

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case Misc 81 of 2006

GABRIEL NJUGUNA MWANGI.....APPLICANT

VERSUS

MT. KENYA WHOLESALERS.....RESPONDENT

RULING

Gabriel Njuguna Mwangi, the applicant herein has come to this court under **Section 27** of the limitation of Actions Act seeking orders for leave to file his suit against the Respondent out of time. According to the grounds stated on the body of the application, it is contended that the applicant has a claim against the respondent for breach of contract and that 6 years have elapsed since the cause of action accrued and that material facts giving rise to the cause of action were not within the knowledge of the applicant at the time of the effluxion of time.

The grounds stated on the body of the application are buttressed by an affidavit sworn by the applicant in which He explains how his cause of action arose.

It is evident that the applicant's intended action is founded on contract. However, **Section 27** of the Limitation of Actions only provides for extension of time in the case of actions founded on tort. The application for extension of time in the case of contract cannot therefore lie under **Section 27** of the Limitation of Actions Act. Such an application can only properly be brought under **Section 26** of the Limitation of Actions Act where the action is based upon the fraud of the Defendant or his agent and the right of action is concealed by the fraud of any such person. In such a situation "the period of Limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it."

It would appear from the affidavit that the applicant claims that the Respondent inflated the prices in the invoices whilst supplying him with cigarettes between the years 1995 and 1998. The applicant claims He only discovered this in November 2003 and that since then He has been pursuing the matter with the police. I have considered this explanation but do find that the applicant could with reasonable diligence have discovered the B.A.T. recommended prices and the V.A.T. rate.

Moreover it is more than 3 years since the applicant discovered the alleged fraud and his explanation for the delay in bringing this application is not satisfactory.

I therefore find that this application is defective and also lacks merit. It is accordingly rejected.

Dated, signed and delivered this 13th day of February 2007.

H. M. OKWENGU

JUDGE