



Raja Material Supplies Limited v Mutegi & another (Civil Appeal E009 of 2021) [2024] KEHC 7228 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7228 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E009 OF 2021**

JM OMIDO, J

JUNE 20, 2024

BETWEEN

RAJA MATERIAL SUPPLIES LIMITED APPELLANT

AND

LAMECH MBAKA MUTEGI 1ST RESPONDENT

MILICENT NYABOKE SWANYA 2ND RESPONDENT

(Being an Appeal from the Ruling and Order of Hon. S. K. Arome, Resident Magistrate delivered on 27th April, 2017 in Kiambu CMCC Misc. Application No. 6 of 2017)

JUDGMENT

1. This appeal was preferred by Raja Material Supplies Limited (hereinafter referred to as “the Appellant”) against the ruling and order of Hon. S. K. Arome, Resident Magistrate rendered on April 27, 2017 *vide* which the Originating Summons dated February 8, 2017 was allowed as prayed.
2. Effectively, the orders that were granted by Hon. Arome were as follows.
 1. That the limitation period within which to file for the cause of action in this suit be and is hereby extended.
 2. That the Applicant to file the intended suit within 15 days.
 3. That costs be in the cause.
3. The grounds of appeal presented by the Appellant in the Memorandum of Appeal dated 12th January, 2021 are as follows:
 1. That the Learned Magistrate erred in law and in fact in purporting to extend the limitation period within which to file a cause of action in the suit whereas the said extension does not fall



under the ambit of that which is permissible and envisaged under section 4(2), 27, 28 and 30 of the [Limitation of Actions Act](#), chapter 22 Laws of Kenya.

2. That the Learned Magistrate erred in law and in fact in granting the Respondents leave to file their claim in Civil Suit No. 246 of 2017; *Lamech Mbaka Mutegi & another v Raja Material Supplies* in the Chief Magistrate's Court sitting in Kiambu, seeking damages for material damage out of time despite the fact that the said claim is not one seeking damages for personal injury and therefore, the cause of action arising therefrom is excluded from that category for which extension of time is permissible as is ably provided under section 27 of the [Limitation of Actions Act](#), chapter 22 Laws of Kenya.
4. Parties in the appeal filed their respective submissions. I have considered the grounds of appeal and the rival submissions. I have also perused the authorities relied upon by the parties. What is discernible from the record is that subsequent to obtaining an order to extend the limitation period within which to file the (then) intended suit, the Respondent proceeded to institute Kiambu Civil Suit No. 246 of 2017; *Lamech Mbaka Mutegi & another v Raja Material Supplies*. The position of the said suit cannot be ascertained from the material before me.
5. From the record, the issue for determination is whether the Learned Magistrate erred in law and in fact in granting the Respondent extension of the limitation period within which to file the above suit.
6. The application that gave rise to the ruling and order from which the instant appeal is preferred was an Originating Summons dated 8th February, 2017, expressed to be brought under order 37 rule 6(1) of the [Civil Procedure Rules](#) and sections 26 and 27 of the [Limitation of Actions Act](#), Chapter 22 of the Laws of Kenya.
7. By its very nature, an application presented under Section 26 and 27 of the [Limitation of Actions Act](#) is one that is *ex parte*. The relevant provision is order 37 rule 6 which states thus:
 6. Extension of limitation period
 - (1) An application under section 27 of the [Limitation of Actions Act](#) (Cap. 22) 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 *ex parte* in that suit. (Emphasis).
8. I take guidance from the decision of *P.M.N v Kenyatta National Hospital & 6 others* [2015] eKLR that when a court extends the limitation period within which to file a suit, the order for such extension can only be challenged at the trial of the suit that is subsequently filed. In the above case the court observed thus:

“My view on that plea is that the defendants have a remedy under the law, which is trite that the application for leave in the suit has to be made *ex parte*, and the challenge to leave granted can only be made at the trial of the suit. The rationale for such procedure was aptly given in the case of *Mary Wambui Kabugu v Kenya Bus Services Ltd*. Civil Appeal No. 195 of 1995 where Shah, JA expressed himself as follows, on the remedy available to the party aggrieved by a decision extending time to file suit where circumstances do not warrant such extension:

“By virtue of section 28(1) of the [Limitation of Actions Act](#), Cap 22, Laws of Kenya (the Act) an application for leave of the superior court (for that matter of the subordinate court) has to be made *ex parte*. The proposed defendant is not a party to that application. Indeed, he cannot be for the simple reason that Section 28(1) mandated that such application “shall



be made ex parte”. This situation is reinforced by the provision of order 36 rule 3(c) of the [Civil Procedure Rules](#)...

In a situation such as outlined above the defendant only becomes aware of the order extending time when he is served with the summons, plaint and the order extending time.

There is no provision in the Act itself to enable the defendant to have the order extending time set aside. In the Court’s view, the only time when such a defendant can challenge the order granting extension of time is at the time of the trial, either on facts brought out at the trial, or by way of arguments at the trial if circumstances and facts allow such arguments at the trial, that is to say if there is a dispute as to facts. It will be up to the judge presiding at the trial to decide the issue but not as a preliminary point.

