not necessarily extinguish such a case of action. In the case or **Rawal Vs Rawal (1990) KLR 275** Bosire J (as he then was) stated: -

“The object of any Limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand and on the other hand protect a defendant after he has lost evidence for his defence from being disturbed after long lapse of time. It is not to extinguish claim.”

The same position was taken in the case of **Iga Vs Makerere University (1972) EA 65** in which the court held: -

“A Plaintiff which is barred by limitation is a plaintiff “barred by law”. A reading of the provision of Section 3 and 4 of the Limitation of Actions Act (together with Order 7 Rule 6 of the Civil Procedure Rules seems clear that unless the Appellant in this case had put himself within the Limitation period by showing the grounds upon which he could claim exemption, the court “shall reject” his claim.. the Limitation of Actions Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred, the court cannot grant the remedy or relief.”

What this means is that a cause of action that is time barred may in certain cases be revived if the conditions set out in Section 27 of the Limitations of Actions Act are fulfilled.

When a court is dealing with an application such as the one before the court, the order should not follow as a matter of course.

This was the finding by the court in the case of **Lucia Wambui Ngugi Vs Kenya Railways & Another** – Nairobi HCCC Miss. Appl. No. 213 of 1989 Mbito J (as he then was) expressed himself as follows: -

“When an application is made for leave under the Limitation of Actions Act, a Judge in chambers should not grant leave as of course. He should carefully scrutinize the case to see whether it is a proper one for leave. Since it has been decided that the Defendants have the right to go back to the High Court to challenge such orders, it is particularly important that when such an application is made, the order should not follow as a matter of course. The evidence in support of the application ought to be very carefully scrutinized, and, if that evidence does not make quite clear that the Plaintiff comes within the terms of the Limitations Act, then either the order ought to be refused or the Plaintiff ought perhaps to be given an opportunity of supplementing his evidence. It must, of course, be assumed for the purposes of the ex parte application that the affidavit evidence is true; but it is only if that evidence makes it absolutely plain that the Plaintiff is entitled to leave that the application should be granted and the order made, for such an order may have the effect of depriving the defendant of a very valuable statutory right. It is not in every case in which leave has been given ex parte on inadequate evidence that the defendant will be able to mitigate the injustice which may have to be done to him by obtaining an order for the trial of a preliminary issue...”

The ex parte applicant in the application before the court has relied on the ground that there were some material facts of a decisive character which were at all material times outside his knowledge. From the further affidavit, it is clear that the accident the subject matter of this application, occurred on 23rd March, 2008, Letters of Administration were applied for on 30th March, 2015 and issued on 20th May, 2015.

The Applicant has attributed the delay in applying for the Letters of Administration to his first advocate. He also attributed the delay in obtaining the relevant documents and in particular the death certificate. It is noted that, the applicant has not disclosed when he instructed the first advocate and how much time it took him to discover that, that advocate was not acting on the matter so that he could instruct the firm of Oregio & Odhiambo Advocates on the 7th February, 2014. Assuming that the first advocate was instructed shortly after the accident occurred in year 2008, it must have taken the ex parte Applicant six years to discover that the advocate was not acting on the matter. In my view, that was an unreasonable period for him to have waited without taking any decisive action.

The other reason advanced was the delay in obtaining relevant documents and in particular the death certificate. The same was issued on 4th March, 2015, which was almost six years from the date the accident occurred. The Applicant has not told the court when he applied for it and what caused the delay. It is difficult for this court to comprehend that it took a good six years for the applicant to be issued with a death certificate.

After carefully scrutinizing the evidence in support of the application, and, in my view, the evidence does not make it clear that the ex parte Plaintiff comes within the terms of Limitation of Actions Act.

Accordingly, I dismiss the Originating Summons dated on 21st July, 2015.

Dated, signed and delivered at Nairobi this 13th day of October, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... *for the ex parte Applicant*