



REPUBLIC OF KENYA

High Court at Kisumu

Miscellaneous Civil Application 245 of 2011

WILIS ONDITI ODHIAMBORESPONDENT

VERSUS

GATEWAY INSURANCE CO LTDAPPLICANT

RULING

The Applicants Notice of Motion dated 14th August 2012 prays for the following orders:-

- 1) The Honourable Court be pleased to review its order made on the 17th October 2011 and set aside, discharged vacate and or otherwise vary the same.**
- 2) The Court does order that Winam SRMCC 53 of 2012 filed pursuant to the order of this court of 17th October 2011 is time bared by statute**
- 3) Costs to the applicant**

The application is supported by the affidavit of one **Lilian Munyiri** sworn on 14th August 2012.

The Respondent herein did file an application dated 1st August 2011 in which he sought leave to file suit out of time. The same was granted *ex parte* on 17th October 2011. Apparently and after being granted the orders sought the respondent proceeded to file case No. Winam SRMCC 53 of 2012.

The above case at Winam seeks declaratory orders to compel the applicant pay damages issued in his favour vide case Number Kisumu CMCC No. 55 of 1994.

It appears from the annexures to the affidavit of Lilian Munyiri that the Respondent had earlier own filed suit No. CMCC 12 of 2009 at Kisumu Law Courts which was struck out for want of limitation on time. This was not disclosed to this court by the Respondent at the time of making the orders dated 17th October 2011.

The respondent has opposed the application through the replying affidavit sworn on 12th October 2012. where he has strongly supported the orders granted on 17th October 2011 as being of no errors to warrant any review. He further argued that the suit No. Kisumu CMCC 12 of 2009 was struck out and therefore the same was not a bar to him filing another suit.

I have carefully perused the application as well as the submissions by both parties.

What is apparent and what was not disclosed to the court clearly was that the orders granted was for

filing suit against the applicant for damages which was awarded to the respondent in August 1996. This is the province of the law of tort essentially.

In view of the above, Section 4 (4) of the limitation of Actions Act Chapter 22 Laws of Kenya is worth producing herein, thus:-

“4(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at receiving periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiry of six years from the date on which the interest became due”.

Clearly twelve (12) years expired on 25th August 2006 and consequently I do not see any provisions of extension of time to enforce the judgment.

The issue raised by the respondent as observed above was in relation to the law of tort. Section 27 (1) of the Limitation of Action Act states :-

“27 (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”.**

It follows as correctly submitted by the applicants that the court in such situation may not extend the requisite time.

Further there ought to be sufficient reasons for extension of time. From what the applicant deposed there was a lapse of inordinate time between the time the suit No. Kisumu CCMC No. 12 of 2009 and the filing of the application.

My attention has been drawn to the attached pleadings in respect to suit No. Winam SPMCC No. 53 of 2012 filed after the order were granted. This suit was filed contrary to the provisions of Section 28 (5) of the Limitations of Actions Act which states:-

“In this Section and Section 27 “Court” in relation to an action means the court in which the action has been, or is intended to be brought”

Clearly, by filing the suit at Winam the respondent contravened the above provisions. It was expected that the respondent having obtained the leave of the court ought to have filed the same in the High Court but not in the lower court.

The application must succeed. There is as shown above error apparent on the record. Many issues were not disclosed to this court which perhaps would not have proceeded to issue the orders it did exparte. This court is enjoined to tamper with its orders for the ends of justice to be met.

Clearly the respondents claim against the applicant is hopelessly out of time. It is incurable at this stage. Equally, the suit at Winam is in law. Allowing it to proceed will be coxing the lower court to proceed with an illegality as it cannot overturn the orders given by this court to extend the time.

I allow the Notice of Motion dated 14th August 2012 on the following terms:-

- a) This court's orders issued on 17th October 2011 are hereby set aside together with any attendant consequences.
- b) Suit No. Winam SRMCC 53 of 2012 is time barred for all intent and purposes.
- c) the applicant shall have the costs of this application.

Orders accordingly.

Dated, signed and delivered at Kisumu this 14th day of November 2012

H.K. CHEMITEI
JUDGE

In the presence of:

Karanja for Applicant

P. J. Otieno for Oyugi for Respondent

HKC/aao