



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELCA NO. 19 OF 2019

COUNTY GOVERNMENT OF MURANGA.....APPELLANT

VS

PETER CHEGE KAMAU.....RESPONDENT

(Being an Appeal against the entire ruling and order delivered by the Hon E Muriuki Nyaga (PM) on the 18/7/19 in CMELC No 415 of 2018)

RULING

1. The Plaintiff filed suit on the 14/12/18 seeking special and general damages in the sum of Kshs 10 million from the Defendant for alleged destruction of houses, trees of various kinds, tea bushes, banana trees, fence and buildings. The Defendant filed a statement of defense on the 4/2/19 denying the Plaintiffs claim and undertook to raise a Preliminary Objection. Simultaneously, it filed a notice of motion seeking interalia, orders to strike out the suit on grounds that the claim was time barred pursuant to section 26 of the Government Proceedings Act read together with section 3 of the Public Authorities Limitation Act for having been brought over 4 years since the cause of action arose.

2. True to its word the Defendant filed a notice of Preliminary Objection on the 4/2/19 seeking orders that the suit is statute barred and that the verifying affidavit on record sworn on the 14/12/18 offends the provisions of Section 34 of the Advocates Act in regards to the drawing and filing of legal documents.

3. The objection was heard and determined by the Learned Principal Magistrate and dismissed it on the 18/7/19 prompting this Appeal.

4. The Appellant in its Memorandum of Appeal has set out 9 grounds of Appeal which I have summed as follows; failure by the learned PM to appreciate that the suit was statute barred; The Respondent did not seek leave to file suit out of time prior to filing of the suit as there was no order annexed to his Replying Affidavit that leave was sought; The learned PM erred in law and fact in holding that leave had been sought on the 5/3/2019 while the suit was filed on 14/12/18 and the Preliminary Objection raised on the 4/2/19; The Appellant was not heard on the application for leave; that enlargement of time does not accrue where the claim is for personal injury; the verifying affidavit offends Section 34 of the Advocates Act in respect to its drawing and filing.

5. The Appellant sought the following orders;

- a. The Ruling by the Hon E Muriuki Nyaga delivered on the 18/7/19 be reversed and set aside.
- b. The suit being CMELC 415 of 2018 be struck out
- c. The cost of the Appeal and the suit in the lower Court be borne by the Respondent.

6. As to whether the Plaintiff had sought leave to institute the suit out of time, the Appellant submitted that though the Respondent in his Replying Affidavit dated the 13/3/19 allege that he had obtained leave to file suit out of time, he did not annex any orders to support the allegations. It argued that from the Ruling of the Court it would appear that leave was granted on the 13/3/19 way after the suit, statement of defence and the Preliminary Objection had been filed.

7. It submitted that Section 28(1) of the Limitation of Actions Act provides that an application for leave of the Court for purposes of section 27 of this Act shall be made ex parte except in so far as the rules of the Court may otherwise provide in relation to applications made after commencement of a relevant suit. That the section requires the application to be made ex parte before the commencement of the suit.

8. That in a case like this one where the leave was sought after the suit has commenced the rules of fair hearing apply so much so that the Defendant ought to have been served and given the opportunity to be heard on the same. **See Kenya Power Lighting Company Limited Vs Collins Agumba Aboge (CA No 57 of 2015)** where the Court held that the granting of leave before the commencement of the suit is only

provisional and the Defendant has the chance to challenge the facts and the law afterwards in the trial and the judge who tries the case is the one who must finally rule whether the Plaintiff has satisfied the conditions for overcoming the time bar.

9. The Appellant submits that leave was sought on the 15/3/19 during the delivery of the ruling. That it is suspicious how the Court got this information as none of the parties had brought it on the record of the Court. It faulted the Court for relying on such information which had hitherto not been brought to the attention of the appellant and accorded the chance to respond to it. That having not been served with the application for extension of time after the commencement of the suit, its rights to be heard under Art 50 of the Constitution were violated.

10. The appellant submitted that the Respondent did not meet the requirements of granting leave under Section 27 of Limitation of Actions Act. To benefit from the provisions of Section 27 and 28 the claim should be in respect for damages for negligence, nuisance or breach of duty, damages in respect to personal injuries of any person. That this case is not for personal injuries. See **Peter Gichuki Mwangi Vs Kenya Copyright Board & 3 Others (2018) EKLR**.

