



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISC. CIVIL APPLICATION NO. 240 OF 2017

HEINZ-PETER HERMAN.....APPLICANT

VERSUS

AFRICAN SAFARI CLUB (IN LIQUIDATION THROUGH ITS

LIQUIDATOR; OFFICIAL RECEIVER).....RESPONDENT

FIRST ASSURANCE COMPANY LIMITED.....INTERESTED PARTY

R U L I N G

1. By Originating Notice of Motion dated 12th May, 2017 and later Amended on the 2nd May 2018, the Applicant seeks the following orders

(a) Spent;

(b) That the honourable court be pleased to grant leave to the Applicant to institute legal proceedings against African Safari Club Limited as per the annexed proposed plaint;

(c) That upon leave being granted as prayed for in prayer 2 above the Applicant be granted leave to file this suit out of time;

(d) That costs of this Application abide the results of the intended suit.

2. The Application is supported by the affidavit of HEINZ-PETER HERMAN, the Applicant and on the following grounds on the face of the application and supporting affidavit:

(a) that on the 18th December 2018, he was booked as a guest into Flamingo Beach Club which is now under receivership and that fell from his balcony of his room on the third floor as a result of the negligence of the Respondent and fell into a coma and was admitted into the ICU at Pandya Hospital in Mombasa and later flown to Germany for specialized treatment.

(b) that due to him being in a coma and prolonged period of hospitalization in Germany, the matter took sometime before it was filed in Court and eventually in the year 2015, he instructed the late **Mr. Oguk, Advocate** who filed **Misc. Civil Application No.43 of 2015** which unfortunately was never heard and he wished to withdraw it.

(c) that an extension of time to allow his claim to be ventilated will ensure that substantive justice is done to the parties as opposed to the bitter feeling that he will always harbor if he is denied a chance to fully ventilate his claim against the Respondent herein.

(d) that the delay in filing this suit within the statutory period has not been intentional or wilful on his part as he was incapacitated through prolonged hospital admission abroad to restore his life factors beyond his control.

(e) that he kept the claim alive by continued communication with the Respondent and the interested party seeking an amicable settlement but such settlement was not realized. The last communication between them was on the 5th January, 2015 when he wrote a letter to the interested Party's General Manager.

(f) that he was a foreigner and was not familiar with the Kenyan laws and procedures in that he spent more time collecting information and documents relating to this matter from the police and the Respondent (hotel).

(g) that in the year 2011, the Respondent was placed under receivership. However, at the time of the incident on the 19th December,

2008, the Respondent was duly insured by the interested party herein.

(h) that the law allows a court to temporarily lift a receivership of a company, particularly where the claim is payable both by the company that has been wound up and the insurance company.

(i) that from the correspondence herein clearly demonstrates that the interested party had provided an insurance cover for the Respondent against the type of injury that visited him.

3. The Respondent opposed the Application and via a Replying Affidavit sworn on the 24th April 2018 by **M/S Hamida Chidagaya** where she states as follows:-

(a) That the Applicant's application to temporarily lift the receivership of the Respondent is not only grossly misconceived but also highly irregular.

(b) That the order of winding up was issued on the 19th June, 2014 and the applicant is also aware of the fact that there are other creditors claiming as against the company as the winding up order is as a result of a creditor petition.

(c) That for the Applicant to file a suit against the Respondent 10 years after the alleged wrong against him and in contravention of the statutes of limitation is highly irregular especially when it has no justifiable cause for the delay and its claim of Kshs.12,344,411/= has not been substantiated through any documentary evidence.

(d) That the applicant has not given any reason as to why Misc. 43 of 2015 was never heard and the applicant has also not specified how long he was hospitalized and neither did he give specifics on that.

(e) That the other creditors should not be punished because of the applicant malfeasance since the winding up proceedings are underway and to lift the winding up order would delay payment of claims against other creditors who have sufficiently proved their claim.

(f) That in any case the Applicant is not a Kenyan citizen and he therefore cannot rely on Article 50 and 159 of the constitution since he is not subject to it.

4. The Interested Party opposed the Applicant's Application via an affidavit sworn on the 4th December 2017 by **Mrs. Janerose Gitonga**, the legal Manager to the Interested Party and averred as follows;

(a) that the Application is misconceived, mischievous and an abuse of the court process and the same ought to be dismissed.

(b) That no sufficient reason for delay was shown by the Applicant and that the reasons advanced by the Applicant are insufficient to warrant issuance of the orders being sought.

(c) That the Interested Party was not involved in the alleged accident giving rise to the Application nor is it a tortfeasor in the intended suit nor does the Applicant's intended claim fall under the provisions of Insurance (motor vehicles) Third party Risk Act, cap 405 and therefore the interested party is not bound by any law to satisfy the claim

(d) That there is no contractual relationship of insurance or any privity of contract or other relationship in law between the Applicant and the Interested Party.

