



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL SUIT NO. 38 OF 2013

BETWEEN

**FLORENCE AKOTH OYARO suing as the administrator of the
estate of EMMANUEL OYARO ATUDO (deceased)..... PLAINTIFF**

AND

TONY OPIYO ABUTO.....1ST DEFENDANT

MATATA NURSING HOSPITAL.....2ND DEFENDANT

CHRISTOPHER OMUKOBA T/A

KENERA ENTERPRISES.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

RULING

1. The Notice of Motion for consideration by the court is dated 5th July 2016. It is made under **sections 1A, 1B and 3A** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** and **Article 159** of the Constitution and it seeks the following orders;

[2] That the Honourable Court be pleased to extend the orders granted on the 23rd May 2011 allowing the applicant to file and serve the plaint out of time.

[3] That the suit to be filed by the applicant be deemed to have been filed and served on time.

2. The application supported by the plaintiff's deposition and in summary she depones that although she was allowed to file the suit out of time, she could not file it within time as she is a poor widow and could not afford filing fees by which time the time within which she was ordered to file the suit had lapsed. She now contends that it is in the interests of justice that time be extended to enable her prosecute the suit.

3. The plaintiff's case arises from the fact that her deceased husband died in a road accident on 31st October 2001. As she did not file the suit within the time limited for filing such suits, she made an application for leave to file the suit out time under the **Limitation of Actions Act (Chapter 22 of the Laws of Kenya)**. From the record of proceedings, the court granted her leave to file and serve the plaint out of time in **High Court Misc. Case No. 163 of 2010 (OS)** within 10 days of the order. The order was made

on 23rd May 2011 and the plaint filed on 26th November 2013. A simple calculation shows that the plaint was filed over two and a half years after the order was made. The tenor of the plaintiff's application is to validate the claim filed in breach of the order granting leave.

4. The issue raised in the application before this court goes to the jurisdiction of the court to extend time for filing suit. The effect of the statute of limitation is that certain causes of action may not be brought after the expiry of a particular period of time. In **Rawal v Rawal [1990] KLR 275** the Court 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.

5. A party, like the plaintiff herein, who wishes to file the suit out of time must apply to the court and satisfy the condition set out in section in **section 27** of the **Limitation of Actions Act**. The court may grant leave for filing the suit on such terms as it deems just. In this case, the court granted the order after being satisfied that the plaintiff had made out a case. Once the order was granted, the matter application for leave was exhausted and could only be re-visited when the suit was heard (see **Mary Wambui Kabugu v Kenya Bus Services Ltd Civil Appeal No. 195 of 1995 and Yunes K Oruta & Another v Samwel Mose Nyamato Civil Appeal No. 96 of 1984**). What the plaintiff seeks in this case is to extend the time for filing suit and to deem the suit, which had been filed in breach of the order, as duly filed. In other words, the plaintiff seeks an order condoning its delay.

6. As a matter of jurisdiction, there is nothing that allows the court to revisit its order granting leave for file the suit out of time in the manner suggested by the plaintiff. Counsel for the plaintiff urged the court to consider the plight of the plaintiff and apply the should be unshackled by technicalities and allow the plaintiff to prosecute the case. Counsel urged the Court to invoke **Article 159** of the Constitution and the overriding objective and inherent jurisdiction of the court set out in **sections 1A, 1B and 3A** of the **Civil Procedure Rules**. The collective effect of these provision is that they enjoin the court to shun technicalities in order to achieve substantive justice but substantive justice cannot be achieved by circumventing mandatory statutory provisions.

7. Even if this court had jurisdiction to grant the orders sought, it is clear to me that the plaintiff is underserving of any indulgence. Leave to file the suit out of time was granted in the year 2011, 10 years after the cause of action accrued while the current application is filed 5 years after the suit was filed. 15 years have elapsed since the cause of action accrued. Surely, it would be unfair to allow the plaintiff to call on parties, who may have forgotten the facts of this case, to defend themselves. Justice looks both at the plaintiff and defendants and in this case, the cause of justice tilts against the plaintiff given the amount of time that has elapsed.

8. Another issue that has caused me grave concern in that summons to enter appearance were issued on 28th November 2013. There is no indication that the summons have been served on the defendants for the court to deem that the same as duly served. Although, the court may extend the validity of summons to enter appearance under **Order 5 rule 2** of the **Rules**, the court may dismiss the suit without notice under **rule 7** which states;

(7) Where no application has been made under subrule (2), the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.

What is clear is that even if I grant the application before me, the suit will hit the wall erected by **Order 5 rule 7** hence I cannot deem the plaint as duly served.

9. It is abundantly clear that the application cannot succeed. It is therefore dismissed.

10. The plaintiff shall now show cause why the suit should not be dismissed.

DATED and DELIVERED at KISUMU this 6th day of September 2016.

D.S. MAJANJA

JUDGE

Mr Omondi T. instructed by Mwamu & Company Advocates for the plaintiff.