



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**MISC. APPLICATION NO. 230 OF 2014**

**LUKA KIPKORIR KIGEN.....PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. The Applicant **Luka Kipkorir Kigen** by his *Ex parte* Originating Summons dated 25<sup>th</sup> September 2014 seeks leave of court to file a suit against Kenya Commercial Bank Limited out of time, and a Draft Complaint has been annexed to the application.

2. The intended suit is based on negligence by the Respondent, and particulars are stated in the Supporting Affidavit sworn by the applicant on the 25<sup>th</sup> September, 2014, that the Bank lost and/or misplaced his title documents to three properties offered to it as security for some financial accommodation that was repaid by the 18<sup>th</sup> July 2006. Due to the loss, the charges were not discharged, nor the title deeds returned to the applicant until the 11<sup>th</sup> December 2013, a period of about seven(7) years causing the applicant to suffer loss of opportunity to utilise his titles.

3. It is stated for the applicant that during the period, negotiations between the Bank and the applicant were ongoing in respect of *quantum* of damages for compensation arises out of the lost opportunity with letters being exchanged between the 9<sup>th</sup> March 2009 upto the 4<sup>th</sup> June 2014 when the Bank terminated negotiations. It is urged that by the time negotiations were terminated, the time for filing the suit had lapsed hence the application. It is noted that the correspondence exchanged between the parties, and specifically from the Bank were written on “**without prejudice basis.**”

The application is brought under the provision of Section 27 and 28 of the Limitation of Actions Act Chapter 22, Order 37 rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

5. Though made *ex parte*, the applicant served the application upon the defendant who filed grounds of opposition that the application is defective for annexing and referring to “**without prejudice**” correspondence. A list of authorities was also filed, and urged the court to strike out the application.

6. In its submissions, the Defendant/Respondent denied that there were any negotiations to resolve the matter and urged the court to strike out the application as unmerited.

7. The court has considered the genesis of the matter leading to the application, the affidavit in support, the annexures and legal provisions upon which it is based.

Applications under Section 27 and 28 of the Limitations of Actions Act are normally made *ex parte*. The defendant becomes aware of the order of extension of time if granted when served with the order and the plaint. If the defendant wishes to question the order, he ought to raise the objection during trial.

Section 28(2) of the Limitation of Actions Act states:

*“where such an application is made before 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, on 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 action, that evidence would be 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) of this Act.*

*(b) to fulfil the requirements of Section 27(2) of this Act in relation to that cause of action.”*

8. In the court's view, whether the application is made before or after institution of the suit, there is no provision for the defendant to be heard before the order of extension for filing the suit out of time is granted as it is meant to be unopposed. However, the applicant has to satisfy the court that there are good reasons and evidence to justify granting of the order.

See Court of Appeal decision in **Civil Appeal No. 96 of 1984 Oruta and Another -vs- Nyamato**

9. In the circumstances of this matter, the court finds that the applicant was out of order when it served the application upon the defendant. Likewise, the defendant was not obliged to file any responses and/or objections to the application as it would have an opportunity to raise the objections during trial of the suit.

10. As stated in the above case, the requirements for extension of time are stringent and the court must be satisfied that they are met before granting the order of extension of time. In the Supporting Affidavit to the application, the applicant has attached correspondence exchanged between the parties. On the face of it, it is clear that an attempt was made where upon some settlement proposals for the compensation claim were made. At this point, it is important to state that the applicants advocates wrote letters to the defendant and demand notices given of intention to file suit but the defendant never responded save on without prejudice basis – acknowledged several meetings between the parties and made proposals of settlement by its letters dated 27<sup>th</sup> January 2014 and 4<sup>th</sup> June 2014 where it gave its final offers of settlements. Suffice to state that the responses and settlement proposals were made after the limitation period of three years from the date the cause of action, tort of negligence, arose – on the 18<sup>th</sup> July 2006.

11. The court has considered the arguments by counsel. The Applicant has not shown sufficient reason and grounds why he did not file suit within the three year period more so as no response were received from the defendant in response to the demand letters dated 9<sup>th</sup> March 2009 and 6<sup>th</sup> May 2013. The applicant did not address the court on his failure to take action before the 18<sup>th</sup> July 2009. The Court finds that there were no negotiations on going between the parties between 18<sup>th</sup> July 2006 and 18<sup>th</sup> July 2009 when time lapsed. The only indication of some sort of negotiations is by the defendants “**without prejudice**” letters dated 27<sup>th</sup> January 2014 and June 4<sup>th</sup> 2014 way after the claim became time barred.

12. On the issue of “**without prejudice**” correspondence, it is a general rule that correspondence on without prejudice basis is not admissible, and cannot be used against a party if the dispute is not resolved – as they are made on the basis that if no resolution is reached, the parties rights revert to the original state if the offer is rejected and litigation ensues. However, without prejudice correspondence may be admissible if a party shows indeed there has been a dispute or negotiation with another and terms for settlement have been offered. In such scenario, the court will of necessity look at the documents to determine whether the conditions under which the rule applies, exists. The rule can only apply when there is negotiation or a dispute.

In the present case, there was no negotiations on going as such negotiations can only be between the parties, not one sided. Such negotiation and offers of settlement only came after the Limitation Period had lapsed.

See **Millicent Wambui -vs- Nainh Botanica Gardening Ltd** (2013) e KLR.

13. Having found that the applicant has not satisfactorily explained his failure to file the intended suit within the limitation period, it follows that the application dated 25<sup>th</sup> September 2014 is disallowed with no orders as to costs.

**Dated, signed and delivered in open court this 17th day of September 2015.**

**JANET MULWA**

**JUDGE**

**In the presence of:**

**Mwangi holding brief for Tambe for Respondent**

**No appearance for Applicant**

**Court clerk - Lina**