



FRANCIS MUGO NDEGWA.....PLAINTIFF/APPLICANT

VERSUS

AMBOSELI COURT LIMITED.....DEFENDANT/RESPONDENT

### R U L I N G

By its Notice of Motion dated 3<sup>rd</sup> July 2012 filed in this court the following day on 4<sup>th</sup> July 2012, the applicant herein is seeking an order of enlargement of time to file suit against the Defendant/Respondent despite the expiry of the statutory time for filing.

The applicant's cause of action from the supporting affidavit sworn on 3<sup>rd</sup> July 2012 is that on 19<sup>th</sup> September 1996 he entered into an agreement for sale of a plot of land in consideration of Kshs. 275,000.00 which he did pay and proceeded to develop the said plot. However, the said development was demolished by the respondent, a demolition which, it is contended, was admitted by the respondent to have been by mistake. However, in 1999 the respondent took over the said plot and evicted the applicant therefrom in without any cause. Although other parties sued the respondent, the applicant due to financial constraints was not joined in the said suit with the result that his advocate has advised him that the statutory time for lodging his claim has lapsed hence the present application. In a draft plaint exhibited he intends to claim an order for specific performance to compel the respondent to effect a transfer to him of the said plot as well as general damages. He also seeks compensation for the current market value of his demolished house as well as special damages.

The effect of the statute of limitation has been the subject of numerous judicial pronouncements. The Limitation of Actions Act provides that certain causes of action may not be brought after the expiry of a particular period of time. In other words the Act bars the bringing of particular actions after the specified periods of limitation. The Act does not extinguish causes of action. In Rawal vs. Rawal [1990] KLR 275, Bosire, J (as he then was) stated:

**“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims”.**

This decision cited Dhanesvar V Mehta vs. Manilal M Shah [1965] EA 321 where it was stated:

**“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand to protect a defendant after he had lost the evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case”.**

The same position was taken in Iga vs. Makerere University [1972] EA 65 in which it was held:

**“A plaint which is barred by limitation is a plaint “barred by law”. A reading of the provisions of sections 3 and 4 of the Limitation Act (Cap 70) together with Order 7 rule 6 of the Civil Procedure Rules seems clear that unless the appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the court “shall reject” his claim...The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time-barred, the court cannot grant the remedy or relief”.**

It therefore follows that a cause of action that is barred may in certain cases be revived if the conditions set out in section 27 of the Limitation of Actions Act, Cap 22 Laws of Kenya are fulfilled. That section provides 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**

**(c) 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 cause of action.**

**(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.**

**(3) This section does not exclude or otherwise affect -**

(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4 (2) (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

The foregoing clearly stipulates the circumstances under which the court may extend time for bringing an action barred by statute. The issue of limitation was extensively dealt with by Mbiti, J in Lucia Wambui Ngugi vs. Kenya Railways & Another Nairobi HCMA No. 213 of 1989 in which the learned Judge expressed himself as follows:

“The Manner in which proceedings are commenced under our Civil Procedure Rules are amply covered. Order 36 Rule 3(c)(1) of the Civil Procedure Rules specifically provides for the manner in which applications for extension of limitation periods under section 27 of the Limitation of Actions Act should be done, namely by way of Originating Summons or Chamber Summons, where there are pending proceedings. As no proceedings were pending in this matter, this application should have been by originating summons under the said order and not by a Miscellaneous Application, which proceedings is apparently unknown to our Civil Procedure, (though it is frequently adopted in this court) nor can it be authorised by section 3A of the Civil Procedure Act in this case as we have a specific provision under our written law. However, as this court has jurisdiction to deal with the application, the court deems it a case of wrong labelling and treats it as an *ex parte* originating summons. It is hoped, however, that learned counsel will in future pay some attention to such simple legal requirements as rules were made for a purpose...The provisions relating to extension of limitation periods are very difficult to understand and as they purport to deprive the defendants of their statutory rights, they must be carefully scrutinised. When an application is made for leave under the Limitation Act, a judge in chambers should not grant leave as of course. He should carefully scrutinise the case to see whether it is a proper one for leave. Since it has been decided that the defendants have no right to go back to the High Court to challenge such orders, it is particularly important that when such an application is made, the order should not follow as a matter of course. The evidence in support of the application ought to be very carefully scrutinised, and, if that evidence does not make quite clear that the plaintiff comes within the terms of the Limitations Act, then either the order ought to be refused or the plaintiff ought perhaps to be given an opportunity of supplementing his evidence. It must, of course be assumed for the 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. It is not in every case in which leave has been given *ex parte* on inadequate evidence that the defendant will be able to mitigate the injustice which my have to done him by obtaining an order for the trial of a preliminary issue...Section 27 of the Limitation of Actions Act...provides that limitation period under section 4(2) of the said Act can be extended in certain circumstances and by the provisions of section 31 of the said Act, all limitation periods prescribed by any other written law is extendable by the provisions of section 27 of the said Act. Consequently this application can only succeed if the applicant can avail herself of the provisions of section 27 of the Act as read with section 31 thereof, which enact that the limiting provision shall not afford a defence to an action founded on tort where the court gives leave on account of the appellant’s ignorance of material facts relating to the cause of action which were of decisive character...Although what amounts to “ignorance of material facts of decisive character” is not always easy to distinguish, by section 30(1) of the Limitation of Actions Act when read with subsection (2) thereof, material facts of decisive character are said to be those relating to a cause of action which would enable a reasonable person to conclude that he had a reasonable chance of succeeding and getting damages of such amount as would justify the bringing of the action”.

