



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISCELLANEOUS APPLICATION 406 OF 2012**

**IN THE MATTER OF BONIFACE K. NDETI AND JACKSON M. NDULULI AND 158 OTHERS**

**AND**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT, CAP 22, LAWS OF KENYA**

**BETWEEN**

**BONIFACE K NDETI & OTHERS(Suing in the representative capacity)..... APPLICANTS**

**VERSUS**

**ATTORNEY GENERAL.....RESPONDENT**

**R U L I N G**

By a Notice of Motion expressed to be brought under the provisions of Order 50 rule 4 of the Civil Procedure Rules and Section 38 of the Limitation of Actions Act Cap 22 the applicants herein seek the following orders:

- 1. THAT Honourable court be pleased to extend time within which the applicants shall file suit against the Government of Kenya through the Attorney General.**
- 2. THAT the costs of this application be in the cause.**

The Summons are based on the following grounds:

- a) The previous advocate failed to file suit despite receiving instructions to do so.**
- b) It is in the interest of justice to have time extended.**

The Motion is supported by an affidavit sworn by **Boniface K. Ndeti** on 6<sup>th</sup> July 2012. According to the deponent, the applicants' houses were in 1981 burnt down by the Government Administration. They then instructed their former lawyer to represent them but the lawyer requested exorbitant fees which they could not raise at the time. However, in 2011 they were able to come together and arrived at a decision to instruct their current advocate notwithstanding the fact that their former advocate kept on misleading them that he had filed the suit on their behalf and was awaiting payment. On discovery of the said misleading information in the year 2011, they lodged a complaint with his professional body. Therefore, it is the applicants' position that the delay in instituting the suit was not deliberate on their part but was occasioned by factors beyond their control. The intended suit involves land which according to them is dear to them and it is only fit that the application be allowed.

In his submissions, **Mr. Muli** learned counsel for the applicants stated that it is in the interest of Justice that the proposed suit which revolves around land be instituted since errors of an advocate ought not to be visited upon the applicants.

The period of limitation to sue the Government is provided for under section 3 of the Public Authorities Limitations Act, Cap 39 Laws of Kenya. The said section provides:

***3.(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.***

***(2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.***

***(3) Where the defence to any proceedings is that the defendant was at the material time acting in the course of his employment by the Government or a local authority and the proceedings were brought after the end of -***

***(a) twelve months, in the case of proceedings founded on tort; or***

***(b) three years, in the case of proceedings founded on contract,***

***from the date on which the cause of action accrued, the court, at any stage of the proceedings, if satisfied that such defendant was at the material time so acting, shall enter judgment for that defendant.***

The cause of action herein, according to the applicants arose in 1981 when their houses were burnt. They were required under the foregoing provisions to bring the action within one year. It is the failure by the applicants to comply with the foregoing provisions that has given rise to these proceedings. One of the provisions cited for seeking extension of time is Order 50 rule 4. The said provision provides:

***Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:***

***Provided that this rule shall not apply to any application in respect of a temporary injunction.***

It is clear that the foregoing provisions have nothing to do with extension of time. Perhaps the applicants meant Order 50 rule 6 which provides:

***Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:***

***Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.***

That provision has been the subject of judicial pronouncements. In **Wilson Osolo vs. John Ojiambo Ochola & Another Civil Appeal No. 6 of 1995** the Court of Appeal held that Order 49 [now Order 50] of the Civil Procedure Rules does not apply to extension of time limited by statutes. It therefore follows that the citing of the correct provision of the law (rule 6) would not have changed the position.

The other provision cited by the applicants is section 38 of the Limitation of Actions Act. That section provides:

***(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may***

***apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.***

***(2) An order made under subsection (1) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.***

***(3) A proprietor of land who has acquired a right to an easement under section 32 may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.***

***(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.***

***(5) The Minister for the time being responsible for land may make rules for facilitating the registration of titles to land or to easements acquired under this Act.***

Here also it is clear that the section does not provide for the extension of time within which to bring an action against the Government. However, section 6 of the said Act provides:

***Notwithstanding the provisions of section 31 of the Limitation of Actions Act, section 22 of that Act shall not apply in respect of the provisions of this Act; and in section 27 of the Limitation of Actions Act the reference to section 4 (2) of that Act shall be read and construed as a reference to section 3 (1) of this Act; but subject thereto and notwithstanding section 42 of the Limitation of Actions Act, Part III of that Act shall apply to this Act.***

Section 31 cited hereinabove provides:

***Where a period of limitation is prescribed for any action or arbitration by any other written law, that written law shall be construed as if Part III were incorporated in it.***

Part III deals with Extension of Periods of Limitation. A reading of section 6 of the Public Authorities Limitation Act together with section 27(1) of the Limitation of Actions Act leads to the conclusion that where limitation period has run out under section 3(1) of the former, the same may be extended under the same conditions stipulated under section 27 of the latter. Section 27 aforesaid 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.*

That section was the subject of the decision 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:

**“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 may 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”.

From the foregoing 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).

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”.

It follows from the foregoing that first and foremost the action must be one for damages for negligence, nuisance or breach of duty. In this case the exact nature of the tort in question is not clear as the applicant has not exhibited a draft plaint. However, it would seem that the claim is in respect of damages arising from trespass to property. Again no mention has been made with respect to damages arising from a claim on personal injuries. The third condition is that leave must then have been sought and obtained. This is the stage at which we are presently. The last requirement is the fulfilment of the provisions of subsection (2) of section 27 of the said Act. Under this subsection the applicant is expected to prove that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the applicant’s knowledge and that he became aware of these facts after the limitation period or within one year before the expiry of the limitation period. In either case, the action must be brought within one year of such discovery.

In this case the first ground relied upon going by the affidavit is that the applicants did not have the exorbitant sum of money that was required at the time of the incident. 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.

The other ground relied upon is that the applicants were misled by their former advocates that the suit had been instituted. The question then is whether this amounts to ignorance of a material fact of a decisive character. As held above “**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**”. In this case, the applicants knew they had a cause of action. They knew that their houses had been destroyed and

they instructed an advocate to act for them. In these circumstances it cannot be said that the applicants were ignorant of a material fact of a decisive character. What they were ignorant of was whether the process had been instituted and not whether they could mount a successful litigation. Apart from the foregoing, from the complaint made allegedly made against the said advocate, it was indicated that the applicants instructed the said advocates in the year 2006, more than a decade after the cause of action arose thereby rendering the advocate's inaction insufficient to warrant the extension sought.

Lastly under Order 37 rule 6 of the Civil Procedure Rules, an application for extension of time prior to the filing of the suit ought to be brought by way of Originating Summons. In other words such an application is by way of a suit and not by a Miscellaneous Application and surely not by a Notice of Motion.

It follows that this application, apart from lacking in merits is also incompetent. Incompetent for citing the wrong provisions of the law and not properly invoking the jurisdiction of the court.

In the result the Notice of Motion dated 6<sup>th</sup> July 2012 is dismissed with no order as to costs.

**Dated at Nairobi this 15<sup>th</sup> day of October 2012**

**G V ODUNGA**  
**JUDGE**

In the absence of the counsel for the parties