

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 315 OF 1986 (OS)

JOSHUA OBUDHO OTIENO.....APPLICANT

-VERSUS-

THE ATTORNEY- GENERAL.....RESPONDENT

RULING

The applicant's Originating Summons dated and filed on 13th June, 2005 was brought under Order XXXVI, rule 3C(2) of the Civil Procedure Rules, and sections 22, 27 and 28 of the Limitation of Actions Act (Cap.22). His prayers:

(i) that, having suffered mental disability from 1993 until December, 2003 the applicant was at liberty at any time before the end of six years from December, 2003 to commence proceedings to recover interest payable pursuant to the decree and certificate of order against the Government issued herein on 12th January, 2004;

(ii) that costs of this application be provided for.

The application is premised on several grounds. One of these grounds is that in mid-1993 and before the expiry of six years from the date of judgement (20th December, 1988) and decree (19th May, 1989), the applicant became mentally ill and he migrated to Tanzania. He did not abandon his claim. He lacked legal capacity during the period of his mental disability, from 1993 to 2003, and so the limitation period for advancing his claim, during that period did not run as against him. In December, 2003 a psychiatrist in Tanzania examined the applicant and confirmed that he had regained his mental capacity. Although he received his medical report from the psychiatrist in 2004, the applicant has not wished to return to the country. It is stated that the applicant is entitled under s.22 of the Limitation of Actions Act (Cap.22), at any time before the end of 6 years from December, 2003 to commence proceedings to recover interest payable, pursuant to the decree and certificate of order against the Government, both issued herein. The applicant is statutorily barred from laying any form of execution against the Government for recovery of the interest, unless leave is granted by the Court.

The application is supported by the affidavit of **Mutavi I. Maseki**, the advocate with the conduct of this matter on behalf of the applicant. To this affidavit are annexed supporting instruments such as the Court's decree issued on 19th May, 1989; the psychiatric consultant's confidential medical report dated 22nd December, 2003; the certificate of order against the Government issued on 12th January, 2004; and correspondence between the applicant's advocates and the office of the Attorney-General.

When this matter came up before me on 12th October, 2005 **Mr. Maseki** appeared for the applicant, while **Mr. Ombwayo**, who had seen the listing in the cause list purely by chance, appeared for the respondent. To his presence, **Mr. Maseki** raised objections, on the basis that the matter fell to be determined *ex parte* under s.27 of the Limitation of Actions Act. **Mr. Ombwayo** noted what is common ground, that this is a matter in which judgement had long been delivered, and the decretal amount had been paid in 1993, so that the only claim now being made was *interest*. I directed that if the State Law Office would have any objection to the applicant's claim of interest, then the same must be articulated during submissions on the substantive application, and it was not necessary at this preliminary, *ex parte* stage for the Attorney-General's representative to be heard.

Learned counsel, **Mr. Maseki**, stated the purpose of the applicant's Originating Summons of 13th June, 2005 as to *seek extension of time* for the applicant to proceed against the Government, to recover interest on the basis of the Court decree. From the decree, the principal sum of Kshs.618,500/= had been paid to the applicant, but no interest had been paid. The decree itself was based on the *consent judgement* of 20th December, 1988 which had provided for *interest at 12%*, until payment in full. Although the plaintiff had requested interest payment, following the issuance of the decree, this had not been paid.

The purpose of this application is, I think, clear and, *prima facie* attended with merit. It is, *prima facie*, entirely justified that the applicant should seek to be paid interest on the decretal sum. It was owing to lack of legal capacity that he did not pursue the claim earlier.

Accordingly, I hereby allow the application by Originating Summons of 13th June, 2005 and order that the applicant/decreet holder is at liberty at any time before the end of six years from December, 2003 to commence proceedings to recover interest payable pursuant to the decree and certificate of order against the Government mentioned herein. The costs shall be in the cause.

DATED and DELIVERED at Nairobi this 28th day of October, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Applicant Decree-holder: Mr. Mutavi Maseki, instructed by M/s. Maseki & Co. Advocates