5. Counsel for the parties in this case were directed to canvass the application by way of written submissions and each one of them filed.

APPLICANT'S SUBMISSIONS

6. **Mr. Gikandi**, Counsel for the Applicant, gave the history of the case sought to be continued by the leave of the court and on this issue, he submitted that **Section 432(2) of the Insolvency Act No. 18 of 2015 provides:**

"(2) When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the Court and subject to such conditions as the Court considers appropriate".

7. He also relied on the case of **Republic v Lucas M. Maitha Chairman Betting Control and Licensing Board & 2 others Ex-Parte Interactive Gaming and Lotteries Limited [2015] e KLR** in which it was held that it is mandatory for leave of court to be sought when a liquidator has been appointed under section 235 of the Insolvency Act, No. 18 of 2015.

8. On leave to file the suit out of time, the counsel cited Section 27 of the Limitation of Actions Act and submitted that the power to extend time is discretionary and the said power should be exercised judiciously and upon defined principles of law.

9. Counsel also submitted that the Applicant did not sit on his right, as he took steps of ensuring his claim is resolved by writing several letters and emails to the Interested Party who was trying to solve the issue although unsuccessful. Therefore, in the interest of justice, the

Applicant should be allowed to have his day in Court as Articles 48 and 50(1) guarantee the Applicant access to justice and a fair hearing

10. He relied on the case of **P.M.N v Kenyatta National Hospital & 6 others [2015] e KLR**.

RESPONDENT'S SUBMISSIONS

11. On the issue of lifting the order of liquidation, M/S Hamida reiterated the contents of her affidavit.

12. On leave to file the suit out of time, Counsel submitted that in an Application for leave under the Limitation of Actions act, a judge should not grant leave as of course. He/she should carefully scrutinize to see whether it is a proper one for leave by scrutinizing the evidence in support of the Application. In this instance the Application has been filed 10 years after the alleged wrong happened in contravention of the statute of Limitation of Actions Act.

13. Counsel also submitted that the Applicant in his plaint states that he had recovered by the year 2009 and he was well within time to file the suit but did not. She relied on the following authorities;

(a) Industrial Court Cause 1467 of 2011, Jeremiah Ojwang Ojak vs. Central Bank of Kenya,

(b) Kenya Power & Lighting Company Limited v Collins Agumba Aboge [2016] eKLR

(c) Kennedy Mureithi & another v Peterson Karimi Gacewa [2016] eKLR

(d) Republic v Retirement Benefits Appeals Tribunal & 2 others [2014] eKLR

(e) Rawal vs. Rawal [1990]KLR275

INTERESTED PARTY'S SUBMISSIONS

14. Counsel for the Interested Party submitted, that the Applicants suit ought to have been filed within 3 years from the date the cause of action arose which was 14th December, 2011, hence the suit ought to have been filed by the 14th December 2012 and that there is no provision for extension of time to file a claim falling under Sections 27 and 29 of the Act.

15. Counsel further submitted that at paragraph 8 of the draft plaint, the Applicant recovered by the year 2009 when he was still within time. Counsel relied on the following authorities:-

(a)Gathoni vs. Kenya Co-Operative Creameries Ltd [1982] KLR 104

(b)Tom Onyango Oketch v Kenyatta National Hospital [2016] eKLR

(c) Rosemary Wanjiru Kungu v Elijah Macharia Githinji & another [2014] eKLR

(d) Republic v Retirement Benefits Appeals Tribunal & 2 others [2014] eKLR

(e) Republic Ex-parte Japheth Noti Charo v Malindi Land and Environment Court Justice Angote [2014] eKLR

ANALYSIS AND DETERMINATION

In considering the application, I have perused through the entire application, the responses and submissions by all the counsel for the parties together with the cited authorities and the law. I find the following issues coming out for determination;

(a) Whether leave should be granted to the Applicant to file his suit out of time.

(b) Whether leave should be granted to the Applicant to institute legal proceedings against African Safari Club Limited (In liquidation)

(c)Whether leave should be granted to the Applicant to file his suit out of time.

16. The law of limitation of Actions is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in the bringing of suits against them. The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same. Jurisdiction is everything, without which, a Court of law downs its tools in respect of a matter before it the moment it holds the opinion that it is without it. (See **Owners of Motor Vessel "Lillian S" vs Caltex Oil (k) Ltd (1989) KLR 1** per Nyarangi JA. See also the Court of Appeal decision in **Owners and Masters of Motor Vessel "Joey" VS Owners and Masters of the Motor Tugs "Barbara" and "Steve B."** [2008]1 EA 367 where, echoing the decision in the case of **Owners of Motor Vessel "Lillian S"**, the Court of Appeal held, inter alia:

"The question of jurisdiction is threshold issue and must be determined by a judge at the threshold stage, using such

evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step.....”

