



REPUBLIC OF KENYA



KENYA LAW
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Kenpipe Co-operative Saving and Credit Society v Githinji (Civil Appeal 612 of 2018) [2024] KEHC 143 (KLR) (Civ) (19 January 2024) (Ruling)

Neutral citation: [2024] KEHC 143 (KLR)

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

CIVIL

CIVIL APPEAL 612 OF 2018

AN ONGERI & HI ONG'UDI, JJ

JANUARY 19, 2024

BETWEEN

KENPIPE CO-OPERATIVE SAVING AND CREDIT SOCIETY APPELLANT

AND

DANIEL WAIGANJO GITHINJI RESPONDENT

RULING

1. The application dated 18/8/2023 is seeking review of this court's judgment delivered on 6/7/2023.
2. The application is based on the following grounds;
 - (i) That this honourable court delivered a judgment on 6th July 2023 allowing the appeal herein.
 - (ii) That the Respondent seeks a review of the said judgment on grounds that the claim at the Cooperative Tribunal was time-barred under Section 4 of the *Limitation of Actions Act* thus denying the said Tribunal and this honourable court the jurisdiction to entertain the said claim and the appeal herein.
 - (iii) That the alleged sums of money which the appellant sought to recover were said to have been withdrawn on 5/4/2006, 5/1/2007, 25/1/2007 and 5/2/2007.
 - (iv) That the claim (Plaint) at the Cooperative Tribunal was filed on 15th July 2016 (roughly 10 years later) thus making the claim time-barred under Section 4(1) (d) of the *Limitation of Actions Act*, Cap 22.
 - (v) That the respondent's advocates made a mistake as they did not advise him on this provision of the law, thus subjecting him to prejudice and inability to find evidence and defend himself better in light of the length of time taken before the claim was filed.



- (vi) That an innocent litigant should not suffer due to the mistake of his advocates and it is important for the court's judgment herein to be reviewed in the context of the said provision of the *Limitation of Actions Act*.
 - (vii) That the respondent/applicant requests the court to review the issue of time limitation and consider whether this court and the Cooperative Tribunal had jurisdiction to entertain this suit and the appeal herein.
 - (viii) That we humbly believe that this court and the Cooperative Tribunal lacked such jurisdiction and this constitutes an error which is apparent on the face of the record which can be reviewed and corrected by this honourable court.
 - (ix) That it is in the best interest of justice and all fairness that this application be allowed and that it be heard during this August vacation.
 - (x) That this application has been made without unreasonable and/or undue delay.
3. The application is supported by the affidavit of M. N. Nganga in which it is deposed that this honourable court delivered judgment on 6th July 2023 allowing the appeal herein.
 4. That the respondent/applicant herein humbly seeks a review of the said judgment on grounds that the claim at the Cooperative Tribunal and this subsequent appeal were time-barred under Section 4 of the Limitations of Actions Act.
 5. That having a new advocate on record, the Respondent/Applicant believes that the Cooperative Tribunal as well as this court lacked jurisdiction to entertain the appellant/ respondent's claim and appeal due to effluxion of time and limitation of time.
 6. That the alleged sums of money which the appellant sought to recover were said to have been withdrawn on 5/4/2006, 5/1/2007, 25/1/2007 and 5/2/2007.
 7. That the claim (plaint) at the Cooperative Tribunal was filed on 15th July 2016 (roughly 10 years later) thus making the claim time-barred under Section 4(1) (d) of the *Limitation of Actions Act*, Cap. 22.
 8. That the respondent's/applicant's previous advocates made a mistake as they did not advise him on this provision of the law, thus subjecting him to prejudice and inability to find evidence and defend himself better in light of the length of time taken before the claim was filed.
 9. That an innocent litigant should not suffer due to the mistake of his advocates and it is important for the court's judgment herein to be reviewed in the context of the said provisions of the Limitation of Actions Act.
 10. That the Respondent/Applicant now requests this honourable court to review the issue of time limitation and consider whether this court and the Cooperative Tribunal had jurisdiction to entertain this suit and the appeal herein.
 11. That it is the honest belief of the Respondent/Applicant that this honourable court and the Cooperative Tribunal lacked such jurisdiction and this constitutes an error which is apparent on the face of the record which can be reviewed and corrected by this honourable court.
 12. The appellant/Respondent filed a replying affidavit dated 23/10/2023 opposing the application in which it is deposed that the respondent/applicant is seeking for orders of stay of execution pending hearing and determination of the application and review of judgement delivered on 6/7/2023.



