



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc. Appli. 719 of 2007 (O.S)**

**WILFRED CHUMAKEMER .....APPLICANT**

**V E R S U S**

**ODDVAR JACOBSEN .....RESPONDENT**

**R U L I N G**

It was held by the Court of Appeal in the case of Gathoni –vs- Kenya Co-operative Creameries Ltd, [1982] eKLR at page 1, that for an application for leave to bring suit out of time to be allowed under section 27 of the Limitation of Actions Act, Cap. 22, it must be shown, to the satisfaction of the court, that failure to sue within time was due to lack of knowledge of certain material facts. The Applicant must also show to the satisfaction of the court that he had taken all reasonable steps and sought appropriate advice in respect of the facts.

In the application before me the Applicant has deponed in paragraph 5 of the supporting affidavit that the defendant in the intended suit is a foreigner, and that during the limitation period he, the Applicant, had reasonably believed that the intended defendant had returned to his country of origin (Norway) because his contract of employment with his employer had expired. That is why he did not file suit. It was only after “reasonable, diligent and thorough investigations” that he managed to locate him in Nairobi at the beginning of May, 2007.

Whether a defendant in an intended suit is within the jurisdiction of the court is a material fact of a decisive character. The fact will inform the applicant whether or not to file the suit. In the present case, the Applicant did not have knowledge of the fact that the defendant in the intended suit was still within the jurisdiction of the court until after expiry (by about 4 months) of the period of limitation. I am satisfied that he had taken all reasonable steps to find out if the defendant in the intended suit was still within jurisdiction.

I will in the circumstances allow the application by originating summons dated 19<sup>th</sup> September, 2007 and grant the leave sought. The Applicant may file the intended suit within fourteen (14) days of delivery of this ruling. Costs of the application shall be in the intended suit. It is so ordered.

DATED AT NAIROBI THIS 14<sup>TH</sup> DAY OF MAY, 2008

**H. P. G. WAWERU**

**J U D G E**

DELIVERED THIS 16<sup>TH</sup> DAY OF MAY, 2008