



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILLIMANI LAW COURTS**  
**MISC.CAUSE NO. 404 OF 2012 (O.S)**

**PETER MARWA MWITA.....APPLICANT/PLAINTIFF**

**VERSUS**

**GULIED ALI MOHAMED .....RESPONDENT /DEFENDANT**

**RULING**

The application for determination before me is an ex parte originating summons dated 3<sup>rd</sup> December 2010 brought under section 27 and 28 of the Limitation of Actions Act and Order 36 Rule 6 of the Civil Procedure Rules. The application seeks for orders that the applicant be granted leave to file out of time and that costs be provided for. This application is based on the grounds that the applicant wishes to commence proceedings against the defendant to recover Kshs. 5,600,000/=being costs of the 560 bales of second hand clothes together with interests and general damages from 2004 arising out of a fraudulent sale of goods and breach of express oral agreement between the applicant and the respondent. That the applicant followed up the matter with various relevant government offices including the police and criminal investigating departments with minimal assistance but later advised the applicant to follow the matter vides civil litigation.

This application is supported by the supporting affidavit of Peter Marwa Mwita who deposes that in the year 2004, he approached the Respondent/defendant who was a clearing agent with the intention of having him clear the goods that he was importing from Toronto which included 564 bales of assorted mitumba clothes. That the Respondent agreed and they signed an agreement to the effect that the respondent shall clear the said goods and transmit the same to the applicant and paid the relevant monies including the cost of bales which was included amounting to Kshs.754,655/=and Kshs 4,520,000/= costs of the goods. He further avers that the goods were delivered to the port by the exporting company M/s Global Textile Exporters Limited which goods were cleared and collected by the respondent. That once the goods were cleared the respondent went ahead contrary to the agreement and sold the bales without contracting or informing him of the sale and or forwarding the proceeds of the sale to the applicant. That the applicant realised that the goods had been sold by the respondent after his futile pursuit to them delivered to him in which the respondent gave contradicting statements about the clearance of the goods. That on following up with the respondents workers they confirmed that the respondent had been selling the goods and the proceeds were used to buy truck lorries for himself. That after his futile attempts to get

the goods and or the equivalent amount from the sale he approached the Mombasa Port Police where he recorded statements. He depones that he went to the Attorney General who advised him to seek civil remedy. He says that due to the foregoing actions he was caught up with time limitation therefore he filed this application.

When the application was heard on 20<sup>th</sup> March 2013, Mr. Nabwayo raised two things, that the applicant applied to file suit as a pauper which was granted by the Deputy Registrar, that the applicant file the originating summons to file suit out of time and that no leave was granted for the applicant to file the suit out of time he asked Court to give directions. Mr. Olonde stated that by virtue of section 28 the proceedings should be ex-parte, that it was for the applicant to present the case and urge the Court to extend it and that the defendant should raise issues in the defence once leave has been granted therefore the defendant's appearance was premature. I note that the counsels were getting into the matter and stated that the application was ex-parte. The applicant's counsel Mr Olonde submitted that that he relied on Order 51 Rule 10 (1) and asked court to look at section 26 and 30 of the Limitation of Actions Act. That the plaintiff's claim is based on fraud and the applicant has exhibited efforts towards the recovery of the monies lost. That he visited several government offices but was guided late hence the application to lay a claim against the defendant. Counsel also submitted that the applicant was filing suit as a pauper.

I have considered the applicant's submissions in court and the pleadings filed. The issue for determination is whether the applicant should be granted leave to file suit out of time. This Court has unfettered discretion to exercise its discretion in considering this application but there are principles which must be considered. In the case of **Wasike vs. Swala [1984] KLR 591**, the Court of Appeal held that "*the applicant must show in descending scale of importance the following factors:-*

1. *That there is merit in his appeal*
2. *That the extension of time to institute and /or file the appeal will not cause undue prejudice to the respondent and*
3. *The delay has not been inordinate"*

Although this is a Court of Appeal decision on filing an appeal out of time outlining an appeal out of time, the principles that guide this Court are the same and are bidding. The applicant has not shown why he took five year (2008-2012) to file this application in Court after he was advised by the Attorney General to pursue this case in court. This delay is inordinate and will prejudice the Respondent considering that one of the intended defendants is already deceased. The applicant has not shown how the respondent will be compensated should this Court allow the application. Taking all these into account, I find no merit in the application and dismiss it. No order as to costs.

Orders accordingly.

Dated, Signed and Delivered this 16<sup>th</sup> Day of May 2013.

**R.E. OUGO**

**JUDGE**

In the presence of:-

.....Plaintiff/Applicant

.....Court Clerk