Potter, J in Gathoni vs. Kenya Co-Operative Creameries Ltd [1982] KLR 104 dealing with the same issue had this to say:

“The disability relied on by the applicant being a physical disability, the nature and the extent of which was not revealed, the learned judge dismissed this ground because disability in the statutory context of section 2(2)(b) of the Limitation of Actions Act does not include physical disability...Of course, if the applicant were under a relevant disability, she would not need the leave of the court to commence her action. The issue as to whether the period of limitation was extended in her case under section 22 would no doubt be raised as a preliminary issue at the trial. The applicant’s application for leave was made under Section 27, where the applicant has to show that her failure to proceed in time was due to material facts of a very decisive character being outside her knowledge (actual or constructive)...Section 30(3) of the Act provides that for the purposes of Section 27 a fact shall be taken at any particular time to have been outside the knowledge (actual or constructive) of a person, if but only if (1) he did not know that fact; and (2) in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and (3) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances...In section 30(5) “appropriate advice” is defined as meaning in relation to any facts or circumstances “advice of a competent person qualified in their respective spheres, to advice on the medical, legal or other aspects of that fact or those circumstances, as the case may be...The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done”.

What comes out clearly from the foregoing is that extension of time only applies to claims made in tort and even in tort the claims must be in respect of claims for personal injuries arising from 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).

This was confirmed in Mary Osumwa vs. Nzoia Sugar Company Limited Civil Appeal No. 244 of 2000 where the Court of Appeal held:

“Section 27(1) of the Limitation of Actions Act clearly lays down that in order to extend time for filing a suit the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the plaintiff as a result of the tort”.

Even in cases where the claim falls under the aforesaid provisions time will not be extended unless the applicant proves 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. In order to prove this the applicant is expected to show that he did not know that fact; that in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and that in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances...in section 30(5) “appropriate advice” is defined as meaning in relation to any facts or circumstances “advice of a competent person qualified in their respective spheres, to advice on the medical, legal or other aspects of that fact or those circumstances, as the case may be”.

In this case It is clear that the only reason advanced why the suit was not instituted in time was due to the financial disability on the part of the applicant.

In The Matter of An Application by Joseph Kiptoo Talam Eldoret HCMCA No. 152 of 2002 (OS) Dulu, J was of the view, which view I respectfully share, that as for material facts relating to the cause of action outside the applicant’s knowledge, financial difficulties is not relevant as far as the law is concerned.

Whereas I am in exercise of Article 159(2) (d) of the constitution I am prepared to overlook and excuse the procedural lapse in bringing this cause in a miscellaneous Application rather than originating summons which is a suit, under order 37 Rule 6 of the Civil Procedure Rules; it is clear that the applicant’s application herein must fail as it does not meet the criteria provided under section 27 aforesaid. In the result the application is dismissed with no order as to costs.

Ruling read, signed and delivered in court this 31st day of July 2012

G.V. ODUNGA

JUDGE

**In the presence of:**

Mr. Kivuva for the Applicant