



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NUMBER 123 OF 2015 (O.S)

IN THE MATTER OF: LEAVE UNDER S 28 OF THE LIMITATION OF ACTIONS ACT (CAP 22 LAWS OF KENYA)

IN THE MATTER OF: LEAVE TO FILE SUIT OUT OF TIME

BETWEEN

DR RICHARD NZIOKA MUIA..... PLAINTIFF

VERSUS

BAKERS CORNER COMPANY LIMITED.....1ST DEFENDANT

MARTIN MUNYAO KIMEU.....2ND DEFENDANT

FLORENCE MUTHONI KIMEU.....3RD DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff’s *Ex parte* Chamber Summons application dated 25th February 2015 and filed on 3rd March 2015 was brought under the provisions of Order 37 Rule 6 of the Civil Procedure Rules, 2010, Sections 4 and 28 of the Limitations of Actions Act and all enabling provisions of the law. It sought the following orders:-

- a. THAT the Court do grant leave to the Plaintiff to file the suit out of time.**
- b. THAT the annexed draft plaint Marked A be deemed as duly filed upon payment of the requisite court fees.**
- c. THAT the costs of the application be provided for.**

THE PLAINTIFF’S CASE

2. The application was supported by the Plaintiff’s Affidavit that was sworn on 28th February 2015. His

Written Submissions were dated 4th June 2015 and filed on 5th June 2015.

3. He stated that he was a director of the 1st Defendant Company (hereinafter referred to as “the Company”) which he incorporated together with the 2nd and 3rd Defendants herein, in 1991. The said Company was created from a close family friendship and depended highly on the good faith of its members. He further contended that the transfer of shares was restricted in the manner provided in the said Company’s Memorandum and Articles of Association.

4. It was his averment that he had been denied his profits in the said Company over a period of time whereupon he wrote to the Registrar of Companies to enquire about the status of the said Company. It was then that he discovered that the 2nd and 3rd Defendants had fraudulently transferred his shares to their family members in 1994, contrary to what was provided in the aforesaid Memorandum and Articles of Association and also filed a Notice of Change of Directors.

5. He was emphatic that the Defendants herein had deprived him of his rightful share in the said Company and that it was in the interests of justice that he prosecutes his suit. He therefore urged the court to allow his application as prayed for the reason that if the same was not allowed, he would suffer irreparable loss.

LEGAL SUBMISSIONS

6. The Plaintiff submitted that his cause of action arose on or about 7th February 1995 when the 2nd and 3rd Defendants filed a Notice of Change of Directors showing that he and his wife namely, Emma Wambui Muia, resigned as directors of the Company on 31st August 1994. He therefore admitted that his cause of action, which was based on contract, was thus statutorily barred as Section 4 of the Limitations of Actions Act Cap 22 (Laws of Kenya) stipulates that the same ought to have been brought before the expiry of six (6) years from 7th February 1995, which in effect was on or about the year 2001.

7. It was, however, his contention that although the said cause of action arose and became statute barred as aforesaid, he could still seek an extension of time to institute his suit against the Defendants as time ran from the date he became aware of the fraudulent acts by the said Defendants, which was on 10th December 2012 when the Registrar of Companies informed him of the aforementioned changes.

8. He relied on the provisions of Section 28 of the Limitations of Actions Act that provide as follows:-

1. An application for leave of the court for purposes of section 27 shall be made *ex parte*, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.

2. ...

3. Where such an application is made after the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, no evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that cause of action, that evidence would in the absence of any evidence to the contrary, be sufficient-

a. to establish that cause of action, apart from any defence under section 4 (2); and

b. to fulfil the requirements of section 27(2) in relation to the cause of action, and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred or such date (as apart from section 27) to afford a defence under section 4(2).

9. The provisions of Sections 4(2) and 27 (2) of the Limitations of Actions Act that the Plaintiff referred

the court to be limited to actions founded on tort or breach of duty and not causes of actions that are founded on contract. Order 37 Rule 6(1) of the Civil Procedure Rules that the Plaintiff also placed reliance upon was inapplicable in the circumstances of this case as it is clear that the same relates to seeking of extension of time under the provisions of Section 27 of the Limitation of Actions Act.

10. Notably, Section 30 of the Limitations of Actions Act provides as follows:-

1. In sections 27, 28 and 29 of this Act, any reference to the material facts relating to a cause of action is a reference to one or more of the following:-

a. the fact that personal injuries resulting from the negligence, nuisance or breach of duty constituting that cause of action;

b. the nature or extent of the personal injuries resulting from negligence, nuisance or breach of duty;

c. the fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable.

