



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. CIVIL APPL. NO. 118 OF 2013

FRANCIS MUGHANI MUGULA

MASUMBUKO NGANDA KATISYA.....APPLICANTS

-V E R S U S-

ANWARALI BROTHERS LIMITED

FELIX KIPKOSKEI TOTOOCH.....RESPONDENTS

RULING

INTRODUCTION

1. The Application before court is the Amended Notice of Motion dated 6th November 2013. The Application is brought under Sections 3, 3A, 63 (E) and 95 of the Civil Procedure Act, Order 50 Rule 6 of the Civil Procedure Rules and Section 27 of the Limitation of Actions Act, Cap. 22 of the Laws of Kenya. The main prayer in the Application is that the Honourable court be pleased to enlarge the time within which to file suit premised on a tort.

2. The Application is supported by the Affidavit of Francis Mughani Mugula as well as on the grounds on its face. In summary, the Applicants' case is that they gave instructions to their advocates on record on **1st July 2012**, to obtain letters of administration *ad colligenda bona*, of the estate of JOSEPHAT MULEWA NGANDA, who died on **12th February 2010** ("the deceased"). That, the advocates obtained the letters on **12th July 2012** but the Applicants were nowhere to be seen to give further instructions until **15th April 2013** when they visited the advocates with instructions that the 1st Applicant had been sick and was undergoing treatment traditionally. That, the advocates could not proceed with the matter due to the absence of the Applicants who were unreachable through mobile phone.

ISSUES

3. The main issue for determination is whether the Applicants have satisfied the conditions necessary to warrant extension of time within which to file suit based on tort.

ANALYSIS

4. The starting point is section 4 (2) of the Limitation of Actions Act Cap. 22 of the Laws of Kenya which

provides that:

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued”

5. According to the Limited Grant of Letters of Administration *ad litem* annexed to the Supporting Affidavit as annexure “FMM 1”, the Deceased died on 12th February 2010. The last day on which the case ought to have been filed, therefore, was 13th February 2013.

6. This Application is brought under Section 27 of the Limitation of Actions Act which provides for extension of limitation period in case of ignorance of material facts in actions for negligence, etc. Section 27 (1) and (2) provide as follows:

1. Section 4(2) does not afford a defence to an action founded on tort where—
 - a. the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
 - b. the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
 - b. the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
 - d. the requirements of subsection (2) are fulfilled in relation to the
 - e. cause of action.

7. In the case of ZACHARIAH B. SHIMECHERO –Vs- ATTORNEY GENERAL & ANOTHER [2006] eKLR, the High Court held that:

“The provisions of section 28(2) of the Limitation of Actions Act enjoin the Court to grant leave only if evidence exists to satisfy the court that if the intended action was brought forthwith and such evidence was adduced in that action, it would in the absence of any evidence to the contrary be sufficient to establish that cause of action (apart from the defence under s. 4(2) of Cap 22) and to meet the requirements of section 27(2) of the Act.” (underlining mine)

8. Thus, in order to grant an order for extension of time where the case has not been filed, the court must be satisfied that the applicant has met the provisions of Sections 27 (2) and 28(2) of the Limitation of Actions Act. Section 28 (2) provides as follows:

“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 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; and
- b. to fulfill the requirements of Section 27(2) of this Act in relation to that cause of action.

9. In this case, the Applicants have not indicated the nature of the case they intend to file, let alone adduce any evidence. The Applicants have only stated that they intend to file a case “premised on a tort”. It is not shown to court the nature of the tort or how the cause of action accrued. Further, no evidence has been adduced to enable the court determine whether if leave were granted and similar evidence adduced in the intended suit, that evidence would in the absence of any evidence to the contrary, be sufficient to establish the cause of action (apart from any defence under Section 4 (2) of the Act) and to fulfill the requirements of Section 27 (2) of the Cap. 22. In light of the failure by the Applicants to satisfy this requirement alone, this application should fail.

10. Section 27(2) of the Limitation of Actions Act provides that:

“2. The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—

a. either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

b. in either case, was a date not earlier than one year before the date on which the action was brought.”

11. Again in the case of ZACHARIAH B. SHIMECHERO –Vs- ATTORNEY GENERAL & ANOTHER (*supra*) it was held that-

“Under section 27 (1) of the Limitation of Actions Act, limitation period cannot be invoked in defence where an action is for breach of duty and damages are claimed for personal injuries and leave has been granted and the requirements of section 27 (2) of the Limitation of Actions Act are fulfilled in relation to the cause of action.”

12. Under Section 27(2), the applicant must prove that material facts relating to the cause of action were or included facts of a decisive character which were at all times **outside the knowledge of applicant** until a date which either was after the limitation period or was not earlier than one year before the end of that period and in either case was a date not earlier than one year before the date on which the action was brought.

13. In the case of GATHONI –Vs- KENYA CO-OPERATIVE CREAMERIES LTD [1982] KLR 140 the Court of Appeal held that under Section 27, *‘the applicant has to show that her failure to proceed in time was due to material facts of a decisive character being outside her knowledge.’*

14. The Applicants have not satisfied this latter requirement either. They have not shown that their failure to proceed in time was due to material facts of a decisive character which were outside their knowledge. The explanation given for the delay, namely, that the 1st Applicant was sick, does not satisfy the condition laid down in Section 27 (2) of Cap. 22.

CONCLUSION

15. For the foregoing reasons, it is apparent that the Applicants have not met the requirements laid down in the Limitation of Actions Act to warrant the granting of the order for extension of the time within which to file suit. The Application, in my considered opinion, should fail.

DATED and DELIVERED at MOMBASA this 20TH day of MARCH, 2014.

MARY KASANGO

JUDGE