11. That this is not a matter that the Court could have correctly exercised its discretion and extend time pursuant to sections 27 and 28 of the Limitation of Actions Act. It argued that if any proceedings ever took place seeking leave to Appeal out of time, they were inconsequential illegal and an affront to the rule of law and principles of natural justice.

12. Relying on section 3 of the Government Proceedings Act, the Appellant argued that actions against the Government founded on tort must be brought within 12 months from the date on which the cause of action accrued. That this suit having been filed in 2018 was filed out of time and therefore is time barred as the cause of action accrued on the 31/1/14. That this was way beyond the limitation period provided under section 4 of the Limitations of Actions Act. That the Respondent did not seek extension of the limitation period under Section 8 of the Public Authorities Act and part iii of the Limitation of Actions Act.

13. The Appellant argued that the suit having been filed out of time, the same is time barred and no remedy sought can be accorded to the Respondent as per the decision in **IGA vs Makerere University (1972) EA 65** where the Court stated that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, the plaint must be rejected.

14. In respect to the verifying affidavit sworn on the 14/12/18 the Appellant argued that this affidavit offends Section 34 as it was drawn and filed by the Plaintiff who in the face of the provisions falls under an unqualified person. That the Respondent does not qualify as an Advocate as per the provisions of section 9 of the Advocates Act. That the Respondent is neither an Advocate, nor his name is in the roll of Advocates nor does he hold a current practicing certificate.

15. In buttressing its point the Appellant relied on the supreme Court decision in the case of **National Bank of Kenya Limited Vs Anaj Warehousing Limited (2015) EKLR** where the Court held that no documents of conveyance becomes invalid under section 34 (1) (a) of the Advocates Act only by dint of its having been prepared by an Advocate who at the time was not holding a current practicing certificate. It was the contention of the Appellant that documents prepared by other categories of unqualified persons such as non Advocates or Advocates whose names have been struck off the roll of Advocates shall be void for all purposes.

16. In conclusion it argued that the verifying affidavit is void for all purposes, this suit included.

17. The Respondent states that he obtained leave to file suit out of time on the 5/3/19 and the Court took that in consideration in arriving at the ruling. It therefore urged the Court to hold that the Appeal should fail on this point.

18. The Respondent questioned the competence of the Appeal on the ground that that the appellant did not extract the order against which it has Appealed. That the supplementary record does not contain the order and therefore the entire Appeal is incompetent and should be dismissed.

19. He argued that he complied with the provisions of section 27(1) c of the Limitation of Actions in seeking leave to file suit out of time. He further submitted that the Respondent is not in violation of either the Government Proceedings Act nor Section 3 of the Public Authorities Limitations Act because the period of 12 months had not lapsed from the date of the order granting leave to file suit out of time.

20. In respect to the verifying affidavit, the Respondent stated that the Plaintiff swore the affidavit verifying the correctness of the averments in the plaint and the same was commissioned by a commissioner for oaths and therefore cannot be said to be invalid in the absence of any evidence that the commissioner of oaths who commissioned the affidavit is an unqualified person for purposes of Section 34 of the Advocates Act.

21. Section 27 provides as follows;

Extension of limitation period in case of ignorance of material facts in actions for negligence, etc.

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

(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) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the Plaintiff until a date which—

(a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

(b) in either case, was a date not earlier than one year before the date on which the action was brought.

(3) This section does not exclude or otherwise affect—

(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

22. Application for leave of Court under section 27

(1) An application for the leave of the Court for the purposes of section 27 of this Act shall be made ex parte, except in so far as rules of Court may otherwise provide in relation to applications made after the commencement of a relevant action.

(2) Where such an application is made before the commencement of a relevant action, the Court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the Plaintiff, it appears to the Court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient—

(a) to establish that cause of action, apart from any defence under section 4(2) of this Act; and

(b) to fulfil the requirements of section 27(2) of this Act in relation to that cause of action.

