



REPUBLIC OF KENYA

High Court at Mombasa

Civil Application 3 of 2013

MEHUL NANDALAL SHAH.....PLAINTIFF

VERSUS

GIDEON KIOKO MBUVI.....DEFENDANT

RULING

1. The Applicant's application is by originating summons for leave to file the suit out of time under Section 27 of the Limitation of Actions Act. Section 4 (1) , 27 (1) (a) and 28 (1) of that Act are also invoked by the Applicant.
2. The background to the application, as set out in the supporting affidavit of Mehul Nandalal Shah, is as follows: In 1995 he entered into an agreement (herewith the "Sale Agreement") with the Respondent to purchase a piece of land known as **LR No MN /1/1710A** in Nyali area. The purchase price was Shs. 14,000,000/- of which he paid Sh. 2,500,000/- as deposit. The applicant later discovered that the sale was a fraud which he reported to the police. Further that the Respondent became Member of Parliament and was inaccessible. The Applicant prays that he be allowed to file the suit out of time on the ground that he was ignorant of the law and that the Constitution discourages denial of access to court due to legal procedural technicalities.
3. The applicant exhibited copies of the sale agreement, receipts, cheques and an agreement ("the Refund Agreement") dated **24th May 1996** between the parties. Under clauses 2 and 3 of the ,(Refund Agreement) the Respondent was to refund the purchase monies with interest thereon, all amounting to Shs. 4,000,000/- over a period of nineteen months from **5th June 1996**.
4. The applicant has complied with Order 37 Rule 6 (1) in that he has filed the application by ex parte originating summons invoking Section 4(1) and 28 (1) of the Limitation of Actions Act, for leave of court. The suit herein emanates from both the Sale Agreement and the Refund Agreement. The amount claimed is Sh. 24,000,000/- being Shs. 4,000,000/- under the Refund Agreement and further interest Under clause 3 of the Refund Agreement, entered into on 24th May 1996
5. For extension of time to overcome the limitation of actions provisions, the Applicant relies on Sec. 27(1) (a) and 28 (I) of the Limitation of Action Act (LAA).That Section (27 (1) (a) (LAA) provides as follows:

"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 a written law)"

The essence of that section is that where a tort is the foundational cause of action, a defence of limitation is excepted. That, however, is not the situation in this matter. The cause of action is contract - in fact on two contracts, being the Sale Agreement and the Refund Agreement.

6. At paragraph 2 of the grounds supporting the ex-parte originating summons the applicant expresses himself as follows:

“That the Applicant has a valid claim against the Respondent for the Applicant and Respondent did execute a (sic) Agreement on the 24th May, 1996 whereat the Respondent did acknowledge that he was indebted to the applicant for the sum of Kshs. 4,000,000/- which sum the respondent is yet to pay”

There is nothing here to suggest that the Applicant's action is founded on tort in respect of which Section 4 (2) does not afford a defence, nor is it suggested by the Applicant that the action is for damages for breach of duty (contractual or otherwise).

7. Section 28 (1) provides for an application for leave of the court under Section 27 to be made ex-parte. This has been done by the Applicant.

Then Section 28 (2) provides that where such an application is made before the commencement of a relevant action, as in this case 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 plaintiff, it appears to the court that, if such an action were brought forthwith and like evidence adduced in that action, would in absence of any evidence to the contrary, be sufficient:

a) To establish that cause of action apart from any defence under section 4 (2)

8. Clearly this court is not obliged to consider the position portion of the defence under the Limitation Act at this stage. I am therefore satisfied from the documentation availed that, absent any defence, the evidence is sufficient to establish the cause if the plaint were filed. On those grounds, I accordingly grant the Applicant's application. Courts in the cause.

R.M. MWONGO
JUDGE

Read on 12/3/2013 By Hon. Justice R.Mwongo

Read in open court

Coram:

Judge:

Court clerk:

In Presence of Parties/Representative as follows:

- a).....
- b).....
- c).....
- d).....