



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI**

MISC APPLI 225 OF 2005

ROBINSON KARURI

PETER MWAKA MULAVU

LUCY NJERI MAINGI

VICTOR KOOME MUGAMBI

ANNE WAMBUI NYAGA

JOSEPH IIRUNGU BARAGU

PHYLIS W. KAHURIA

DAVID KULUSA KASIVWAU

SARAH K. KAHURIA

ZEDLA K. MSABENI

ELIAZAAR KIMANI WAKARALIA

JOYCE WAKESHOAPPLICANTS

VERSUS

KENYA RAILWAY CORPORATIONDEFENDANT

RULING

By their Application of the 3.2.2005 the Applicants seek orders that an order be granted to extend the time by a period of one month, to enable the Plaintiff either jointly or individually to file suit against the Defendant herein.

The Application is brought under the provision of O.49 Rule 5 of the Civil Procedure, which states: -

“ Where a limited time has been fixed for doing any act or taking any proceeding under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders

otherwise.”

It is not at first glance clear what the Applicants want. However, in the supporting affidavit of the first Applicant reference is made to the Ruling of the Mr. Justice Ojwang of the 23.1.2004 in which he struck out a previous suit of the Applicants for failure to comply with the provisions of section 87(a) of the Kenya Railway Corporation Act (Cap 397) which states as follows: -

(a) The action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Managing Director by the Plaintiff or his agent; ”

In order to put the matters right the Applicant served the Notice on the Defendant dated 17.3.2004 and 27.4.2004 respectively to comply with the provisions of section 87(a). Consequent upon the issue of this Notice no suit was filed. This it appears was because section 87 (b) of the said Act states as follows: -

(b) The action or legal proceedings shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damages, within six months next after the cessation thereof”

The act complained of by the Applicants had occurred over a year before the Notices were filed and thus the Applicants had failed to comply with the period allowed to them to institute a suit.

Miss. Mutua submitted that the court had power to enlarge the time for filing the suit and this was what the court was being asked to do.

Miss. Onyango for the Respondent opposed the application and submitted that O.49 Rule 5 did not apply and that in any event the Application had been brought in February, 2005 some 8 to 9 months after the Notices were issued.

She relied on the case of **Nzoia Sugar Company Ltd versus Kenya Ports Authority {1990} KLR 319** in which Githinji J (as he then was) held that although a limitation period provided for in an Act of Parliament (in that case the Kenya Ports Authority Act) could be extended if it fell within the provisions of the part III of the Limitation Act by virtue of section 31 of that Act. In that case the cause of action was not one contemplated by the provisions of the section contained in part III.

This present application is not brought under the provision of the Limitation Act but under the provisions of O.49 rule 5. However this rule only applies to enlargement of time for acts done under the Rules. This clearly does not apply in this case. Can the Applicant apply under part III of the Limitation Act?

As Mr. justice Githinji held section 31 of the Act incorporates the provisions of Part III into any written law, which prescribes a limitation period. In the instant case is section 87(b) referred to above.

The Application as drafted does not indicate any of the reasons for an extension of time set out in Part III and even if I were to allow the Application as one brought under the provisions of Part III I am not able to grant the relief sought.

In the result I have no alternative but to dismiss this application with costs to the Respondent.

Dated and delivered at Nairobi this 20th day of July, 2005

P.J. RANSLEY

JUDGE