(3) Where such an application is made after the commencement of a relevant action, the Court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the Plaintiff, it appears to the Court that, if the like evidence would in the absence of any evidence to the contrary, be sufficient—

(a) to establish that cause of action, apart from any defence under section 4(2) of this Act; and

(b) to fulfil the requirements of section 27(2) of this Act in relation to that cause of action, and it also appears to the Court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the Plaintiff that the matters constituting that cause of action had occurred on such a date as (apart from section 27 of this Act) to afford a defence under section 4(2) of this Act.

(4) In this section, “**relevant action**” in relation to an application for the leave of the Court, means any action in connexion with which the leave sought by the application is required.

(5) In this section and in section 27 of this Act “**Court**”, in relation to an action, means the Court in which the action has been or is intended to be brought.

23. In respect to the whether the Defendant obtained leave to file suit out of time, I have seen an order in CMCC No 64 of 2019 (OS) given in Court on the 5/3/19 and issued on the 8/3/19 which states as follows;

“it is hereby ordered that the Applicant be and is hereby granted leave to file suit out of time.....”

24. In the case of **Skingley Vs cape Asbestos Co Limited (1968) 2 Llyods LR 201 at 203** the Court stated that the jurisdiction of the Court to grant leave to file a suit out of time is donated by section 28 of the Limitation of Actions Act. Section 27 of the Act sets out the conditions which must be satisfied before such leave may be granted. If the Applicant satisfies those conditions the Court handling the application has no discretion in the matter. It must grant the leave sought. But it must be remembered that it is *ex parte*. So in due course the Defendant shall have an opportunity of challenging the facts and fighting the case.

25. It is not lost on the Court that the suit was commenced on the 14/12/18 and the defence was filed on the 4/2/19 together with the Preliminary Objection. The said orders were issued on the 14/3/19 on record vide an application dated the 21/2/19. It is evident that it was filed after the commencement of the suit and therefore the correct procedure to apply is that the same ought to have been heard *inter partes*. At the risk of speculating, the Court is careful to warn itself because the proceedings of the Originating Summons were not availed to the Court by any of the parties in this suit and therefore the Court does not have the benefit of knowing if the application was *ex parte* or not.

26. It is therefore not true that the said orders are missing on record. The Replying Affidavit sworn by the Respondent under para 4 indicated that he had sought leave to file suit out of time. The orders seeking leave to file suit out of time was therefore brought to the attention of the Appellants way back in March 2019 and they cannot claim that they were unaware of the said orders.

27. The learned Principal Magistrate was therefore correct in holding that the Respondent had sought and obtained leave to file suit out of time.

28. Notwithstanding the holding of the Court in para 27, the said orders can only be challenged by the appellant in the trial of the suit and not by way of Appeal or review in this Court. See **Yunes K Oruta & Anor Vs Samuel Muge Nyamato CA 96 of 1994**.

29. It is the view of the Court that the orders of extension of time are still alive having not been Appealed, set aside or vacated and the best for a to challenge it is before the trial Court by way of setting aside or discharge through such other action open to the appellant, if the orders were granted *ex parte*. The pertinent question is whether or not the Respondent was entitled to the extension of time pursuant to section 27(1) of the Limitation of Actions Act can only be challenged in the trial proceedings.

30. It is noted that the Appellant did not challenge the orders when the same were brought to its knowledge in the month of March 2019.

31. In respect to the verifying affidavit, the Court notes that the verifying affidavit is drawn and sworn by the Respondent as to the correctness of the averments in the plaint. The view of this Court is that section 34 of the Advocates Act relates to the drawing of documents that create obligations as between parties and hence the need to have a qualified person under Section 16 draw the said documents. An affidavit basically carries the written evidence of a person upon which an oath is taken before an identifiable person under the Oaths and Declarations Act. Even assuming otherwise, can an unrepresented party’s verifying affidavit where the party is unrepresented be rejected on account that it has been drawn by the unrepresented party? Any rejection of the unrepresented party’s pleadings, in my view will offend the right of a party to be heard as encapsulated in Art 50 of the constitution. I am further persuaded that this does not go to the substance of the case. See Article 159(2) (d) of the Constitution.

32. In the end the Appeal fails and it is dismissed with costs payable to the Respondent by the Appellant.

33. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANGA THIS 5TH DAY OF MARCH 2020

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Gacheru HB for Waweru for the Appellant

Ndegwa HB for Bwonwonga for the Respondent

Irene and Njeri, Court Assistants