11. For the foregoing reasons, the court found that the cases of Jane Mwikali vs Shimanzi Autoworld Agencies Limited [2014] eKLR and George Musyoki vs Sarova Hotels [2014] eKLR that he relied upon were distinguishable from the facts of his case as the same related to negligence and breach of duty respectively as envisaged under the provisions of Section 30 of the Limitation of Actions Act.

12. The court did not, however, consider the relevance or applicability of the facts of the case of HCMA No 213 of 1989 Lucia Wambui Ngugi vs Kenya Railways & Another (unreported) as the same was not attached to the Plaintiff's submissions.

13. However, the court was in agreement with the holding of Mbitio J (as he then was) in that case when he stated that as follows:-

“...When an application is made for leave under the Limitation of Action (sic) Act, a judge in chambers should not grant leave as if course. He should certainly scrutinise the case to see whether it is a proper one for leave. Since it is decided that the defendants have no right to go back to the High Court to challenge such orders... It must, of course, be assumed for 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...”

14. Applying the *ratio decidendi* of the said learned judge and the provisions of Section 28 of the Limitation of Actions Act that the Plaintiff relied upon against the facts of the case herein, the court came to the firm conclusion that the application by the Plaintiff herein was misplaced as the same did not relate to a tort or breach of duty.

15. Be that as it may, even if the court were to consider the same facts against the provisions of Section 26 of the Limitation of Actions Act that relate to a case where a cause of action which is based on allegation of fraud of a defendant as had been contended by the Plaintiff herein in Paragraph 10 of his draft plaint, the court was still not satisfied that this was a suitable case in which it could grant the orders the Plaintiff had sought.

16. Evidently, the Plaintiff wrote to the Registrar of Companies on 25th November 2012 whereupon the said Registrar vide his letter of 10th December 2012 informed him that the Company's file showed that his interest in the said Company ceased in 1994. The Registrar of Companies' letter dated 9th December 2013 to M/S Nyiha, Mukoma & Co Advocates, his advocates herein, was also clear that he was not a

director in the Company. Additionally, the minutes of the meeting of 13th June 2013 indicated that the issue of the irregular transfer of shares was a matter for discussion in the said meeting.

17. Whilst it was clear to the court that a party should only be denied an opportunity to approach any court for relief as a last resort, the Plaintiff's conduct was indicative of his lack of initiative to vigorously pursue his interests in the 1st Defendant Company.

18. He failed to adduce evidence to explain what action he took over the period that he was denied profits in the said Company to mitigate his losses or that he sought to institute suit immediately he became aware of the alleged fraud by the 2nd and 3rd Defendants in 2012.

19. There was therefore no doubt in the mind of this court that the Plaintiff was guilty of laches and there was indeed inordinate delay in bringing the application herein and that having slept on his rights, he must therefore suffer the consequences of his failure to take any action to pursue his interests in the Company.

20. Accordingly, having considered the pleadings, the affidavit evidence, the written submissions and the case law in support of the Plaintiff's case, the court came to the firm conclusion that allowing the Plaintiff to revive an action that had long being barred by statute without any plausible explanation of delay in filing an application seeking extension to time to file out of time, would go against the very grain of the doctrine that "Equity does not aid the indolent."

21. The court ought not to assist a party who sleeps on his rights with a view to him regularising his failure to do an act from which he would benefitted had he acted within the limitation period or acted expeditiously, after discovery of a material fact.

22. Indeed, bringing an action almost twenty one (21) years after the cause of action arose and almost three (3) years after the Plaintiff became aware of the purported fraud, as he alleged, would amount to an abuse of the process of the court, of which a court ought not to be a party to as its duty is to always act in a manner that meets the ends of justice to all parties irrespective of whether or not all of them are before the court at any given time.

DISPOSITION

23. Accordingly, the upshot of this court's ruling was that the Plaintiff's *Ex parte* Chamber Summons application dated 25th February 2015 and filed on 3rd March 2015 was not merited and the same is hereby dismissed with no order as to costs.

24. It is so ordered.

DATED at **NAIROBI** this 18th day of September 2015

J. KAMAU

JUDGE

READ, DELIVERED and **SIGNED** at **NAIROBI** this 4th day of December 2015

J. KAMAU

JUDGE