...The Respondent having obtained leave to file action as required by the law, that order can only be queried at the trial but not by application to discharge it otherwise the provision of the Act in providing for obtaining an order ex parte will be rendered nugatory.

It would appear that notwithstanding the provisions of section 27 of the Act, the question whether or not the plaintiff was entitled to the extension can only be challenged in the proceedings. This is one of the exceptions to the general rule that a party against whom an ex parte order has been made, can apply to the court which made the order to set aside... The judge who heard the application for extension of time must first hear it (in case of an application filed before filing suit) ex parte. He has no discretion in the matter. He is bound by the requirements of the Act. If the evidence shows prima facie that the requirements of the Act are satisfied, leave should be given.

It is in the action only that the defendant can challenge the facts in due course. This is, because the requirements of section 27 are explicit and the judge cannot go beyond the scope of those requirements. He cannot for instance grant leave out of sympathy, or because the applicant did not know the law etc. If evidence showing prima facie that the requirements of the Act are satisfied, leave should be given leaving the defendant to challenge the facts in the action in due course. The statute does not seem by its language to confer discretion but merely a jurisdiction to decide whether the requirements of the statute are or are not fulfilled. That decision of course involves points on which judicial mind may differ... The trial judge will not be sitting in appeal on findings of the judge who granted leave in the first instance. His job would primarily be to decide if the leave was actually and legally properly obtained. There may be cases where medical evidence may be misleading enough to enable one judge to grant such leave but when correct medical data may be brought forward by the defendant, the picture may drastically change.

There may be clear cases where the applicant may swear to facts which are not true, which can only be challenged at the trial. There may even be cases where a Judge, because of work-load in the superior court, may not have time to apply his mind to the requirements of the Act which Act of course limits the granting of such leave in respect of personal injury, [Fatal Accidents Act](#), and the [Law Reform Act](#) claims only. Often the interpretation of section 27, 28 and 29 of the Act, as explained in Section 30 of the Act may not have been brought to the attention of the judge. It follows that the order granting an extension stands and is binding on the parties. But that means that the order stands until it has been effectively set aside. And such an order, where the objection to it is of the character here set up by the appellants, can only be so directed to that special end... The trial judge is entitled to hear the challenges hurled at the ex parte order and decide whether or not the ex parte order was correctly obtained by the applicant. The issue as to whether or not leave to file suit out of



time was granted properly or not is a matter to be challenged at the trial stage and not by a review application.” (Emphasis mine).

9. In the same decision, Akiwumi, JA on his part held as follows:

“When the judge of the superior court grants leave *ex parte*, under the Limitation Act to institute proceedings which can be challenged at the trial, he in a way, does no more than a judge does when he for instance, grants an *ex parte* injunction, which can also be successfully challenged before another judge at its inter partes hearing. Furthermore, the question of a judge of the superior court sitting on appeal on the granting of an *ex parte* order under the Limitation Act by another judge of the superior court, does not in the particular circumstances, arise.

In general a party affected by an *ex parte* order can apply to discharge it but the procedure under the Limitation Act is altogether exceptional. It says in terms that an application shall be made *ex parte*. This is a strong indication that the Judge is to decide the application on hearing one side only. No provision is made for the defendant being heard. It must be remembered that even when the judge grants leave, there is nothing final about it. It is merely provisional. The defendant will have every opportunity of challenging the facts and the law afterwards at the trial. The judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar. He is not in the least bound by the provisional view expressed by the judge in chambers who gave leave.” (Emphasis mine).

10. The same position was re-affirmed in *Yunes K Oruta & Another vs. Samuel Mose Nyamato* Civil Appeal No. 96 of 1984 (UR).

11. There is also the case of *Republic v Principal Magistrate P. Ngare Gesora Principal Magistrate’s Court & 2 others ex parte Nation Media Group Ltd* [2013] eKLR, where the court held that an *ex parte* order extending time is provisional rather than final and a party who wishes to challenge such an order can only do so at the trial of the suit that is subsequently filed.

12. From the foregoing, it is clear to me that the application for extension of the limitation period within which to file a suit is one that is required by law to be heard and determined *ex parte*. The order of extension granted in such an application is not subject to appeal by a Respondent who in the first place was not a party to the Originating Summons. The proper manner in which to challenge the ruling or order that emanates from such an application is by confronting it at the trial of the suit that is filed pursuant to the order for extension.

13. In the end, for the reasons stated above, I find that the appeal lacks merit and I proceed to dismiss it. Considering that the grounds upon which the appeal fails were not raised by the Respondent, each party shall bear their own costs of the appeal.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 20TH DAY OF JUNE, 2024.

JOE M. OMIDO

JUDGE

For Appellant: No appearance.

For Respondent: Mr. Macharia.

Court Assistant: Ms. Njoroje.

