



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1178 of 2004

DOMINIC NJUGUNA WAIRIMU.....PLAINTIFF

VERSUS

JOSEPH WAMBUGU KIBE.....DEFENDANT

RULING

The background information to the application is that the Plaintiff **DOMINIC NJUGUNA WAIRIMU** filed **NAIROBI HCCC MISC.APPLICATION NO. 1055 OF 2004** by way of Chamber Summons under Section 3A of the Civil Procedure Act seeking orders that the applicant be given unconditional leave to file suit out of time, costs be in the cause and the court do give a time frame within which to file the plaint. From the copy annexed to the application as annexure NMI the application is dated 6.8.2004 and filed on 9.8.2004. Apparently orders were given though none has been exhibited. This gave birth to the filing of the suit herein. The plaint is dated 28.10.2004 and filed on 1.11.2004. There is an amended defence on the record dated 20.1.2005 and filed on 21.10.2005. The reply to defence is dated 12.11.2004 and filed on 14.12.2004.

The defendant has filed the application subject of this ruling by way of Chamber Summons under Order VI rule 13 (1) (d) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law seeking orders that the plaint dated 28th October, 2004 be struck out, costs of the application and the main suit be borne by the plaintiff and any other or further order be made as this honourable court may deem fit to grant. The grounds in support is a purely point of law. It is to the effect that the proper procedure for seeking leave to file suit out of time envisaged by Section 27, 28 of the limitation of actions Act is not a Chamber Summons but an originating summons under Order 36 rule 3(c) Civil Procedure Rules. That this being the case the suit on record is a nullity as it was not procedurally presented as shown by the legal authorities cited to court.

In response Counsel for the plaintiff opposed the application on the ground that the defendant applicant should have moved to challenge the order granting leave to file the suit instead of attacking the suit. As long as that order is not set aside it is in force and as long as it remains in force the suit has validity. They further content that if the applicant has any grievance then they should raise it at the time of trial.

In reply Counsel for the applicant submitted that they are not attacking the merits of the order granting leave but the procedure followed in obtaining the same. Further that the Plaintiff will not be left remediless as and he will have an opportunity to commence proper proceedings to file suit out of time after the current one is struck out.

On the courts assessment of the facts herein, there is no dispute that the suit herein is a by product of an order for extension of time to file suit out of time. The subject matter of the proceedings is a claim for damages arising from a claim in tort based on the tort of negligence. The action was therefore subject to

the provisions of the limitation of actions Act. Cap.22 laws of Kenya

tion 5(2) thereof states “*An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.*”

The operation word here is “may”. It is the word which creates an avenue through which an application for extension of time to file suit out of time can be made. In fact Section 27(1) (b) provides specifically that this is not a defence, meaning, expiry of 3 years in favour of a tort feisor is not an absolute defence. The Section states:-

27(1) (b) “*Section 4(2) does not afford a defence to an action founded on tort where: 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 requirement of sub section (2) are fulfilled in relation to the cause of action”

Section 28(1) (2) provides the ingredients to be satisfied in order to qualify for leave.

28(1) “*an application for the leave of the court for the purposes of Section 27 shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.*

(2) where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates it but only if on evidence adduced by or on behalf of the plaintiff, it appears to the court that if such an action were brought forthwith and the like, evidence were adduced in that action the evidence would in the absence of any evidence to the contrary, be sufficient:-

(a) to establish that cause of action, apart from any defence under Section 4(2) and

(b) to fulfill the requirements of Section 27(2) in relation to the cause of action”

The reason why the Court has set out the provisions of Section 4(2), 27 and 28(1) (2) of Cap.22 Laws of Kenya simply to show that the plaintiff was within his rights and the law in seeking to file suit out of time. It is also to confirm the defendant/applicant’s assertion that they are not attacking the merits of the orders granting leave but only the procedure used to get those orders.

The procedure used by the plaintiff/respondent to seek leave is a Chamber Summons brought under Section 3A of the Civil Procedure Act as shown by annexure NM1. Section 3A of the Civil Procedure Act provides “*nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court”*

It is now trite law that this saving of inherent powers of the court applies only where there is no provision catering for the particular situation sought to be remedied. In other words the procedure adopted by the plaintiff/respondent can only be shielded from the demands of the defendant applicant is there if no provision in law providing for contrary procedure. The stand of the defendant applicant is that there is such a procedure provided for. The court was referred to order 36 rule 3(c) (1) and (2) Civil Procedure Rules. It states “*3 c(1) An application under Section 27 of the limitation of Actions Act made before filing a suit shall be made ex parte by originating summons supported by affidavit*

(2) Any such application made after the filing of a suit shall be made exparte by summons in that suit supported by affidavit”.

Applying this to the facts herein it is clear that the method used by the plaintiff/respondent was applicable where a suit had already been filed. Since no suit had been filed the procedure in sub rule 1 was the one which should have been employed by the plaintiff/respondent.

He failed to do so and since there is no qualification under that rule, he invites the sanction of this court as shown by the decision of the courts in the cases cited to this court namely: The case of **KENYANGA VERSUS OMBWORI [2001] 2 E.A 416, OMEGA ENTERPRISES KENYA LTD VERSUS KENYA TOURIST DEVELOPMENT CORPORATION AND 2 OTHERS NAIROBI C.A. 59/1993 AND NDATHO VERSUS ITUMO AND 2 OTHERS [2002] 2 KLR 637** all of which are Court of Appeal decisions where proceedings originated through a wrong process was thrown out. The current one is no exception. All is not lost to the plaintiff as he has room to properly originate his claim. The application dated 23rd March 2005 and filed on 1.4.2005 has merit. The suit dated 28th October 2004 and filed on 1st November, 2004 been found to be incompetent. The same is struck out with leave to the Plaintiff/respondent to initiate fresh proceedings through originating summons for leave to file suit out of time. The defendant/applicant will have costs of both the application and the suit.

DATED, READ AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY, 2007.

R. NAMBUYE

JUDGE