

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 743 of 2006

**IN THE MATTER OF: AN APPLICATION UNDER SECTIONS 27 & 28 OF THE
LIMITATION ACT FOR LEAVE TO FILE SUIT OUT OF TIME**

BETWEEN

MARY WANGARI NGUGI PLAINTIFF

versus

SAMMY MWAURA NJAU 1ST DEFENDANT

HENRY C. NGOTHO 2ND DEFENDANT

RULING

This is an application by way of an Originating Summons brought under Order XXXIV Rule 1 and Rule 3(c) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and Sections 27 and 28 of the Limitation of Actions Act praying for orders that the Applicant be granted leave to file suit out of time.

The Applicant who claims to be a personal representative of the late Michael Matata said to have died on 20th June, 1994 filed HCCC No.3968 of 1994 for compensation. That suit was dismissed for want of prosecution on 6th July, 2001 and an application to reinstate the same was subsequently dismissed late the year 2003. This originating summons is dated 30th August, 2006 and the exparte applicant states in her affidavit that the advocate she had instructed never told her of the progress of the case until she learned of the position after the application to reinstate her case had been dismissed. She says she went to the Advocates Complaints Commission and her current advocates M/S Nyandieka & Associates who advised her to file this application.

The Applicant blames her former Advocates M/S C.N. Kihara & Co., Advocates who she says breached their duty owed to her and failed to prosecute the case diligently and later failed to inform her of the said dismissal.

Must complainants always be believed? Is every one of them truthful? I think those are relevant questions to be asked when complainants blame their previous advocates for dismissal of their cases and the advocates complained against are not given the opportunity to respond to the allegations against them.

In the absence of reaction from M/s C.N. Kihara therefore, the Applicant's case is that mistakes of her former Advocates should not be visited upon her.

Perhaps I would have viewed this application differently had there been no dismissed application for reinstatement of the case. My learned brother, Lenaola J., gave a reasoned ruling when dismissing the Applicant's application for reinstatement and I find no good reason saying in this ruling what would seem to be the contrary, even though this is a separate application.

Another reason why I would be reluctant to allow the Applicant's application is the fact that up to now, the only document she can rely upon to claim being a personal representative of the late Michael

Matata is a Limited Grant of Letter of Administration “and colligenda bona” dated 20th September, 1994. More than twelve years to-date, the Applicant does not have a full grant of letters of administration. Does she mean to say no full grant has been obtained in the estate of Michael Matata Lelo to-date. If such a grant has been obtained, who obtained it and why is he/she not coming forward to get the Court orders the Applicant is asking for in this case? Since the Limited Grant the Applicant has is “Limited to the purpose only of collecting and getting in and receiving the estate and doing such things as be necessary for the preservation of the same”, is that not giving opportunity to the applicant intermeddle with the estate of the deceased when the Applicant is a person who needs more than 12 years to obtain a full grant of letters of administration?

From what I am saying, I feel I should not grant this originating summons dated 30th August, 2004 and the same is hereby dismissed.

Dated and delivered at Nairobi this 3rd of May, 2007.

J.M. KHAMONI

JUDGE