



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 715 of 2006

POLO WINES & FOODS LIMITED..... PLAINTIFF

VERSUS

EXPRESS KENYA LIMITEDDEFENDANT

RULING

This is an ex parte originating summons filed on 24.12.2006 under the Limitation of Actions Act for extension of time within which to bring an action against the respondent. The applicant has also invoked Order XXXVI Rule 3 C(1) of the Civil Procedure Rules, Section 3A 63(e) of the Civil Procedure Act and all enabling provisions of the Law. The application is supported by an affidavit of one Mayur Shah a director of the applicant. In the affidavit it is deponed that on or around 26.2.1996 the applicant with the consent of the respondent left 100 cartons and 7 bottles of whisky in the respondent's warehouse for storage purposes. On the said date the aforesaid goods while in the possession of the respondent were stolen from the said warehouse. It is also deponed that the theft was as a result of the negligence of the respondent. It is then deponed that the applicant has been demanding refund of the said goods in vain and that the delay in prosecuting the matter was as a result of several promises by the respondent that they were investigating the matter the results whereof have not been disclosed to the applicant. In the premises, the applicant prays for leave to file suit against the respondent out of time.

The applicant's claim is based in the tort of negligence and fraudulent misrepresentation. Under Section 4(2) of the Limitation of Actions Act such an action may not be brought after the end of three years from the date on which the cause of action accrued and if in contract at the end of 6 years. In this case the applicant's action should have been filed three or 6 years after 26.2.1996. It was not for reasons given by the applicant. But is there a power to enlarge the time within which the action should have been instituted?

Section 27(i) is in the following terms:-

“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 of a 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 action;

and

(d) the requirements of subsection (2) are fulfilled in relation to the cause of action”.

In the matter at hand, it is clear that the damages claimed by the applicant are not for the negligence, nuisance or breach of duty consisting of or including damages in respect of personal injuries of the applicant. The damages claimed by the applicant are solely as a result of theft due to the negligence of the respondent. Damages for personal injuries are not claimed. In those premises the applicant has not satisfied the requirements of Section 27 (1).

Even if damages for personal injuries had been claimed, the supporting affidavit of the applicant in my view has not fulfilled the requirements of subsection (2) of Section 27 of the Limitation of Actions Act.

In the end, the Originating Summons is declined with no order as to costs.

Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY, 2007.

F. AZANGALALA

JUDGE

Read in the presence of:-

Onindo for the applicant.

F. AZANGALALA

JUDGE

17/5/07