



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL CASE NO. 628 OF 2007

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

AND

IN THE MATTER OF APPLICATION FOR LEAVE TO FILE SUIT OUT OF TIME

BETWEEN

PRUDENTIAL BUILDING SOCIETY (IN LIQUIDATION)

.....APPLICANT

AND

SIGAL INVESTMENTS LTD

MISON KIPKOTI

JANE KIPKOTI

JAMES MUIRUTI KACHUMBIRA

WILSON KIPKEMBOI KIPKOTI

PAUL KISPANG KOSGEI

**(Estate of the Late PHILIP KIMAIYO KANDIE)
RESPONDENTS**

RULING

Before the court is an application by way of Chamber Summons dated 25th June, 2008. It is premised under Order XXXVI Rule 12 Order LI Rule 17, Section 27 and 28 of Limitations of Actions Act, Sec 3A of Civil Procedure Act and Sec. 80 of Civil Procedure Act. Order XLIV Rule 1. The application is supported by the grounds set forth on the application and further on the supporting affidavit. It seeks the following prayers:-

- 1. That this Honourable court be pleased to vacate and set aside its orders made on 8th May, 2008 and issued on 28th May, 2008.***
- 2. That the Originating Summons dated 3rd September 2007 be dismissed with costs to the respondents.***
- 3. That the costs of this application be provided for.***

It may be appropriate to give a background leading to this application.

The Applicant/Respondent i.e. The Prudential Building Society (In Liquidation) filed an Originating Summons premised under Sec. 27 of the Limitations of Actions Act (Cap. 22 of Laws of Kenya), Sec. 3A of Civil Procedure Act (cap. 21 of Laws of Kenya) Order XXXVI Rule 3C of the Civil procedure Rules (now substituted by Civil Procedure Rules, 2010)

The said Originating Summons sought leave of the court to grant the Applicant/Respondent to file a suit against all the Respondents to recover the advances paid to them on the irregular securities provided for the legal charges executed between the respective parties. The application was allowed by the court on 8th May, 2008.

The present application was then filed. The Respondent/Applicant has opposed the same and has filed a replying affidavit sworn by one Caroline Kemei, an Advocate representing the Respondents' company in Liquidation.

The written submissions were filed and highlighted by both the counsel.

The main issue raised by the Applicant is that the order made by earlier court was without jurisdiction and hence is a nullity without any force of law. The following issues were then submitted for consideration by the court.

- 1. Did the court have jurisdiction under the Limitation of Actions Act to issue the orders issued on 9th May, 2008 copy annexed to the application?**
- 2. What is the effect of lack of substantive jurisdiction?**
- 3. Can the court entertain applications to set aside leave to file suit out of time prior to filing suit?**
- 4. What orders are appropriate?**

In respect of the first issue, it was contended that Sections 27 and 28 of the Limitation of Actions Act (referred to as "*The Act*") give jurisdiction to the court in extending the time prescribed by the Act. The present suit is not an action for damages for negligence, nuisance or breach of duty and that the damages do not include or consist of personal injuries. In my view it might be appropriate to cite relevant part of Sec. 27 of the Act.

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 of written law); and

(b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consists 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.

(3) This section does not exclude or otherwise effect –

(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 of 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.

In short, what is contended is that the application before the court was under Sec. 27 of the Act which relates exclusively to actions under tort. Here is the action which is solely based on issues under contract and the court did not have any substantive authority to grant the order sought in the Originating Summons. The order amounts to nothing having been granted without jurisdiction.

It is further submitted that the issue raised is of substantive law and not of the fact and that issue of law need not await the trial to be canvassed and decided.

The Respondent's company relied upon the provisions of Order XLIX Rule 5 of the substituted Civil Procedure Rules. However, I may agree with the submissions by the Applicant that the said provision only applies to any act or proceedings under the Rules and that it cannot apply to the process of Limitation provided by an Act of Parliament. Sec. 3A of the Civil Procedure Act was relied upon and the court was urged to uphold the order so as to achieve ends of justice. Moreover, Secs. 1A and of the Civil Procedure Act were cited to buttress the provision of Sec. 3A of Civil Procedure Act

Lastly, it was urged that the mention of Sec. 27 of the Act could be taken as a typographical error and the same can be amended because the court has inherent jurisdiction to amend the pleadings at any time. The error which did not catch the eyes of the Applicant's counsel as well as of the Court is not fatal and the court can amend the mention of Sec. 27 to read Sec. 26 of the Act.

I have perused the affidavit in support of the Originating Summons dated 5th September, 2007 and do note that the averments of irregular payments/advances were made. The payments so made can be covered under mistake and/or fraud which, according to the Respondents' Company were discovered on investigation carried out after the order whereby the company was placed under statutory management. Sec. 26 of the Act, does provide that period of Limitation does not begin to run until the Plaintiff has discovered the mistake etc or could with reasonable diligence have discovered it.

I do agree that the mention of Sec. 27 was definitely not appropriate and no order as granted can be given relying on those provisions but the application also indicated other provisions of law, specially Sec. 3A of the Civil Procedure Act, which grants inherent power to the court. As of now, this court also has the additional powers under Secs. 1A and 1B of the said Act. To crown all, Article 159(2)(d) of the Constitution enjoins the court to administer justice without undue regard to procedural technicality. I should also quote Order L Rule 12 of the substituted Civil Procedure Rules and Order 51 Rule 10 of Civil Procedure Rules 2010. The latter provision has added a provision, namely Sub-rule 2, which stipulates:

“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”

In my considered view the substance of the Originating Summons was not affected by mention of Sec. 27 of the Limitation of Actions Act. I shall thus hesitate to declare the order in question as a nullity or without jurisdiction and do hold that the error in mentioning Sec. 27 amongst the then legal provisions in the application is not fatal.

I thus dismiss the application dated 25th June, 2008 with no orders as to costs.

I am not pleased with delay in getting this application heard after almost two years.

Orders accordingly.

Dated, signed and delivered at Nairobi this 24th day of **October, 2011**

K. H. RAWAL
JUDGE
24.10.2010