



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 411 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL SECRETARY MINISTRY

OF INTERIOR & COORDINATION OF NATIONAL GOVERNMENT STATE

DEPARTMENT OF INTERIOR.....RESPONDENT

EX PARTE:

ABDUL SATTAR MOUGHAL & MOHAMMED SHAHID MOUGHAL

RULING

Introduction

1. On or about the 8th day of August 1985, Mohammed Shahid Moughal (hereinafter the 2nd Applicant) was riding motor cycle registration number KRD 651 belonging to Abdul Sattar Moughal (herein after the 1st Applicant) when the said motor cycle was hit by motor vehicle registration number GK D894 belonging to the Government of the Republic of Kenya which was at the material time driven by an employee, servant and/or agent of the Government of Kenya. By reason of the said accident the 1st Applicant said motor cycle was extensively damaged and the 2nd Applicant sustained severe bodily injuries.
2. As a result thereof, the Applicants filed suit at the High Court of Kenya in Nairobi being Nairobi HCCC No 668 of 1986 against the Attorney General claiming general and special damages arising from the said accident. The suit was subsequently transferred to the Chief Magistrates Court Nairobi where it was registered as CMCC No. 8552 of 1996. The suit proceeded for hearing after which judgment was delivered on 8th October 2000 when the 1st Applicant was awarded Ksh.6,000/= as damages and the 2nd Applicant was awarded Ksh.397,940/= as general and special damages. The Applicants were also awarded costs of the suit together with interest on the judgment sums at court rates from 8th October 2000.
3. The Applicants procured Certificates of Order against the Government dated 12th September 2006, which they state were duly served upon the Attorney General. The same were for the sums of Ksh.782,070.24 and Ksh.28,405.09 respectively, and at the time of filing this application the payable amounts stood at Kshs. 40,903.33 for the 1st Applicant and Kshs. 1,126,181.14 for the 2nd Applicant.
4. However, that to date the Accounting Officer, Office of the President then, and now the Principal Secretary, Ministry of Interior & Coordination of National Government State Department of Interior who is the Respondent herein, has failed and or refused to settle the sum due to the Applicant as per the said judgment, notwithstanding the various letters written to the Attorney Generals Chambers by the Applicants lawyers seeking payment. The above facts are narrated in the Applicants statement of facts dated 10th December 2018. The Applicants annexed copies of the Decree, Certificates of Costs, Certificates of Order against the Government and of the correspondence with the Attorney General.
5. The Applicants consequently filed the instant application by way of a Notice of Motion dated 10th December 2018, after being granted leave. The Applicants are seeking an order of mandamus, to compel the Respondent to settle the decretal sums emanating from CMCC No.

8552 of 1996 formerly HCC NO 668 of 1986 being Kshs. 40,903.33 and Kshs. 1,126,181.14 awarded to the 1st and 2nd Applicant respectively plus interest thereon calculated at court rates from the date of judgment.

The Preliminary Objection

6. The Respondent thereupon filed a Notice of Preliminary Objection dated 14th January, 2019, on the ground that the said application offends the provisions of section 4(4) of the Limitation of Actions Act and ought to be dismissed with costs. The Applicants' counsel thereupon sought leave to file an affidavit to show that the Respondent had acknowledged the debt, and that the period of limitation therefore did not apply. The said replying affidavit was sworn on 22nd February 2019 by Wanjiru T. Christine, the Applicants' Advocate ,

7. The Applicants stated therein that after obtaining judgment in CMCC 8552 of 1996 they promptly notified the office of the Attorney General, which office acknowledged the said debt and advised that they were calling for the payment cheque in a letter dated 11th September 2003. That when no payment was forthcoming, the Applicants' Advocate wrote to the Attorney General on various occasions demanding payment, who communicated via a letter dated 2nd April, 2004 that they had called for the monies and would revert once again. Further, that on 17th February, 2012 the Attorney General wrote to the Applicants asking them to forward a copy of the subject judgment and Certificate of Order against the Government for purposes of settlement. The Applicants stated that they once again communicated to the Attorney General on 10th August, 2016 reminding them to pay the decretal sum and interest. The Applicants attached copies of the said letters.

8. However, that despite compliance with the requirements for payment and demand, the Attorney General has despite of acknowledging the said debt refused to pay the said amount. Therefore, that having acknowledged a debt of the said amounts owed to the Applicants, the Attorney General is estopped from claiming that the move to recover their debt is time barred. In addition, that the Attorney General comes to court with unclean hands, having misrepresented the fact that they were paying the amounts owed to the Applicants, and then claiming the their claim for payment is time barred, and as such the Attorney General is not deserving of this courts discretion.

9. This Court gave directions that the Respondent's Notice of Preliminary Objection dated 14th January 2019 be heard and determined first by way of written submissions, hence this ruling.