13. The Appellant deponed that a stay of execution is expressly provided for under Order 42 of the Civil Procedure Rules 2020 when an appeal has been lodged against a judgement and or decree or there is an intended appeal. However, there is no provision of the law under Order 45 of the Civil Procedure Rules that provides for a stay of execution of judgement and or decree pending the hearing of an application for review.
14. He deponed further that the applicant has also not disclosed how he is likely to suffer substantial loss if the orders of stay are not granted since the Appellant/respondent has not threatened him with any execution process. That the applicant has not proposed any security pending the hearing and determination of this application as required by law.
15. On review he averred that the issues raised by the applicant are purely issues of law that can only be canvassed on appeal and not through a review application since the same does not meet the ingredients and or threshold for review of a judgement. The applicant's application is a ploy to defeating ends of justice, unfair and detrimental to the Appellant/respondent herein with an intention to deny it the opportunity to enjoy the fruits of its judgement and the same should be dismissed.
16. The parties filed written submissions as follows; the applicant submitted that he seeks a review on the grounds that the claim at the Cooperative Tribunal was time barred under Section 4 of the Limitation of Actions Act thus denying the said Tribunal and consequently this Honorable Court jurisdiction to entertain the said Claim and the Appeal herein.
17. The alleged sums of money which the Appellant sought to recover were withdrawn on 5/4/2006, 5/1/2007, 25/1/2007 and 5/2/2007. The Claim (Plaint) at the Cooperative Tribunal was filed on 15/7/2016, roughly 10 years later thus making the Claim time-barred under section 4 (1), (d) of the Limitation of Actions Act, Cap. 22. It was therefore his submission that this court and the Cooperative Tribunal lacked the requisite jurisdiction to entertain this matter and this constitutes an error on the face of the record which can be corrected by way of review.
18. The applicant further submitted that the application herein was made without unreasonable and/or undue delay. Being that the Judgement herein was delivered on 6/7/2023 and the instant Application made on 18/8/2023, the same demonstrates the Respondent/Applicant's vigilance at sourcing for new Advocates in keenness of prosecuting this matter, unlike the Appellant/Respondent who waited 10 years before filing their Claim. In support of his argument the applicant cited Benson Makori Makworo v Nairobi Metropolitan Services & 2 Others [2022] eKLR where the learned judge cited the Court of Appeal in Nakuru Civil Appeal No. 119 Of 2017 Public Service Commission & 2 Others v Eric Cheruiyot & 16 Others consolidated with Civil Appeal No. 139 Of 2017 County Government of Embu & Another v Eric Cheruiyot & 15 Others (Unreported) in a decision rendered on 8th February, 2022 on the doctrine of jurisdiction in general as follows: -

“ 37. The locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel Lillian S' v. Caltex Oil Kenya Ltd* [1989] 1 KLR 1. Nyarangi, -IA, relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows:

... jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.



38. A decision made by a court of law without proper jurisdiction amount to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae."
19. The Appellant/respondent alternatively argued that the applicant delayed in filing the application herein as judgement was entered on 6/7/2023 whereas this application for stay was made on 18/8/2023 and hence inordinate.
20. The respondent further contended that the applicant has failed to prove that there is discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicants or could not be produced by them during the hearing or at the time when the decree was passed. The application does not disclose any new evidence or matter that was not within their knowledge as at the time of commencing the suit and hearing of the suit and passing of judgement. Instead, the ground as pleaded in the application qualifies as a ground for appeal and not for review.
21. The respondent argued that if an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of order 45 rule 1 of the *Civil Procedure Rules*, 2010.
22. The issues for determination in the application dated 18/8/2023 are as follows;
- (i) Whether the suit and the appeal are statute time barred.
 - (ii) Whether the judgment and decree should be reviewed and/or set aside.
23. On the issue as to whether the suit and appeal are barred by statute, we find that the respondent/applicant did not raise the said issue for determination during the hearing at the Tribunal and also during the hearing of the appeal.
24. We find that the Respondent/Applicant failed to raise the said issue in his pleadings as required by Order 2 rule 4 of the *Civil Procedure Rules* and he is estopped from raising it at this stage.
25. Order 2 rule 4 of the *Civil Procedure* provides that:
- "4. A party shall in any pleading subsequent to a plaint plead specifically any
 - (1) matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statue of Limitation or any fact showing illegality –
 - (a) which he alleges, makes any claim or defence of the opposite party not maintainable;
 - (b) which, if not specifically pleaded, might take the opposite party by surprise; or
 - (c) which raised issues of fact not arising out of the preceding pleading"
26. A party relying on limitation should specifically plead it. If the defence is taken, it is up to the plaintiff to bring his case within any of the exceptions to the *Limitation of Actions Act* or other statute of limitation as may be the case.
27. We find that there are good reasons for the position of the law that the defence of limitation should be pleaded specifically as such;



- (i) To avoid ambush upon or taking the plaintiff by surprise on such a fundamental issue as limitation of actions.
 - (ii) To notify the Plaintiff of the defence of limitation; in effect to tell the plaintiff that his claim is not maintainable in law.
 - (iii) To give the plaintiff an opportunity to plead such facts as are necessary to bring his claim within the exception of Section 27 of the Limitation of Actions Act. Ordinarily, he will do so in his reply to defence.
28. We therefore find that the Appellant failed to plead the issue that the suit was statute time barred and he cannot raise it at this stage.
29. On the issue as to whether the judgment and decree should be reviewed, the governing provision of review is as follows; Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules* provides as follows:-

Section 80. Review

“ Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

[Order 45, rule 1.] Application for review of decree or order.

“ 1.

(1) Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court



which passed the decree or made the order without unreasonable delay.

- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”

30. We find that there is no basis for review. The said issue of the alleged limitation of actions was within the knowledge of the Respondent/Applicant and he failed to raise it.

31. We find that the application dated 18/8/2023 lacks in merit and the same is dismissed with costs to the appellant/respondent.

DATED AND SIGNED ON THIS 18TH DAY OF JANUARY 2024 AT MILIMANI NAIROBI.

DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF JANUARY, 2024.

H. I ONG’UDI

JUDGE OF THE HIGH COURT

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A. N. ONGERI

JUDGE OF THE HIGH COURT

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