



Mbugua v Automobile Association of Kenya & another (Miscellaneous Civil Application E260 of 2024) [2024] KEHC 12790 (KLR) (Civ) (24 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12790 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E260 OF 2024
CW MEOLI, J
OCTOBER 24, 2024**

BETWEEN

ERASTUS MBUGUA APPLICANT

AND

AUTOMOBILE ASSOCIATION OF KENYA 1ST RESPONDENT

LIBERTY INSURANCE COMPANY 2ND RESPONDENT

RULING

1. The Notice of Motion dated 28.03.2024 (the Motion) filed by Erastus Mbugua (hereafter the Applicant) invokes Sections 3A and 63E of the *Civil Procedure Act* (CPA); Section 27 of the *Limitation of Actions Act*; and Order 51, Rule 1 of the Civil Procedure Rules (CPR). Therein, the Applicant seeks the following orders:
 1. Spent.
 2. That this Honourable Court be pleased to grant leave to file suit out of time.
 3. That costs of this application be provided in the cause.” (sic).
2. The Motion is supported by the affidavit of the Applicant and echoes the grounds on the face of the motion. The gist of his affidavit is that he was an employee of Automobile Association of Kenya (hereafter the 1st Respondent) serving as a breakdown driver from 15.12.1989 until 7.10.2004 when he opted to resign. He further stated that during the time of his employment, the 1st Respondent made monthly deductions on his salary, towards pension and to the National Social Security Fund (NSSF) among others. That following his resignation, he sought payment in respect of his pension and related deductions and was able to receive all save for the pension deductions, from the 1st Respondent.



3. The Applicant averred that his attempts at recovering his pension funds from the 1st Respondent proved futile, with the latter claiming that the relevant pension funds were transferred to Liberty Insurance Company (hereafter the 2nd Respondent) who then informed him that the said funds were subsequently transferred to a separate insurance company, namely Britam Insurance Company Limited; which Company on its part denied ever receiving such funds, upon the Applicant's inquiry.
4. The Applicant further averred that he has been following up on his pension funds for the past eight (8) years now, to no avail. That the delay in filing suit within the statutory timelines was occasioned by the fact that the Respondents had severally promised to remit his pension funds but did not. That in view of the foregoing, it would serve the interest of justice for the court to grant the orders sought in the Motion.
5. By way of the replying affidavit sworn by Cynthia Arami, Manager-Pensions at the 2nd Respondent Company on 27.06.2024, the Motion was opposed. Therein, she stated that the 2nd Respondent transferred the pension scheme belonging to the 1st Respondent, to Britam Insurance Company Limited, pursuant to the letters dated 1.10.2015 and 6.11.2015 annexed as "CA 1." The deponent further stated that the Applicant was duly notified of the aforesaid transfer, vide a letter dated 25.11.2022.
6. The 1st Respondent on its part filed the Grounds of Opposition dated 22.07.2024 to challenge the Motion, containing the grounds hereunder:
 1. The applicant invokes Section 27 of the [Limitation of Actions Act](#) to seek extension of time to file the suit. The annexed draft plaint alleges that the cause of action in the suit to be founded on an alleged breach of contract.
 2. Section 27 of the [Limitation of Actions Act](#) relates to cases where the cause of action is founded on negligence, not contract.
 3. While considering Section 27 of the [Limitation of Actions Act](#), in *Mary Osundwa v Nzoia Sugar Company Limited* Civil Appeal No. 244 of 2000 [2002] eKLR, the Court of Appeal held as follows:

“The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort.”
 4. Any potential suit would be time barred, and the court does not have jurisdiction to extend time for filing suit in cases involving contract. (sic)
7. When the matter came up before the court on 25.07.2024, the parties agreed to have the Motion determined on the basis of the respective affidavit evidence and the Grounds of Opposition on record, respectively.
8. The court has therefore considered the material canvassed in support of and in opposition to the Motion, which seeks extension of time to enable the Applicant bring his intended suit.
9. From the contents of the Grounds of Opposition, it is apparent that a preliminary issue arose therein, being whether the court has jurisdiction to extend the time for filing the suit, to begin with. The court will therefore first address itself on this issue.
10. From a perusal of the draft pleadings which are annexed to the Motion and marked as "EM-7" it is apparent that the Applicant's cause of action against the 1st and 2nd Respondents arose from an



alleged breach of contract. That being the case, Section 4(1) of the *Limitation of Actions Act* becomes applicable. The same provides as follows:

“The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

- (a) actions founded on contract;
- (b) actions to enforce a recognizance;
- (c) actions to enforce an award;
- (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
- (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law”.

11. As earlier mentioned, the instant Motion is anchored primarily on Section 27 of the *Limitation of Actions Act*, which expresses that:

“Section 4 (2) does not afford a defence to an action founded on tort where—

- 1.
 - (a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
 - (b) 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 section; and
 - (d) the requirements of subsection (2) are fulfilled in relation to the cause of action.
- 2.
- 3.

12. The above provision has been the subject of interpretation in different superior courts. In the case of *Mary Osundwa v Nzoia Sugar Company Limited Civil Appeal No. 244 of 2000 [2002] eKLR* the Appellant had successfully sought leave (granted by consent in the High Court) to file a cause for alleged breach of contract, 7 years since the cause of action accrued. The Court of Appeal having set out the provisions of Section 27 (1) of the *Limitation of Actions Act* stated that:

“The section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort. Accordingly, Osiemo J. had no jurisdiction to extend time as he purported to do on



28th May, 1991. That the order was by consent was neither here nor there; the parties could not confer jurisdiction on the Judge by their consent”.

13. No doubt echoing the holdings in *Wycliffe A. Swanya v Toyota East Africa Limited and Another* [2009] eKLR; *Rawal v Rawal* (1990) KLR 275 and *Dhanesvar V. Mehta v Manilal M. Shah* [1965] EA 321, Aburili J restated the rationale behind the enactment of the *Limitation of Actions Act*, in the case of *Bosire Ogero v Royal Media Services* [2015] eKLR thus:

“The Law of Limitation of actions is intended to bar plaintiffs from instituting claims that are stale and (is) aimed at protecting defendants against unreasonable delay in bringing of suits against them. The issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same”.

14. Flowing from all the foregoing circumstances, legal provisions and authorities cited, the court therefore finds that, from a plain reading of Section 27(1) of the *Limitation of Actions Act* and based on precedent, there is no jurisdiction to extend the time for the filing of a claim founded on an alleged breach of contract.
15. The upshot therefore is that the Notice of Motion dated 28.03.2024 lacks merit and is hereby dismissed with costs to the 1st and 2nd Respondents.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24TH DAY OF OCTOBER 2024.

C. MEOLI

JUDGE

In the presence of:

Mr. Ajulu for Mr. Kuya for the Applicant:

N/A for the 1st Respondent:

Mr. Mwihuri for the 2nd Respondent

C/A: Erick