The Arguments

10. Ms. Annette Nyakora, a Litigation Counsel in the Attorney General's chambers, filed submissions on behalf of the Respondent dated 6th February 2019. It was contended therein that judgment in **CMCC NO. 8552 of 1996** formerly **HCCC NO. 668 of 1986** was delivered on 8th October, 2000 and a decree obtained the same year on 29th November 2000, and it has been more than eighteen (18) years since the said judgment was delivered. Therefore, that the application herein is time barred dint of section 4 (4) of the Limitations of Action Act, which requires that an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered.

11. The Respondent further submitted that its Preliminary Objection fits within the definition provided in **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd (1969) E.A 696** , as it seeks to determine if the application is statutorily barred, and if it succeeds the court will be saved the cost of a lengthy hearing and attendant expenses on either side.

12. Reliance was placed on the decisions in **Alexander Mbaka vs Royford Muriuki Rauni & 7 Others, (2016) e KLR** and **Hudson Moffat Mbue vs Settlement Fund Trustees & 3 Others ELC No 5704 of 1992**, that once a judgment has passed the 12th year of issue, it cannot be enforced. The Respondent also contended that the Applicant is not a vigilant litigant and has been indolent and shown lack of interest in the suit.

13. Muchui & Co Advocates, the Advocates on record for the Applicant, filed submissions dated 22nd February 2019. The Applicants, while acknowledging that indeed their judgment was rendered more than twelve years ago, submitted that they are exempt from the limitation period as provided for under section 4(4) of the Limitation of Actions Act by virtue of the fact that the Attorney General acknowledged the said debt on various occasions indicating each time the intention to pay the outstanding sums.

14. Reliance was placed on section 23(3) of the Limitation of Actions Act and the decision of the Court of Appeal in **Afro Freight Foundation Ltd vs African Liner Agencies [2009] eKLR** , for the argument that there is revival of a cause of action where there is a proven acknowledgement, and time would start running afresh from the date of such acknowledgement. Therefore, that the Applicant's right for payment accrued on the date of the last acknowledgment by the Attorney General being 10th August, 2016 which was the last communication between the Attorney General and the Applicants' Advocates.

15. Lastly, that the Attorney General comes to court with unclean hands having misrepresented themselves to the Applicants as to their intention to settle the claim, and the Applicants' inaction was pegged on this misrepresentation. Further that it is thus not true that the Applicants have been indolent and lacked interest in following this matter, as they have constantly demanded and complied with the Attorney Generals demands in a bid to get the fruits of their judgment.

The Determination

16. The circumstances in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what

is sought is the exercise of judicial discretion.”

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

17. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro -vs- Mbaja (2005)1 KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in **Mukisa Biscuit Company vs West End Distributors Ltd(supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

18. The issues for determination herein therefore are whether the grounds raised in the Respondent’s preliminary objection raise pure points of law, and if so, whether the said preliminary objection has merit and should be upheld. If not upheld, the Court will then consider if the Applicant is deserved of extension of time. The Respondent in this respect states that the Applicant’s application dated 10th December 2018, is time barred, and relies on section 4(4) which provides as follows:

“(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

19. The time of filing of proceedings in this Court to enforce a judgment is thus clearly regulated by the law, and if not complied with ousts the jurisdiction of this Court. This is thus a pure point of law that has been raised by the Respondent.

20. In the present case it is not in dispute that the judgment sought to be enforced by the Applicant’s application dated 10th December 2018 was delivered in **CMCC NO. 8552 of 1996** on 8th October, 2000, and that the said application was filed after more than twelve years after the judgment. The Applicant however argues that the time was extended by section 23(3) of the Limitation of Action Act to this case, arising from the Respondent’s acknowledgement of its liability to pay the decretal sum. Section 23(3) provides as follows:

“(3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment:

Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt..”

21. It was confirmed by the Court of Appeal in **Afro Freight Foundation Ltd vs African Liner Agencies (supra)** and in **Kisii County Governement vs Masosa Construction Company Ltd (2015) eKLR**, that under this provision, where the “*person liable or accountable*” acknowledges the claim, the right accrues on the date of acknowledgment. The Respondent has in this respect not disputed the facts put forward by the Applicant as regards its acknowledgment of its obligation to pay the decretal sum, and in particular the contents of its letters in which it requested for documents to forward to the relevant department for payment, which letters were annexed by the Applicants.

22. Thus, notwithstanding that the prescribed period of limitation has expired, the said statutory period was extended by the Respondent’s acknowledgment of its debt, and the Applicant can therefore file an application to enforce his judgment outside the prescribed period of twelve years. To this extent the Respondent’s Preliminary Objection dated 14th January 2019 is found not to have merit.

23. I accordingly order as follows:

I. The Respondent’s Preliminary Objection dated 14th January 2019 is not merited and it is accordingly dismissed.

II. The Applicants’ Notice of Motion dated 10th December 2018 is hereby deemed to be properly on record.

III. There shall be no order as to costs.

24. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF MAY 2019

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 8TH DAY OF MAY 2019

J. MATIVO

JUDGE