17. In the instant case, the Respondent and the Interested Party’s contention is that the suit is time barred since the Plaintiff in his plaint pleaded that the cause of action arose on **18th December, 2008** and the suit herein ought to have been filed by the **18th December, 2011**.

18. The effect of the statute of Limitation of Actions Act is that certain causes of action may not be brought after the expiry of a particular period of time. In other words the Act bars the bringing of particular actions after the specified periods of limitation but does not necessarily extinguish such causes of action. In the case of **Rawal vs. Rawal (supra)** stated:

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after along lapse of time. It is not to extinguish claims”. See also Dhanesvar V Mehta vs. Manilal M Shah [1965] EA 321.

In the case of **TM – AM Construction Group (K) Civil Engineering and Constructions and Another Vs Norah Nyambeki Ongweyi Nakuru CA No. 18 of 2017** where the court observed as follows;

“ Once the Respondent states that she was prevented from filing suit due to her ill health and medical treatment, she was mandated to prove it and once the Defendants raised the issue of Limitation in the Defence, the Respondent was put on notice.”

19. In the case of **Gathoni vs Kenya Co-operative Creameries Ltd [1982] KLR**, the Court of Appeal said:-

“The disability relied on by the applicant being a physical disability, the nature and the extent of which was not revealed, the learned judge dismissed this ground because disability in the statutory context of section 2(2) (b) of the Limitation of Actions Act does not include physical disability ... Of course, if the applicant were under a relevant disability, she would not need the leave of the court to commence her action.”

20. According to the Applicant, he fell into coma and was later flown to Germany for specialized treatment. He stated that the delay in filing his suit within the statutory period was not intentional or wilful on his part as he was incapacitated through a prolonged hospital admission abroad and he could not come back to Kenya in time to institute the suit.

21. This Court has perused the documents annexed to the Applicant’s Application and noticed that at paragraph 14 of the Applicant’s Supporting Affidavit, he depones that he found his motorbike which he had left at the hotel parking had been disposed off. In the Applicants list of document at page 37 (**Annexure HPH 5**) is a Police Abstract report dated 3rd February 2011. From the report, this Court deciphers that the report was personally made by the Applicant on the date indicated therein in Mombasa at Bamburi Police Station. This led this Court to conclude that indeed, the Applicant was in Kenya and was even capable of making a report at a Police Station and by which time the Applicant was still not statute barred from filing his claim.

22. The incapacity relied upon by the Applicant is defeated by the fact that as at 3rd February, 2011, the Applicant was in Kenya and was even able to file a police report. It is this Court’s finding that the disability relied on did not in any way impede the Applicant from filing his suit within time.

23. The Applicant avers that he kept the claim alive, by continued communication with the Respondent and the Interested Party by seeking for an amicable settlement. Unfortunately, such settlement was not realized and that the last communication between the parties was on the 5th January 2015.

24. It is this Court’s view that correspondence between parties does not stop time from running. This Court wishes to associate itself with the reasoning In the case of **Sammy Sawe Korir v Cabinet Secretary (Ministry of Defence) Ex-parte Attorney General [2016] Eklr** Githuba J stated as follows...

“In this case, the applicant has sought enlargement of the statutory limitation period for his intended action on grounds that he was unable to file suit within time due to partial physical disability occasioned by the injuries he sustained which required him to be hospitalized for a long time. He also claimed that he had been pursuing negotiations for an out of court settlement which had collapsed. In my considered view, these are not the conditions or reasons that are contemplated under Section 27 of the Act on the basis of which a court can extend time within which a suit can be filed. Time can only be extended if the applicant proved that he was ignorant of material facts constituting the cause of action. The applicant in this case did not claim that he was ignorant of the material facts constituting his alleged cause of action against the 1st respondent either before or after the limitation period expired.”

Similarly, In **Tana and Athi Rivers Development Authority v Joseph Mbindyo and 3 Others NYR CA Civil Appeal No. 253 of 2011 [2013] eKLR**, the Court held as follows

..... From the foregoing provisions it is clear that before the court granted the ex parte leave to the respondents to file the suit out of time it had to be satisfied that the material facts relating to the cause of action were not within their knowledge until after time limited for filing the suit had expired. In the instant case, the respondents’ argued that the reason for the delay was due to the ongoing negotiations’ between the parties. We agree with Mr. Okeyo that the aforesaid reason does not constitute material

facts which were not within the knowledge of the respondents as envisaged under section 27(2) of the Limitation of Actions Act.

25. In conclusion, despite the unfortunate circumstances the applicant found himself in, and the compassion this Court might have for the Applicant, it is unable to find in favour of the Applicant. In the circumstances, this court opines that it will be an academic exercise for it to determine the second issue of leave to file a suit against Respondent.

26. Consequently, the Application dated 2.5.2018 for leave fails and the same is hereby dismissed with an order that each party bears their own costs of the Application.

Orders accordingly.

Dated, signed and delivered at Mombasa this 11th day of October, 2019.

D. O. CHEPKWONY

JUDGE