



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 148 OF 2018

1. WITOLD KAWONCZY

2. MAREK SEKACZ

3. RICHARD KARISA.....APPLICANTS

VERSUS

1. SUKEN LOGISTICS SS LTD

2. SPARTFREIGHT LOGISTICS LTD

3. PATRICK OKUTOY.....RESPONDENTS

RULING

1. By an application brought by *ex parte* originating summons dated 7/5/2018 and premised upon the provisions and section 1A, 1B 3A & Order 37, Civil Procedure Act, Section 4, 27 & 28 Limitation of Actions Act and Articles 10,41, 50 159 & 162 of the constitution, the Applicant sought in the main an order that the Applicant be granted leave to file a suit out of time.

2. The grounds disclosed in support of the Application are that there was a contract entered between the parties by which the Applicants, as importers of some cargo consisting of second- hand motor vehicle tyres, contracted the Respondents for the purposes of having the cargo cleared from the port. However the respondents are accused of having had the same released to a party other than the Applicants. There is a dearth of exactitude with dates but the Affidavit in support of the Application says the Applicant discovered that the goods had been released sometimes November 2006 after which the Respondents offered to them a myriad of excuses and reasons but after some pressure was exerted they admitted to lapses on their part and offered to compensate the Applicants. The period between November 2016 and November 2017 was then spent waiting for compensation till the time to file suit lapsed without the promise being met. It is deposed that time lapsed due to genuine belief that the matter could be settled amicably without the need to file suit.

Based on that belief the Applicants then obtained advice for counsel that they ought not be penalized and that unless leave is granted they shall forever be barred from ever pursuing the compensation from the Respondents.

3. Having read the application and the documents thereto the only issue for determination is whether a case for extension of time has been made out. Answering that question would however involve answering whether or not there is jurisdiction to extend time on the facts disclosed and, lastly, whether on the clear provisions of Section 27 and 28 of the Limitation of Actions Act, the provisions of the constitution need to be invited in a matter as simple as extension of time.

4. While it is now acceptable that in order to enable access to justice as a constitutional right the court should in majority of cases be inclined to grant extension of time, such cannot be in all and every application^[1].

5. Extension of time is procedural remedy that must be provided for and regulated by some enactment. For extension to file a suit out of time in the High Court and courts of equal status as well as the subordinate courts, the General Applicable Law is the Limitation of Actions Act. That statute provides at Section 27 as follows:-

1. “Section 4(2) does not afford a defense 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 his 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)...(Emphasis provided)

6. It is explicit that the law only provide for extension of time in causes of action based on tort and the tort must be one in which damages are claimed for personal injuries to any person. An applicant has a duty to prove that the cause which has become statute barred and for which he seeks extension of time is now based in negligence, nuisance or breach of duty. And that is not all, having brought himself under that threshold one still needs to prove that a material fact(s) relating to the cause of action was outside his knowledge.

7. Here the cause of action is undeniably one grounded on a contract.

However, even if one was to plead the tort of *detinue* or *conversion*, still that is not permitted by the statute for time to be extended.

8. In *Willis Onditi Odhiambo vs Gateway Insurance Company Ltd [2014] eKLR* the Court of Appeal while interpreting the provision of Section 27, cap 22 said:-

“Under Section 27, as can be gleaned from the provision cited above, time to file suit can only be extended where the action is founded on tort and must relate to the tort of negligence, nuisance or breach of contract and the damages claimed be in respect of personal injuries to the plaintiffs as a result of the tort”.

...In *May Osundwa vs Nzoia Sugar Company Ltd [2002] eKL*, Osiemo J, had, with the consent of the parties, granted extension of time to file suit retrospectively. Notwithstanding that the parties had consented, on appeal, this court said of section 27(1) of the Limitation of Actions Act:-

“This section clearly lays down the circumstances in which the court would have jurisdiction to extend time. That action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The Section does not give jurisdiction to court to extend time for filling suit in cases involving contract or any other causes of action other than those in tort”.

9. Being bound by the decision of that higher court and my own understanding of the statute I cannot escape the conclusion that the suit sought to be filed out of time being premised on a cause of action in contract, there exists no jurisdiction in the court to extend time

10. The finding by the court of appeal, above cited, is to me what entrenches position of the law which must prevail as it has always done. It is important to note that the Court of Appeal delivered itself in 2014 when the constitution 2010 was in place and to me had become fully entrenched subsequent to several decisions interpreting the Articles the Applicant now seeks to rely upon to found his application.

Do the constitutional provisions cited aid the applicant?

11. My view is that for the constitution to remain the *grund norm* of the law in this country, it must be left to serve its unique and special place in determination of disputes. It cannot achieve that purpose, like it was the only law now applicable and as if the rest of other sources of law have since been thrown through the window and jettisoned out of application by the courts. This is the position taken by the Supreme Court when it quoted with approval the judgment of the Court of Appeal (Kiage, JA) in *Nicholas kiptoo Arap Korir Salat [2013] eKLR* where the Judge said:-

‘I am not in the least persuaded that Article 159 of the constitution and the Oxygen principle which both command courts to do substantial justice in an efficient, proportionate and cost effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of the rules of procedure and to create an anarchical free-for-all in the administration of justice. This court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules...’

12. The provisions of the constitution cited by the Applicant have not rendered irrelevant the provisions of Limitation of Actions Act. An act of parliament cannot be repealed by inference. It can only be repealed by a legislative action which is the preserve of parliament.

13. For the foregoing reasons, I do find that the Application dated 7/5/2018 is wholly misconceived, lacks merits and is therefore dismissed.

I make no orders as to costs because the proceeded *ex-parte* as the law dictates and no party has thereby incurred any costs to be thus indemnified.

Dated and delivered at Mombasa this 6th day of July 2018.

P.J.O. OTIENO

JUDGE

[\[1\]](#) Nicholas kiptoo Arab Korir Salat vs IEBC [2015] eKLR