



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 536 of 2012

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

AND

**IN THE MATTER OF PUBLIC AUTHORITIES LIMITATION ACT, CHAPTER 39 OF THE
LAWS OF KENYA**

IN THE MATTER OF LEAVE FOR EXTENSION OF TIME TO INSTITUTE PROCEEDINGS

BY MAJ. GEN (RTD) ENOCH SASIA AND LT. COL. (RTD) BARNABAS RONO

RULING

By Originating Summons dated 21st September 2012 expressed to be brought under Sections 5 and 6 of Public Authorities Limitation Act, Chapter 39 of the Laws of Kenya Sections 27 and 31 of the Limitation of Actions Act Chapter 22 of the Laws of Kenya, Order 37 Rule 6 of the Civil Procedure Rules 2010 and Article 159 (sic) of the Laws of Kenya, the applicants herein seek orders for leave to institute proceedings against the Attorney General, Chief of Kenya Defence Forces and the Defence Council out of time under the provisions of the above two pieces of legislation.

The summons is supported by an affidavit sworn by **Maj. Gen. (Rtd) Enock Sasia** sworn on 21st September 2012. According to the deponent who is one of the applicants herein, the applicants were under the Commission of Kenya Defence Forces as Assistant Chief of General Staff in charge of various departments at the Defence Headquarters. According to the deponent, arising from a contract made between the Government of Kenya and Union Logistics Limited (Union Logistics) in the year 2008 for the supply of ferry spare parts documents were made to facilitate payment to Union Logistics for the said contract. It transpired according to the deponent that due no fault on the part of the applicants, payment to Union Logistics was over-evaluated by a sum of Kshs. 32 million. Despite the applicants being exonerated from any wrong doing and despite no loss having been occasioned as a result thereof, the applicants were charged with various offences under the Armed Forces Act in respect thereof and were on 15th November 2010 forced to write resignation letters. There followed investigations conducted by the Parliamentary Departmental Committee on Defence and Foreign Relations which Committee summoned the applicants on 3rd March 2011 which Committee they expected to resolve the issue surrounding their forced resignation to conclusion and make recommendations for their reinstatement to the Force. However, there was a delay in completion and presentation of the said report which the applicants contend was not of their own making because Parliament is a government agency whose calendar is beyond their control. According to the applicants, they now believe that the said report is not forthcoming yet the non-presentation of the report is a disability on their side which has put them on limbo on their

next cause of action. They, however intend to institute action against the Attorney General, Chief of Kenya Defence Forces, Chief of Defence for abuse of process of the law, misfeasance in public office, unlawful termination of commission and abuse of office which causes of action are time barred hence the necessity to obtain leave herein.

In his submissions **Mr Chelanga**, learned counsel for the applicants, reiterated the foregoing and contended that the applicants wanted to await the outcome of the decision of the Committee to decide on the course to take and ought not to be penalised for relying on the Parliament since Parliamentary dealings ought not to be trivialised. Relying on the decision in the case of **Gatune vs. The Headmaster, Nairobi Technical High School & Another [1988] KLR 561**, it is submitted that the applicants were engaged with National Assembly hence they ought to be granted leave in respect of their cause of action which arose in November 2010 and lapsed in September 2011 and the present application brought within a year. In his view, learned counsel submitted that the applicants ought not to be driven out of the seat of justice hence the application should be allowed.

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:

(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 November 2010 when they were forced to resign. 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. 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 by the applicants herein 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 **Mbito, 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 be 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). The nearest cause of action to the ones mentioned by the applicants herein would be breach of statutory duty if abuse of office were to be stretched to mean breach of statutory duty. However, there is no allegation at all that the said breach consists of or includes damages in respect of personal injuries to the applicants.

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”.

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 genuinely believed that their grievances could be adequately addressed by Parliament. It is not alleged that they were ignorant of the facts that could lead them to successfully mount legal proceedings. The complaint as I understand them is that they believe the alternative Parliamentary avenue could assist them get reinstated. In my view a genuine but mistaken belief as to the correct cause of action does not amount to ignorance of a fact of a decisive character for the purposes of section 27 aforesaid to warrant the court in extending time to institute legal proceedings.

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. Whereas in these proceedings the same are indicated to be brought by Originating Summons the title to the proceedings read "miscellaneous application" instead of "civil suit". Originating Summons I must reiterate is a Civil Suit and not a Miscellaneous Application. That alone, however, would not have been enough to disallow the application if the same was otherwise merited in light of the provisions of Article 159(2)(d) of the Constitution.

Before I conclude I wish to comment briefly on the decision in **Gatune vs. The Headmaster, Nairobi Technical High School & Another** (supra). In that case it was held that the Attorney General occupies a crucial role in litigation and protracted negotiations with him in form payment of damages are taken seriously and a reasonable lay claimant would feel that by negotiating with him, the Attorney General had invited him to delay court proceedings and that he would not be prejudiced by the delay. The reason for this is to be found in the fact that 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. Therefore where circumstances permit the cause of action which is barred as opposed to being extinguished is capable of being revived. See **Rawal vs. Rawal [1990] KLR 275** and **Iga vs. Makerere University [1972] EA 65.**

In the present case it is not alleged that the Attorney General or any of the intended defendants held any negotiations with the applicants. There is similarly no allegation that the Parliamentary Committee negotiated with the applicants since the applicants have not alleged that any liability attached to the said Committee. That Committee's role, if I understand the applicants well was limited to compiling and tabling its report. Accordingly, it is my view and I so hold that the case cited is distinguishable from the circumstances of the present case.

In the result these summons are unmerited and are dismissed but with no order as to costs.

Dated at Nairobi this 6th day of December 2012

G.V ODUNGA
JUDGE

Delivered in the presence of Mr Chelanga for the Applicants